

**PUBLIC**

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

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

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<b>In the Matter of</b>	)	
	)	
<b>RAMBUS INCORPORATED,</b>	)	
	)	
<b>a corporation.</b>	)	<b>Docket No. 9302</b>
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	)	
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**RESPONSE OF RAMBUS INC. TO COMPLAINT COUNSEL’S BRIEF  
REGARDING MOTION OF NON-PARTY MITSUBISHI ELECTRIC CORP. TO  
ENFORCE PROTECTIVE ORDER**

## INTRODUCTION

Complaint Counsel's brief, filed in response to the Commission's invitation, raises a few new arguments that Rambus has not previously had the opportunity to address. In addition, Complaint Counsel's brief misstates or incompletely describes certain potentially pertinent facts, which is not surprising since many of these facts are not within Complaint Counsel's personal knowledge. Rambus thus seeks to respond to the new arguments raised by Complaint Counsel and to correct portions of the factual record as they relate to non-party Mitsubishi Electric Corp.'s motion to enforce protective order.

As explained further below, the following potentially pertinent facts were either omitted from Complaint Counsel's brief or not accurately described:

- Rambus understood that Mitsubishi Electric Corp. (Mitsubishi Japan) was voluntarily providing documents to Rambus, not in response to a subpoena or in connection with this proceeding, but simply in response to a letter request, and that Mitsubishi Japan did not expect that its documents would be maintained in confidence, including because of the following facts: (a) Rambus served a subpoena on Mitsubishi Electric & Electronics USA, Inc. ("MEUS"); (b) MEUS, represented by Bingham & McCutchen LLP, produced certain documents which it stamped in accordance with the Protective Order, but refused to produce any documents from its parent, Mitsubishi Japan; (c) after MEUS was ordered to produce documents from its Japanese parent, (Order Denying motion of Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order (11/12/2002)), Rambus's counsel was contacted by lawyers from another firm, Jenner & Block, LLC, which said it was separately representing Mitsubishi Japan; (d) these attorneys said that Mitsubishi Japan would voluntarily provide documents to Rambus, but would not be producing the documents in response to the subpoena served on its subsidiary, MEUS; (e) while each of the documents produced by MEUS was stamped in accordance with the Protective Order in this case (*see, e.g.*, Exhibit RX-1157, included in the Appendix of Exhibits filed herewith at Tab A); (f) none of the documents voluntarily provided by Mitsubishi Japan were so stamped (*see, e.g.*, Exhibits RX-0416A, RX-0885A, RX-2211 and RX-2213A, included in the Appendix at Tab B)<sup>1</sup>; (g) Rambus and Complaint Counsel each gave notice to MEUS of their intention to use during the hearing certain documents that MEUS had produced and

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<sup>1</sup> The Exhibits with the suffix A consist of a translation of the Mitsubishi Japan document from Japanese into English, followed by the original document in Japanese.

had designated as “Confidential”; (h) neither Rambus nor Complaint Counsel gave notice to Mitsubishi Japan of their intention to use during the hearing documents voluntarily provided by Mitsubishi Japan; (i) during the hearing several documents voluntarily provided by Mitsubishi Japan were admitted in evidence (*see, e.g.*, Appendix at Tabs B and G); (j) at no time did any counsel suggest that any of these Exhibits could not be used at the hearing because prior notice had not been given; and (k) at no time did any counsel suggest that any of these Exhibits contained confidential information that should be protected under the terms of the Protective Order.

- With two exceptions discussed below, the only Mitsubishi Japan documents used by Rambus outside of this proceeding were ones admitted in evidence in this proceeding. Documents admitted in evidence in this proceeding, other than those afforded *in camera* treatment, are publicly available and are not entitled to any confidentiality protection. None of the Mitsubishi Japan documents were afforded *in camera* treatment.
- Once counsel for Mitsubishi Japan asserted confidentiality concerns regarding the use of Mitsubishi Japan documents in other litigation, counsel for Rambus subpoenaed those documents from Jenner & Block, LLC. Jenner & Block refused to produce the subpoenaed documents and Rambus filed a motion to compel production. This motion was granted on May 26, 2004, by Magistrate Judge William J. Hibbler of the United States District Court for the Northern District of Illinois. (A copy of Magistrate Judge Hibbler’s Order is included in the Appendix at Tab C.) As a result of this Order, Rambus is free to use the Mitsubishi Japan documents in the *Infineon* case, subject to the terms of the Protective Order in that case. Subsequently, Jenner & Block agreed that the Mitsubishi Japan documents could be used in the *Hynix* and *Micron* cases, subject to the Protective Order in effect in each case.

These facts establish that Rambus acted reasonably in treating the documents Mitsubishi Japan voluntarily provided to it as not being subject to the Protective Order. These facts also make plain that neither Rambus, nor Complaint Counsel, ever had reason to think that these documents contained Confidential Discovery Material. Finally, these facts demonstrate that Rambus has not used the Mitsubishi Japan documents in ways that are inconsistent with the terms of the Protective Order, assuming it does apply to the Mitsubishi Japan documents, but obtained the right to use these documents in other proceedings by subpoenaing the documents.

## BACKGROUND

### I. Chronology Of Events Leading Up To Use Of Mitsubishi Japan Documents At The Hearing.

It may be useful for the Commission to have a brief chronology of the pertinent events leading up to the use of certain Mitsubishi Japan documents at the hearing in this matter.

- October 3, 2002: Rambus served a subpoena duces tecum on the agent for service of process for Mitsubishi Electric & Electronics USA, Inc.
- A lengthy meet-and-confer was held between counsel for Rambus and counsel for MEUS on October 21, 2002. This discussion was memorialized in part in a letter from counsel for MEUS dated October 23, 2002. (A true and correct copy of this letter is included in the Appendix at Tab D.)
- On October 28, 2002, MEUS filed a motion to quash subpoena.
- On November 12, 2002, Judge Timony denied MEUS' motion.
- On November 18, 2002, Judge Timony issued an opinion supporting his November 12, 2002 Order.
- On November 18, 2002, MEUS filed an interlocutory appeal from Judge Timony's Order.
- On November 26, 2002, Judge Timony denied MEUS' request for interlocutory appeal.
- Although Judge Timony ordered MEUS to comply with the subpoena by no later than November 22, 2002, as of December 20, 2002, MEUS still had not done so. On December 23, 2002, Rambus filed a motion to compel MEUS to comply with Judge Timony's November 12, 2002 Order.
- On December 30, 2002, MEUS filed papers in opposition to Rambus's motion to compel. In these papers, MEUS stated, *inter alia*, that MEUS had no legal right to demand documents from Mitsubishi Japan, that Mitsubishi Japan was refusing to provide the documents to MEUS, and that MEUS was therefore "unable to obtain and produce" documents in the possession of Mitsubishi Japan. *See* Non-Party Mitsubishi Electric & Electronics USA, Inc.'s Opposition To Respondent Rambus Inc.'s Motion To Compel, filed December 30, 2002 at 3-4.
- In January 2003, counsel for Mitsubishi Japan, Jenner & Block, contacted Rambus's counsel in order to explain that Mitsubishi Japan was not subject to the subpoena served on MEUS and was not obligated to produce any documents to Rambus. Ultimately, as outlined in the Declaration of Steven M. Perry In Opposition To

Motion Of Non-Party Mitsubishi Electric Corporation To Enforce Protective Order (hereinafter "Perry Decl."), filed April 19, 2004, Mitsubishi Japan's counsel offered to have Mitsubishi Japan voluntarily produce certain documents, not in response to the subpoena served on MEUS, but in response to Mr. Perry's letter request.

- On February 10, 2003, Rambus gave notice to MEUS, pursuant to 16 C.F.R. § 3.45, of Rambus's intention to use certain ma

Mitsubishi Japan documents occurred in late March or early April 2003. Each of the Mitsubishi Japan documents that was used in the European proceedings later was admitted into evidence in this hearing.

On February 27, 2004, in connection with the ongoing *Infineon* litigation, Rambus served a subpoena on MEUS seeking to authenticate certain documents for use in that litigation. (A true and correct copy of this subpoena (without attachments) is included in the Appendix at Tab H.)

Protective Orders issued in those cases. (A true and correct copy of Jenner & Block's letter to this effect is included in the Appendix at Tab I.)

## ARGUMENT

### **I. It Was Reasonable For Rambus To Consider The Mitsubishi Japan Documents To Have Been Produced Voluntarily And Outside The Scope Of The Protective Order In This Proceeding.**

In its Opposition to Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order, filed April 19, 2004, Rambus explained the basis for its position that the documents voluntarily provided to it by Mitsubishi Japan were provided outside the discovery process in this proceeding and thus were not subject to the Protective Order. Rambus will not repeat what it said in that brief. Rather, Rambus responds only to the new arguments presented by Complaint Counsel.

As Complaint Counsel note, the Protective Order applies to documents obtained “pursuant to compulsory process or voluntarily in lieu thereof.” The Mitsubishi Japan documents were not obtained pursuant to compulsory process. MEUS was obligated by compulsory process to produce the Mitsubishi Japan documents to Rambus, but it refused to do so. Neither MEUS nor its attorneys, Bingham & McCutchen LLP, produced any Mitsubishi Japan documents to Rambus. Rather, Mitsubishi Japan, through its attorneys, Jenner & Block, voluntarily provided documents to Rambus. *See, e.g.*, Mr. Harris' February 18, 2003 letter to Mr. Perry, Perry Decl., Ex. B (“I am shipping to you under separate cover documents voluntarily produced by Mitsubishi Electric Corporation [Mitsubishi Japan] in response to your letter request.”) Mitsubishi Japan was never subpoenaed by Rambus and its counsel continually asserted that Mitsubishi Japan was not subject to compulsory process issued by any U.S. tribunal. Moreover, since Mitsubishi Japan was not subpoenaed by Rambus, and since Rambus







Further, Complaint Counsel had access to the Mitsubishi Japan documents, yet Complaint Counsel at no time suggested that the documents needed to be treated as “Confidential Discovery Materials.” Complaint Counsel knew, for instance, that Rambus included various of the Mitsubishi Japan documents on its exhibit list, both in Japanese and as translated into English, without having given any notice under 16 C.F.R. § 3.45.<sup>4</sup> Thus, Complaint Counsel knew that Rambus was not treating the documents as “Confidential Discovery Materials.”

Finally, it is dispositive that even now Mitsubishi Japan does not request that the documents it provided to Rambus be treated as “Confidential Discovery Materials.” Neither in its motion nor in its reply does Mitsubishi Japan ask for this relief.

Complaint Counsel’s request that the Mitsubishi Japan documents be treated as “Confidential Discovery Material should be denied.

### **III. Rambus Has Treated The Mitsubishi Japan Documents Appropriately.**

As set forth above, Rambus reasonably understood that the Mitsubishi Japan documents voluntarily provided to it were not governed by the terms of the Protective Order. While proceeding under this understanding, and long before Mitsubishi Japan took a contrary position, Rambus used certain of the Mitsubishi Japan documents in connection with European patent cases. The documents it used were all later admitted into evidence in this proceeding, and thus are available without restriction to the general public, as well as to Rambus.

In connection with the *Infineon* case, Rambus sought to authenticate certain of the Mitsubishi Japan documents and to that end sought the testimony of a MEUS witness to do so.

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<sup>4</sup> Notice under 16 C.F.R. § 3.45 would have been required if the documents were “Confidential Discovery Material.” Notice was not required for documents for which confidential treatment was not requested.

In response to the subpoena, counsel for Mitsubishi Japan contended that Rambus was not permitted to make use of these documents in the *Infineon* case. At that point, Rambus made no further use of the documents. Instead, Rambus subpoenaed the documents from Jenner & Block, counsel for Mitsubishi Japan. After litigation in the United States

## CONCLUSION

For these reasons, Rambus respectfully requests that the Motion Of Non-Party Mitsubishi Electric Corporation To Enforce Protective Order be denied.

DATED: October 26, 2004

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of	)	
	)	
	)	Docket No. 9302
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**CERTIFICATE OF SERVICE**

I, Kenneth A. Bamberger, hereby certify that on October 26, 2004, I caused true and correct copies of the *Response of Rambus Inc. to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corp. to Enforce Protective Order and Motion of Respondent Rambus Inc. For Leave to File a Response to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corp. To Enforce Protective Order* to be served on the following persons by hand delivery:

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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a corporation, )  
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**CERTIFICATION**

I, Kenneth A. Bamberger, hereby certify that the electronic copies of *Response of Rambus Inc. to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corp. to Enforce Protective Order* and *Motion of Respondent Rambus Inc. For Leave to File a Response to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corp. To Enforce Protective Order* accompanying this certification are true and correct copies of the paper versions that are being filed with the Secretary of the Commission on October 26, 2004 by other means.

**Kenneth A. Bamberger**  
**October 26, 2004**