

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)¹; (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

¹ 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 materials produced by MEUS during the hearing in this matter. (A true and correct copy of this notice is included in the Appendix at Tab E.) Complaint Counsel were served with this notice. On April 1, 2003, Complaint Counsel gave notice of their intention to use certain materials produced by MEUS during the hearing in this matter. (A true and correct copy of Complaint Counsel's notice is included in the Appendix at Tab F.) Notice was required under the Commission's rules to be given for any documents for which confidential treatment had been claimed by the producing party. Neither Rambus nor Complaint Counsel gave notice to Mitsubishi Japan of an intention to use at the hearing materials that had been provided by Mitsubishi Japan.
- Rambus included a number of Mitsubishi Japan documents on its exhibit list in this matter. That exhibit list was served on Complaint Counsel on April 3, 2003.
- On May 6, 2003, Complaint Counsel stipulated to the admission of certain documents that Mitsubishi Japan had voluntarily provided to Rambus. These exhibits were formally admitted on May 21, 2003, and they thereupon became part of the public record in this matter.
- At no time did Complaint Counsel object that the materials voluntarily provided by Mitsubishi Japan should be treated as Confidential Discovery Material, that notice of the use of these materials was required to be given to Mitsubishi Japan, or that these materials should not become part of the public record.

As a result of the foregoing events, various documents provided by Mitsubishi Japan were admitted in evidence during the hearing in this matter. (A complete list of the Mitsubishi Japan documents that were admitted in evidence is included in the Appendix at Tab G.) *In camera* treatment was not requested for, or given to, any of these Mitsubishi Japan documents. Thus, these documents became part of the public record and now can be used in any proceeding without restriction.

II. Rambus's Use Of Mitsubishi Japan's Documents In Other Proceedings.

In connection with patent proceedings in Europe, Rambus did make evidentiary use of certain of the documents provided by Mitsubishi Japan. The first such use of any of the

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.) All but two of the documents attached to this subpoena had been admitted at the hearing in this matter. The two exceptions were one page of the document attached to the subpoena at Tab 34 (MEC 3001714) and the document attached at Tab 39 (MEC 403332-334). During April 2004, counsel for Rambus and counsel for Mitsubishi Japan continued to discuss (and disagree) on whether these two documents could be used by Rambus in the *Infineon* case. On April 8, 2004, Mitsubishi Japan filed its Motion To Enforce Protective Order, which is now before the Commission.

On the same day, in order to clarify its rights to use the Mitsubishi Japan documents in other litigation, Rambus caused a subpoena to be served on Jenner & Block in connection with the *Infineon* case that required production of all of the Mitsubishi Japan documents that Jenner & Block previously had voluntarily provided to Rambus's counsel. Jenner & Block resisted this subpoena and Rambus was forced to file a motion to compel. That motion to compel was granted. *See* Appendix at Tab C. Rambus thus was authorized to use all of the Mitsubishi Japan documents in the *Infineon* case. Rambus also caused subpoenas to be served on Jenner & Block in connection with the *Micron* and *Hynix* cases. In response, Jenner & Block agreed that Rambus could use the Mitsubishi Japan documents in those cases, as well, under the terms of the

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

never suggested that it could subpoena Mitsubishi Japan, Mitsubishi Japan was not providing documents in lieu of a subpoena directed to it.

The issue thus resolves itself into two questions: First, did Mitsubishi Japan provide documents in response to or in lieu of a subpoena to MEUS? Second, if the documents from Mitsubishi Japan were not provided in response to or in lieu of compulsory process, should they nonetheless have been treated as “Discovery Material” because they were obtained in connection with discovery in this matter?

As to the first question, MEUS refused to produce Mitsubishi Japan documents and adamantly took the position that it could not do so.² The fact that Mitsubishi Japan was represented by counsel separate and apart from the counsel representing MEUS emphasizes the independence of the two entities and supports Rambus’s conclusion that documents voluntarily provided by Mitsubishi Japan should not be regarded as being provided either in response to or in lieu of a subpoena to MEUS.

That leads, then, to the second question. Were the Mitsubishi Japan documents obtained in connection with discovery in this matter? If every document voluntarily produced to a private party, or to Complaint Counsel, is to be treated as if it were produced in discovery, the consequences would be significant.³ For instance, would counsel for private parties and Complaint Counsel need to turn over all such documents to the opposing party? Would any

² In a December 20, 2002 letter, MEUS’ counsel advised that MEUS had “asked whether [Mitsubishi Japan] would provide responsive documents to MEUS for production to Rambus” and that Mitsubishi Japan responded that “it will not provide documents to MEUS that [it] maintains under its exclusive control in Japan.” Exhibit F to the Declaration of John W. Calkins, filed on or about December 26, 2002.

³ Some of these significant issues, including whether a broad construction of the term “Discovery Material” would aid or hinder investigations undertaken by the Commission, prosecutions by
(Footnote continued)

work product or investigative privilege remain? Put differently, should all documents obtained in the course of an investigation or an adjudicatory proceeding be viewed as having been obtained in discovery and thus be required to be disclosed to the other side, as is the case with documents or information actually obtained in discovery? It was certainly the case in this particular proceeding that Complaint Counsel and Rambus's counsel obtained documents from third parties that were not shared with the other side. On some occasions this information was used in cross-examination, and disclosed then to the other side. On other occasions it was used affirmatively, and in these instances the information may have been first disclosed when it was placed on an exhibit list. On yet other occasions the information was not used during the trial, and thus was never disclosed to the other side. Complaint Counsel's endorsement of Mitsubishi Japan's very broad construction of the term "Discovery Material" would undermine long-settled privileges for counsel's work product and should be rejected.

II. The Mitsubishi Japan Documents Are Not Entitled To Be Treated As Confidential Discovery Materials.

Complaint Counsel argue that Rambus should have decided, on its own, that the Mitsubishi Japan documents were "Confidential Discovery Materials." This position is unreasonable and unjustified. Every other third party, including MEUS, designated materials it considered confidential by using the appropriate legends set forth in the Protective Order. *See, e.g.,* document at Tab A (stamped "Confidential"). Rambus was entitled to rely on Mitsubishi Japan's very able counsel to do the same. When Mitsubishi Japan's counsel failed to designate the Mitsubishi Japan documents as confidential under the terms of the Protective Order, Rambus was entitled to conclude that no confidentiality protection was sought or required.

Complaint Counsel and the preparation of a Respondent's defense, appear to be ones on which the Commission invited comment in its October 4, 2004 Order.

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. § 3.45.⁴ 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.

⁴ 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 District Court for the Northern District of Illinois, Rambus gained access to the Mitsubishi Japan documents for use in the *Infineon*, *Hynix* and *Micron* cases.

IV. Mitsubishi Japan Has Not Suffered Any Injury

With but two exceptions, Rambus has only used Mitsubishi Japan documents that were admitted in evidence in this proceeding. Documents admitted in evidence are available to the general public and thus can be used by Rambus (and others) in any legal proceeding without restriction.

The only use Rambus made of documents not admitted in evidence in this proceeding was to attach them to a subpoena served on MEUS. Thereafter, Rambus obtained copies of these two documents, and various other Mitsubishi Japan documents, by subpoenaing them from Jenner & Block. Rambus now has possession of all of the Mitsubishi Japan documents, including the two about which Mitsubishi Japan originally complained, and any further use of those documents will be governed by the protective orders in effect in the *Infineon*, *Hynix* and *Micron* actions.

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

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

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

In the Matter of)
)
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RAMBUS INC.,)
)
a corporation,)
_____)

Docket No. 9302

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