

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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**OPPOSITION OF RAMBUS INC. TO MOTION  
OF NON-PARTY MITSUBISHI ELECTRIC CORPORATION TO  
ENFORCE PROTECTIVE ORDER**

During its negotiations concerning the voluntary provision of certain documents to Rambus Inc. (“Rambus”), Mitsubishi Electric Corporation (“Mitsubishi Japan”) adamantly maintained that it was not subject to the jurisdiction of this Commission, that the subpoena served by Rambus on Mitsubishi Japan’s U.S. subsidiary (Mitsubishi Electric & Electronics USA, Inc. (“MEUS”)) did not reach documents held by Mitsubishi Japan, and that it would not (and could not be required to) participate in discovery in this matter. In short, Mitsubishi Japan maintained that neither the Commission nor any United States court had the power to require it to produce discovery materials. Completely outside of the discovery process, however, Mitsubishi Japan voluntarily gave to Rambus certain documents. It did so with the express intent of avoiding any precedent holding that documents held by Mitsubishi Japan could be subject to the discovery jurisdiction of a U.S. tribunal.

Now, having avoided that precedent, Mitsubishi Japan claims that the documents it voluntarily gave to Rambus outside of the discovery process are subject to the Protective Order Governing Discovery Material (“Protective Order”) entered in this

matter. Mitsubishi Japan seems to be of the mind that it could avoid participating in discovery in this matter, yet it can now turn around and claim the benefits of an order meant to govern the very process it renounced. But Mitsubishi Japan cannot have its cake and eat it too. Having maintained that it was not subject to this Commission's authority and that its voluntary giving documents to Rambus was outside of the Commission's jurisdiction, Mitsubishi Japan cannot now (that it is convenient) claim these documents fall under the umbrella of the protective order. The Commission should deny Mitsubishi Japan's attempt to invoke the protections of the system that it declined to recognize and in which it refused to participate.

## **I.** **BACKGROUND**

In September 2002, Rambus served a subpoena on MEUS seeking documents relevant to this matter. On October 30, 2002, MEUS moved to quash the subpoena, arguing, in part, that it could not be required to produce documents held by its foreign parent, Mitsubishi Japan. The Administrative Law Judge ("ALJ") overseeing this matter denied MEUS's motion by order dated November 12, 2002. MEUS then moved for interlocutory review of the ALJ's order, but the ALJ denied that motion.

Despite the ALJ's orders, Mitsubishi Japan steadfastly maintained that documents held by it were not subject to Rambus's subpoena. Declaration of Steven M. Perry ("Perry Decl.") ¶ 2. The stated reason for this was that Mitsubishi Japan did not want to create any precedent by acknowledging its documents could be obtained by serving a subpoena upon the parent's U.S. subsidiary. Perry Decl. ¶ 2. Accordingly, Mitsubishi Japan took the position that Rambus's subpoena had never been, and could never be, served on Mitsubishi Japan or enforced against upon it, and that that Mitsubishi Japan would not provide any documents as a result of the subpoena or in connection with any discovery process. Perry Decl. ¶ 2.

Given Mitsubishi Japan's refusal to acknowledge that its files were

available to be produced in “discovery,” Rambus inquired whether Mitsubishi Japan would voluntarily give to Rambus certain documents. Perry Decl. ¶ 3. The categories of documents in this request differed in several respects from those sought in the subpoena that Rambus had served on MEUS. Perry Decl. ¶ 3 & Ex. A.

Mitsubishi Japan eventually agreed to voluntarily give certain documents to Rambus. Perry Decl. ¶ 4. This agreement was confirmed in a letter from Mitsubishi Japan’s counsel, stating that he was shipping to Rambus “documents voluntarily produced by Mitsubishi Electric Corporation (“MELCO”) in response to your letter request.” Perry Decl. ¶ 4 & Ex. B. The letter does not suggest that counsel or Mitsubishi Japan was providing documents in response to any subpoena, nor does his letter concede or state that the Japanese parent company was invoking the protection of the U.S. judicial process or agency process in any way. Perry Decl. ¶ 5. Rambus’s counsel understood at the time that counsel for Mitsubishi Japan had taken that position very deliberately, consistent with his position about the lack of agency or court jurisdiction over the Japanese parent’s documents. Perry Decl. ¶ 5.

Rambus subsequently received several boxes of documents from counsel for Mitsubishi Japan. Perry Decl. ¶ 5. The documents bore no confidentiality designation of any kind. Perry Decl. ¶ 5.

## **II.** **ARGUMENT**

Consideration of the circumstances surrounding Mitsubishi’s voluntarily giving documents to Rambus inevitably leads to the conclusion that the documents are not subject to the Protective Order in this case. The documents – like so many millions of documents daily exchanged between companies – were voluntarily given to Rambus outside of the discovery process. Mitsubishi Japan cannot now claim otherwise in order to obtain the protections of the process it refused to participate in or even acknowledge.

Given this, there is no basis to Mitsubishi Japan’s contention that the

documents are subject to the limitations on use in the Protective Order. Nor is there any merit to the argument that the documents somehow qualify as Confidential Discovery Material.

**A. The Documents Are Not Subject To The Protective Order**

At the core of its position, Mitsubishi Japan contends that the documents it voluntarily gave to Rambus fall under the Protective Order because they somehow qualify as “Discovery Material” as defined by the Order. “Discovery Material,” however, includes only materials that were “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.” Protective Order ¶ 1m. And it is clear from the events leading up to Mitsubishi Japan’s voluntary provision of documents to Rambus that the documents do not fall within this definition.

First, the documents were not given to Rambus “pursuant to compulsory process” or “in lieu thereof.” Protective Order ¶ 1m. Mitsubishi Japan repeatedly and emphatically denied that the documents were subject to compulsory process. Perry Decl. ¶ 2. Its position was driven by a desire to avoid a precedent that Mitsubishi Japan’s documents could be obtained by serving a subpoena upon its U.S. subsidiary. Perry Decl. ¶ 2. So it maintained that Rambus’s subpoena had never been, and could never be, served on Mitsubishi Japan or enforced against upon it, and that that Mitsubishi Japan would not provide any documents as a result of the subpoena. Perry Decl. ¶ 2. In essence, Mitsubishi Japan maintained that there could be no causal connection between its giving documents to Rambus and the subpoena served on MEUS. And, as Mitsubishi Japan itself acknowledged, the documents were provided to Rambus pursuant to Rambus’s “letter request,” not any subpoena. Perry Decl. Ex. B.

Second, it is clear that the documents were not given to Rambus “in

connection with discovery in this Matter.” Protective Order ¶ 1m. Mitsubishi Japan unmistakably maintained that it would not provide any documents in connection with the discovery process. Perry Decl. ¶ 2. Given Mitsubishi Japan’s refusal to acknowledge that its files were subject to discovery, Rambus sought certain documents from Mitsubishi Japan *outside* of the discovery process. By letter, Rambus requested that Mitsubishi Japan voluntarily give to Rambus a set of documents that differed significantly from those sought in Rambus’s subpoena. Perry Decl. ¶ 3. It was only through this request, not the discovery process, that Rambus obtained the documents from Mitsubishi Japan. Perry Decl. ¶¶ 4-5.

Importantly, in responding to Rambus’s request, Mitsubishi Japan *acknowledged* that it was providing the documents outside of the discovery process: the letter from its counsel stated that it Mitsubishi Japan would provide documents to Rambus “voluntarily . . . in response to [Rambus’s] letter request.” Perry Decl. Ex. B. This was wholly consistent with Mitsubishi Japan’s position throughout the discussions with Rambus’s counsel. The letter does not suggest that Mitsubishi Japan was providing documents in response to Rambus’s subpoena. Nor does it state or even imply that Mitsubishi Japan was invoking the protections of the discovery process. Given the history of the discussions, the only reasonable conclusion was that Mitsubishi Japan had deliberately taken this position to maintain its position that neither the Commission nor any U.S. court had jurisdiction over the documents. Perry Decl. ¶ 5.

Mitsubishi Japan cannot have both ways. Having managed to stay out of the discovery process in this matter, it cannot now seek the protections afforded participants in that process. The documents that it voluntarily gave to Rambus have the same status as any other documents voluntarily exchanged between companies. Absent contractual or statutory obligations, the recipient of such documents may use them as they wish. Here, the documents simply are not covered by the Protective Order, and Mitsubishi Japan cannot seek the protections given in the process it abjured.

**B. The Documents Are Not “Confidential Discovery Material”**

Mitsubishi Japan also wrongly argues that the documents it gave to Rambus should be treated as “Confidential Discovery Material.” Basing this assertion on the flawed premise that the documents are subject to the Protective Order, Mitsubishi Japan compounds this mistake by misreading Paragraph 6 of that Order. Paragraph 6 applies only to materials that were produced *before* the entry of the protective order:

All documents obtained by compulsory process or voluntarily from any Party or Third Party, regardless of whether designated or marked confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews, or depositions that were obtained before this Protective Order was 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, material shall be treated as Confidential Discovery Material unless otherwise designated as either Restricted Confidential Discovery Material or non-confidential.

Protective Order ¶ 6 (emphasis added). Paragraph 6 was obviously intended to protect materials obtained during the investigational phase of this matter. A slip of ellipses in Mitsubishi Japan’s motion to enforce, however, conveniently omits the key language from this paragraph. *See* Mitsubishi Japan Br. at n.2 (omitting “that were obtained before this Protective Order was adopted”). But the fact is that Mitsubishi Japan voluntarily gave the documents to Rambus in February 2003, long after the entry of the protective order. *See* Mitsubishi Japan Br. at 2; Perry Decl. Ex. B. Accordingly, even if the documents were subject to the Protective Order, they are not Confidential Discovery Material unless they are labeled as such pursuant to Paragraph 4 of the Protective Order. But none of the documents were designated as confidential in any way. Perry Decl. ¶ 5.

As Mitsubishi Japan’s argument that the documents are Confidential Discovery Material falls, so too does its insinuation that Rambus somehow failed to properly give notice that some of the documents would be entered into evidence.

Mitsubishi Japan Br. at n.3. Notice of an intent to introduce documents into evidence is only required for Confidential Discovery Material. Protective Order ¶ 18 (“If the Parties intend to introduce as evidence at trial any Confidential Discovery Material of . . . a Producing Party, the Disclosing Party must provide at least 10 days notice to the Producing Party”). Accordingly, certain Mitsubishi Japan documents were properly admitted into evidence and are now part of the public record.

### **III. CONCLUSION**

For the forgoing reasons, the Commission should deny Mitsubishi Japan’s motion to enforce the protective order.

DATED: April 19, 2004

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jacqueline M. Haberer, hereby certify that on April 19, 2004, I caused a true and correct copy of the *Opposition of Rambus Inc. to Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order* to be served by facsimile, to be followed by overnight delivery, to Donald R. Harris of Jenner & Block LLC, counsel for Mitsubishi Electric Corporation, at One IBM Plaza, Chicago, Illinois 60611-7603, and on the following persons by hand delivery:

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**CERTIFICATION**

I, Jacqueline M. Haberer, hereby certify that the electronic copy of the *Opposition of Rambus Inc. to Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 19, 2004 by other means.

**Jacqueline M. Haberer**  
**April 19, 2004**