

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orsen Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**REPLY OF NON-PARTY MITSUBISHI ELECTRIC CORPORATION
IN SUPPORT OF ITS MOTION TO ENFORCE PROTECTIVE ORDER**

Mitsubishi Electric Corporation, a Japanese corporation, by its attorneys, Jenner & Block, submits the following Reply in support of its Motion to Enforce Protective Order.

The documents produced by Mitsubishi Electric Corporation (“MELCO”) to Rambus Inc. (“Rambus”) in February, 2003 were either:

“produced pursuant to compulsory process or voluntarily in lieu thereof,” or they are “other documents or information produced or given to one party . . . by a third party in connection with discovery in this Matter;”

or:

voluntarily produced by MELCO for purposes other than discovery in the FTC Matter, with the parties understanding that Rambus could use the documents for any purpose, including business or commercial purposes, or in litigation having nothing to do with the FTC Matter.

In an effort to avoid the above quoted language of the Protective Order entered by the Administrative Law Judge, Rambus argues that production was not “in connection with discovery in this Matter.” The record clearly demonstrates otherwise.

There is no support for Rambus’ assertion that the documents in question were “voluntarily given to Rambus outside of the discovery process.” MELCO and Rambus disagreed over the question of whether Rambus’ subpoena served upon MELCO’s U.S. subsidiary required the production of documents in the possession of MELCO in Japan. After the subsidiary’s motion to quash the subpoena had been denied, Rambus advised that it “would prefer to resolve this matter without the need for further motion practice.” (See Ex.2.)¹ The compromise ultimately agreed upon was the production of certain categories of documents that Rambus viewed as important to its litigation positions before the FTC. There was never any question about whether the documents produced were to be used in the FTC proceeding, or for some other purpose.

Contrary to Rambus’ Opposition (see pp.1, 2), there was never any discussion about the possibility that the MELCO documents might be used for some purpose other than the FTC Matter, and there was never any discussion suggesting that MELCO or its counsel agreed to produce documents “with the express intent of avoiding any precedent holding that documents held by [MELCO] could be subject to the discovery jurisdiction of a U.S. tribunal.” (See April 21, 2004 Harris Declaration, ¶ 3.) All conversations among counsel, and all of the written communications between counsel, make clear that the production was for Rambus’ use in the FTC matter. In fact, part of the agreement was that, following the production, Rambus would not seek “any further documents from MELCO in connection with the above-referenced [FTC]

¹ All citations to exhibits are references to exhibits filed in support of MELCO’s Motion to Enforce Protective Order.

proceeding.” (Ex.3.) And, MELCO agreed to provide a Privilege Log of any documents withheld on privilege grounds. (Id.) Neither of these provisions make sense unless the documents were produced to provide discovery to Rambus in the FTC Matter.

Rambus’ position that MELCO’s production of documents was not in connection with discovery in the FTC matter defies common sense. That was the only use ever mentioned by anyone. (See April 21, 2004 Harris Declaration, p 4.) Rambus’ position that the parties intended that Rambus would be free to use the documents for business or commercial purposes, or in connection with other Rambus litigation not involving the FTC, or, presumably, to publish the documents in a daily newspaper, is totally unsupported. (Id.)

Documents produced for Rambus’ use in the FTC Matter following a discovery dispute are “Discovery Material” under paragraph 1m of the Protective Order because they were either produced “voluntarily in lieu [of compulsory process]” or they were “other documents... produced or given to one Party by ... a Third Party in connection with discovery in this Matter.” Discovery Material can “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.” (Protective Order, ¶ 1m.)

As a result, the Commission should enter an Order providing that the documents in question are “Discovery Material” under the Protective Order and directing Rambus to identify any persons not referenced in Paragraphs 7 and 8 of the Protective Order to whom Rambus or its counsel has disclosed the documents.

MITSUBISHI ELECTRIC CORPORATION

By: _____
One of Its Attorneys

Dated: April _____, 2004

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