

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

In the Matter of

RAMBUS INCORPORATED,

Respondent.

Docket No. 9302

**RESPONSE OF RAMBUS INC. TO MOTION OF THIRD-PARTY INFINEON
TECHNOLOGY FOR CLARIFICATION OF THE AUGUST 2, 2002
PROTECTIVE ORDER**

The August 2, 2002 Protective Order entered in the above-referenced proceeding provides that “Discovery Material” “shall be used solely by the Parties for the purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose.” “Discovery Material” includes all deposition testimony taken in this proceeding.

By its motion, third-party Infineon Technology seeks to modify the Protective Order so that it can use Discovery Material, specifically deposition testimony, not in this proceeding, but in an action between Rambus Inc. (“Rambus”), on the one hand, and Infineon Technologies AG, Infineon Technologies North America Corp., and Infineon Technologies Holding North America Inc. (collectively, “Infineon”), on the other hand, which action is pending in the United States District Court for the Eastern District of Virginia (hereinafter the “Infineon litigation”).

Rambus has offered to provide Infineon with copies of transcripts of depositions taken in this proceeding of Rambus’s current employees, except to the extent such transcripts contain information designated as “Confidential” by third parties, so long as Infineon will agree to be bound by the provisions of the Protective Order, including those provisions which prohibit the use of such deposition testimony in any other proceeding, including the Infineon litigation. Infineon has refused this offer, insisting that it be given such deposition transcripts free from the use limitations of the Protective Order. Infineon also has sought transcripts from depositions taken in this proceeding of former Rambus employees, but Rambus has refused to provide Infineon with copies of those transcripts since Rambus cannot waive the rights of its former employees to insist on compliance with the various provisions of the Protective Order. In this regard, Rambus’s former employees are no different than third parties.

As explained further below, Rambus does not oppose a modification of the Protective Order that would permit deposition transcripts of current Rambus and Infineon

employees to be used in the Infineon litigation as if the depositions had been taken in that case. However, without notice to all third parties whose depositions were taken in this proceeding, and without affording those persons an opportunity to be heard, the Protective Order should not be amended to permit the use of the transcripts from those third-party depositions to be used other than in accordance with the provisions of the Protective Order. Included among the third parties whose rights under the Protective Order should not be modified without notice and an opportunity to be heard are those former Rambus employees whose depositions were taken in this proceeding.

I. BACKGROUND INFORMATION

A large number of witnesses, more than seventy, were deposed in this proceeding. Each of those depositions was taken subject to the August 2, 2002 Protective Order entered in this matter. That Protective Order provides that all deposition testimony taken in this proceeding shall be treated as “Discovery Material” subject to the provisions of that Protective Order. *See* Third-Party Infineon Technology’s Motion for Clarification of the August 2, 2002 Protective Order (hereinafter, “Motion”), Exhibit A at 4, ¶1(m). Among other things, the Protective Order provides that “Discovery Material, or information derived therefrom shall 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.” *Id.* at 6, ¶2. Some of the depositions taken in this proceeding are of current Rambus employees; others are of former Rambus employees. Many others, of course, are of third parties. Most of the deposition transcripts contain material that has been designated as “Confidential Discovery Material” or “Restricted Confidential Discovery Material.” The Protective Order imposes further restrictions on information that has been so designated. *See generally id.* at 8-11, ¶¶ 7-10. Declaration of Gregory P. Stone in Response to Motion of Third-Party Infineon Technology for Clarification of the August 2, 2002 Protective Order (“Stone Decl.”), filed concurrently herewith, at ¶2.

In the Infineon litigation, Rambus has produced to Infineon many of the documents that it produced in this proceeding and Infineon, which was subpoenaed in this proceeding, also has produced in the Infineon litigation many of the documents that it produced in this matter. Some of the same documents produced by Rambus and Infineon in this proceeding were produced in the Infineon litigation before they were produced in this matter; others were produced in the Infineon litigation after they had been produced here. *See Stone Decl.* at ¶3.

The present Motion relates not to the production of documents, however, but to the production of deposition transcripts that would not exist but for this proceeding. Infineon seeks the production of transcripts of depositions taken in this proceeding of current and former Rambus employees. Rambus has offered to produce to Infineon the transcripts of depositions taken in this proceeding of its current employees, so long as Infineon agrees to comply with the terms of the Protective Order, including the provisions of paragraph 2 of the Protective Order that restrict the use of the transcripts to this proceeding. *Stone Decl.* at ¶¶4, 6 & Exs. 1-4. However, Rambus has declined to produce the transcripts of depositions taken in this proceeding of its former employees, because to do so appears to be inconsistent with the provisions of the Protective Order. *Stone Decl.* at ¶¶ 5, 7.

II. ARGUMENT

The Protective Order prohibits the use in any other proceeding of transcripts of depositions taken in this proceeding. Rambus is willing to consent to amend the Protective Order so that the transcripts of depositions of its current employees, as well as the transcripts of depositions of Infineon's current employees, can be used in the Infineon litigation, subject to the confidentiality provisions of the protective order in that action. Rambus submits herewith a proposed Order to amend the Protective Order accordingly. That leaves in dispute only the issue of whether transcripts of depositions of

former Rambus employees may, consistent with the terms of the Protective Order, be provided to Infineon and used by it in the Infineon litigation.

At the time third parties were deposed in this proceeding, they reasonably would have expected that their deposition testimony would be used only in connection with this proceeding and that information designated as “Confidential” or “Restricted Confidential” would remain subject to the restrictions and limitations of the Protective Order unless such testimony was introduced in evidence during trial. These expectations of third parties should not be disturbed unless the third parties first are given notice and an opportunity to be heard.

Rambus would not object to revising the Protective Order to permit deposition transcripts of all third parties to be used in other proceedings so long as the testimony was subject to confidentiality constraints that provided the same protection as the confidentiality provisions in the Protective Order in this proceeding. However, Rambus does not believe that such changes can be made in the Protective Order without first providing notice to all of the third parties who were deposed in this action and allowing them an opportunity to be heard.

Infineon suggests in its Motion that the District Court in the Infineon litigation ordered Rambus to produce deposition transcripts from this proceeding. To the contrary, and consistent with the interests of comity, the Court in that proceeding has not done so. Rather, it has instructed Infineon to seek an amendment of the Protective Order in this proceeding to enable and authorize Rambus to produce such transcripts. As noted earlier, Rambus will consent to an amendment of the Protective Order that would enable it to produce deposition transcripts of its current employees. However, as Rambus previously has pointed out to Infineon, if Infineon seeks to compel production of deposition transcripts of third parties, including former Rambus employees, then Infineon should provide them with notice and allow them an opportunity to be heard in response to any effort to amend the Protective Order to permit production of such transcripts.

Infineon also seems to imply that it would be prejudiced in some fashion if deposition transcripts from this proceeding are not produced to it.¹ Quite to the contrary, however, Infineon had ample opportunity to depose Rambus's current and former employees prior to the first trial in the Infineon litigation and has been afforded a further opportunity to depose them prior to the second trial with respect to new issues that Infineon has been permitted to raise on remand and newly-produced documents. Indeed, Infineon has deposed most if not all of the current and former Rambus employees who were deposed in this proceeding.²

III. CONCLUSION

Rambus submits that the Commission should modify the Protective Order to permit use in the Infineon litigation of transcripts of depositions of current Rambus and Infineon employees taken in this proceeding. In all other respects Infineon's motion should be denied, including because the rights of third parties should not be affected or

¹ Infineon also incorrectly alleges that Rambus "has a sordid history of destroying evidence." Motion at 3 n.3. To the contrary, as Chief Administrative Law Judge McGuire found after a lengthy trial, "the process here has not been prejudiced as there is *no* indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed." Initial Decision, *In re Rambus Inc.*, Docket No. 9302, at 244, 2004 WL 390647 (FTC Feb. 23, 2004) (emphasis added).

² Infineon also argues that Rambus improperly made use in the Infineon litigation of Discovery Material (not transcripts, but documents) from this proceeding. Infineon correctly points out that documents that were produced by Infineon in this proceeding, as well as documents that were produced by Rambus in this proceeding, were used in the Infineon litigation. However, Infineon neglected to say that the District Court in the Infineon litigation directed the parties to ensure that they had provided to each other copies of documents that had not been produced prior the 2001 trial there but that would have been responsive to earlier document requests – a category that encompasses all the documents to which Infineon refers in its Motion (and tellingly does not attach). Indeed, Infineon has never before contended that Rambus's use of these documents was improper.

diminished without first providing those third parties with notice and an opportunity to be heard.

DATED: June 4, 2004

Respectfully submitted,

Gregory P. Stone
Steven M. Perry
Peter A. Detre
Sean P. Gates
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100

A. Douglas Melamed
Kenneth A. Bamberger
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

John M. Guaragna
GRAY, CARY, WARE & FREIDENRICH LLP
1221 S. MoPac Expressway, Suite 400
Austin, Texas 78746
(512) 457-7125

Attorneys for Respondent Rambus Inc.

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

In the Matter of

RAMBUS INCORPORATED,

Respondent.

Docket No. 9302

[PROPOSED] ORDER MODIFYING AUGUST 2, 2002 PROTECTIVE ORDER

IT IS ORDERED THAT:

The August 2, 2002 Protective Order is modified such that depositions taken in this proceeding of current employees of Rambus Incorporated, Infineon Technologies AG, Infineon Technologies North America Corp., and/or Infineon Technologies Holding North America Inc. may be used in an action now pending in the United States District Court for the Eastern District of Virginia entitled *Rambus Inc. v. Infineon Technologies AG, et al.*, Civil Action No. 3:00cv524, as though those depositions had been taken in that proceeding, subject to designation by the entity whose employee was deposed as to the confidentiality restrictions that should apply under the terms of any protective order in effect in that proceeding.

By the Commission:

ISSUED: June ____, 2004

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Rebecca A. Williams, hereby certify that on June 4, 2004, I caused a true and correct copy of the *Response of Rambus Inc. to Motion of Third-Party Infineon Technology for Clarification of the August 2, 2002 Protective Order* and the related *Proposed Order* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Richard B. Dagen, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Malcolm L. Catt, Esq.
Attorney
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Rebecca A. Williams

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATION

I, Rebecca A. Williams, hereby certify that the electronic copy of the *Response of Rambus Inc. to Motion of Third-Party Infineon for Clarification of the August 2, 2002 Protective Order* and the related *Proposed 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 June 4, 2004 by other means.

Rebecca A. Williams
June 4, 2004