

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

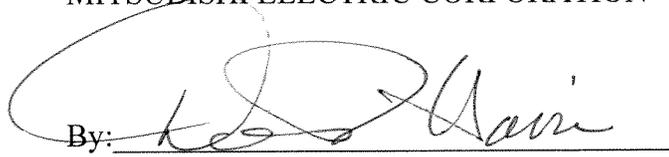
**MOTION OF NON-PARTY MITSUBISHI ELECTRIC CORPORATION
FOR LEAVE TO FILE A RESPONSE TO RAMBUS INC.'S RESPONSE TO
COMPLAINT COUNSEL'S BRIEF REGARDING MOTION OF NON-PARTY
MITSUBISHI ELECTRIC CORP. TO ENFORCE PROTECTIVE ORDER**

Non-party Mitsubishi Electric Corporation ("MELCO"), a Japanese corporation, by its attorneys, Jenner & Block, seeks leave to file a Response to Rambus Inc.'s Response to Complaint Counsel's October 18, 2004 Brief.

On October 4, 2004, the Commission invited Complaint Counsel to file a brief expressing views on MELCO's Motion to Enforce the Protective Order entered in this matter. Complaint Counsel filed a brief on October 18, 2004, On October 26, 2004 Rambus sought leave to file a response to Complaint Counsel's Brief, and attached a copy of Rambus' Response. Rambus served those papers on counsel for MELCO on November 3, 2004.

Rambus' Response raises issues not addressed in the original briefing in April on MELCO's Motion to Enforce the Protective Order, and MELCO therefore requests leave to file the attached Response to Rambus' Response to Complaint Counsel's Brief.

MITSUBISHI ELECTRIC CORPORATION

By: 

Its Attorney

Dated: November 9, 2004

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**RESPONSE OF MITSUBISHI ELECTRIC CORPORATION
TO RAMBUS INC.'S RESPONSE TO COMPLAINT COUNSEL'S BRIEF REGARDING
MOTION OF NON-PARTY MITSUBISHI ELECTRIC CORPORATION TO
ENFORCE PROTECTIVE ORDER**

On April 8, 2004, non-party Mitsubishi Electric Corporation ("MELCO"), filed a motion with the Commission seeking to enforce the Protective Order entered by the Administrative Law Judge in this matter. Rambus filed an Opposition to this motion on April 19, and MELCO filed a reply in support of the motion on April 22, 2004.

By Order dated October 4, 2004, the Commission asked Complaint Counsel to file a brief expressing views on MELCO's motion. Complaint Counsel complied on October 18, 2004. On or about October 26, 2004 Rambus filed a Response to Complaint Counsel's brief, serving Counsel for MELCO on November 3, 2004.

Rambus' Response generally consists of two parts. First, Rambus rehashes in detail the arguments it made in its April, 2004 Opposition to MELCO's Motion to Enforce the Protective Order. And second, Rambus presents a recital of factual events subsequent to the completion of briefing on MELCO's Motion for consideration by the Commission in ruling upon the Motion.

I. RAMBUS' REPETITION OF ITS APRIL, 2004 ARGUMENTS DOES NOT ADVANCE RAMBUS' POSITION.

Nothing contained in Rambus' rehash changes the facts establishing that the Motion to Enforce the Protective Order should be granted. Paragraph 1(m) of the Protective Order very broadly defines "Discovery Material" to include "documents produced pursuant to compulsory process or voluntarily in lieu thereof," and "any other documents . . . produced or given to one Party . . . by a Third Party in connection with discovery in this Matter." As pointed out by Complaint Counsel (Brief, pp. 4-5) and in MELCO's original brief, MELCO's production of documents to Rambus was clearly a negotiated compromise in lieu of production pursuant to a subpoena that Rambus had issued to a MELCO subsidiary. And in any event, the documents produced by MELCO were obviously documents produced by a third party "in connection with discovery in this Matter." Neither in April, nor now in response to Complaint Counsel's Brief, can Rambus suggest what the purpose of MELCO's production was if that production was not "in connection with discovery in this Matter."

As Complaint Counsel points out, the correspondence between the attorneys for MELCO and Rambus references this Docket, and makes clear that Rambus sought MELCO documents for use in this case. Even the facts cited in Rambus' Introduction (Response, p. 1) demonstrate that the documents produced by MELCO were intended for use in this Matter, and that the production of those documents was in lieu of continuing to dispute the scope of Rambus' subpoena. The MELCO documents are therefore "Discovery Material."

And the Protective Order (§ 2) could not be clearer in directing that "Discovery Material . . . 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." In its Response (at p. 8) to Complaint Counsel, Rambus argues that giving effect to the plain definition

of “Discovery Material” set forth in paragraph 2 “would undermine long-settled privileges for counsel’s work product.” That is absurd. There are no “long-settled privileges for counsel’s work product” that entitle a litigant to use documents obtained from a third party for any purpose chosen by the litigant. Enforcing a clear Protective Order mandate that Discovery Materials can only be used in the litigation governed by the Order infringes not at all upon “counsel’s work product.”

MELCO’s production of documents was both a negotiated compromise in lieu of complying with Rambus’ subpoena, and in connection with discovery in this Matter. As a result, MELCO’s documents are Discovery Materials under Paragraph 2 of the Protective Order, and cannot be used by Rambus other than for purposes of this Matter.¹

II. RAMBUS’ NEW MATTER SUPPORTS GRANTING MELCO’S MOTION TO ENFORCE THE PROTECTIVE ORDER.

The second portion of Rambus’ Response raises new matter which actually supports granting MELCO’s motion. Although Rambus did not disclose this to the Commission or to MELCO in its Opposition filed in April, 2004, Rambus’ October 26 Response (p. 4) admits that in early 2003 Rambus “first” used “certain” MELCO documents in “patent proceedings in Europe.” That is of course exactly what is prohibited by Paragraph 2 of the Commission’s Protective Order. And although Rambus identified the date of its “first use”, it did not identify subsequent uses nor did it reveal what MELCO documents were disclosed or to whom, or even how many “patent proceedings in Europe” were involved.

¹ As MELCO’s briefs filed in April point out, and as Complaint Counsel’s Brief acknowledges (p. 6), the Protective Order prohibits a party from using Discovery Materials outside of the Commission proceedings without regard to whether the Discovery Materials have been marked as “Confidential” or “Restricted Confidential.”

Providing no verifiable details, Rambus claims (Response, p. 5) that the unidentified MELCO documents used in unidentified European proceedings were later admitted into evidence in this Docket. But Rambus later states that “[w]ith but two exceptions, Rambus has only used [MELCO] documents that were admitted in evidence in this proceeding.” (Response, p. 10.) Thus, it is not at all clear what use Rambus has made of the MELCO documents produced in this Matter, and that will never become clear unless the Commission grants MELCO’s Motion to Enforce the Protection Order.

Rambus goes on to argue that in 2004 it subpoenaed MELCO’s law firm, Jenner & Block, in connection with three of Rambus’ U.S. litigations (cases against Infineon, Micron, and Hynix), and after the denial of a motion to quash in the *Infineon* case, negotiated an agreement providing that Rambus could use MELCO documents obtained from Jenner & Block in these three cases subject to the Protective Orders in these three cases. Rambus does not explain how an agreement permitting it to use MELCO documents obtained from Jenner & Block in three identified cases subject to Protective Orders in those cases, frees Rambus to use MELCO documents produced in the FTC Matter in any other Rambus litigation, or for any other purpose including Rambus’ business or commercial purposes.

Rambus’ belated admission to the Commission that it has disclosed MELCO documents to unknown parties and individuals in Europe, and that it did so without notification to MELCO and without disclosure to the Commission in Rambus’ April 19, 2004 Opposition to MELCO’s Motion to Enforce the Protective Order, demonstrates why it is essential that the Commission grant MELCO’s Motion. If MELCO knows what Rambus is up to, it can perhaps obtain protection from the Court involved as it did in the *Infineon*, *Hynix*, and *Micron* cases. But if Rambus simply pretends that the FTC Protective Order is inapplicable to Rambus’ conduct

despite the Order's clear language to the contrary, Rambus can do anything it wants with the MELCO documents produced to it in this Matter, including using those documents for its own business or commercial purposes, and using them in litigation unknown to MELCO. Under those circumstances, MELCO has no ability to protect its documents, and the Commission has no ability to protect the integrity of its process.²

III. RAMBUS' CONDUCT HAS LIKELY PREJUDICED MELCO AND IF UNCHECKED, POSES A GRAVE THREAT OF ADDITIONAL SERIOUS INJURY.

Rambus' argument (Response, p. 10) that MELCO has not been injured by Rambus' conduct in effect asks the Commission to read Paragraph 2 of the Protective Order to state "Discovery Material . . . shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose unless Rambus, in its sole unfettered discretion, believes that the use outside of this Matter will not injure the party producing documents to Rambus." The Protective Order does not permit Rambus this self-designed safe harbor.

Even if Paragraph 2 of the Order provided that a lack of injury justified failing to comply with the Order, Rambus' secretive, unilateral conduct would make it very difficult for MELCO to prove injury from Rambus' disclosure of "certain" unidentified documents to an unidentified number of parties and individuals located in unidentified locations. The only way that MELCO can be protected in the future, and the only way it can determine if it has already been injured, is for the Commission to grant MELCO's Motion, "clarifying" for Rambus that "use solely by the

² At several of points, Rambus' Response (pp. 2, 4, 9) attempts to equate its conduct with the conduct of Complaint Counsel, apparently suggesting that if it is guilty of violating the Protective Order, Complaint Counsel is equally culpable. But there is a rather significant difference. Complaint Counsel has never asserted that the MELCO documents are not Discovery Material, and that as a result Complaint Counsel is free to give copies of those documents to anyone he chooses. And, of course, Complaint Counsel has never done so. Rather, Complaint Counsel's Brief supports the common-sense plain meaning interpretation of the Protective Order advanced by MELCO's Motion to Enforce the Protective Order.

Parties for purposes of this Matter” means “use solely by the Parties for purposes of this Matter,” and requiring Rambus to identify in detail all disclosures that it has previously made.

CONCLUSION

In addition to harming MELCO, and threatening future harm, Rambus’ cavalier disregard of MELCO’s legitimate interest in protecting its documents and its refusal to acknowledge the plain language used in the Protective Order threatens the integrity of the Commission’s processes. As Complaint Counsel points out (Brief, p. 6), it is important to the Commission that third parties feel that they can cooperate with Commission investigations without having to worry that documents produced for use in a Commission investigation will be misused by one of the parties involved in the investigation. If a Commission Protective Order says that no party can use such documents other than in connection with the Commission proceedings, a non-party providing documents ought not have to worry that one of the parties might unilaterally decide that the Protective Order does not mean what it says, exposing the non-party’s documents to uncontrolled use and dissemination.

For the reasons stated above, the Commission should (1) grant MELCO’s Motion to Enforce the Protective Order, (2) specifically order that documents provided by MELCO to Rambus in connection with this Matter are “Discovery Material” under the Protective Order; and (3) order Rambus to advise MELCO’s undersigned counsel and the Commission of all uses not for the purposes of this Matter that it has made of MELCO’s documents, listing the names and

addresses of all such persons to whom Rambus or its counsel has disclosed the documents, and providing for each such person a description of the document or documents and the date of the disclosure.

mitsubishi electric corporation

By: 

Its Attorney

Dated: November 9, 2004

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

In the Matter of

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Docket No. 9302

CERTIFICATION

I, Donald R. Harris, hereby certify that the electronic copies of *Response of Non-Party Mitsubishi Electric Corporation to Rambus Inc.'s Response to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order and Motion of Mitsubishi Electric Corporation For Leave to File* said Response accompanying this Certification are true and correct copies of the paper versions that are being filed with the Secretary of the Commission on November 9, 2004 by other means.

Donald R. Harris
Counsel for Mitsubishi Electric Corporation

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

In the Matter of

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CERTIFICATE OF SERVICE

I, Donald R. Harris, hereby certify that on November 8, 2004, I caused true and correct copies of *Response of Non-Party Mitsubishi Electric Corporation to Rambus Inc.'s Response to Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order and Motion of Mitsubishi Electric Corporation For Leave to File* said Response to be served on the following persons by the method(s) indicated below:

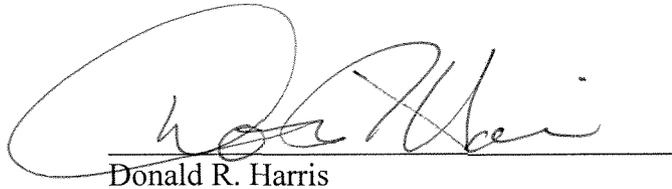
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