UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER GRANTING IN PART, NON-PARTY MICRON TECHNOLOGY INC.'S MOTION FOR PROTECTIVE ORDER

By motion dated May 29, 2003, non-party Micron Technology Inc.("Micron") moved pursuant to Rule 3.31(d) of the Commission 's Rules of Practice for a protective order prohibiting counsel for Respondent ("Rambus") from disclosing certain highly confidential and sensitive Micron documents to Rambus in house counsel and senior officials of Rambus. Micron's motion is filed pursuant to a Notice of Non-Opposition By Non-Party Micron Technology, Inc. To Certain Confidentiality Challenges filed by Respondent on May 28, 2003. ("Rambus Notice").

Respondent's Notice of Non-Opposition asserts that it notified Micron of its disagreement over designations that Micron assigned to twenty-one (21) documents ("Challenged Documents") that have been afforded *in camera* treatment. Specifically, for each of these twenty one Micron documents, Respondent challenged Micron's confidentiality designations under Section 11(a) of the August 5, 2002 Protective Order. Under the terms of the Protective Order, Respondent would not be permitted to disclose Restricted Confidential documents to in house counsel or executives of Respondent. Respondent however, notified Micron that it sought agreement, under terms Sections 1(o) and 1(n) of the Protective Order, to disclose each of these twenty-one documents to six employees of Rambus: Respondent's General Counsel, John Danforth, Respondent's in house counsel, Robert Kramer and Paul Anderson, Respondent's CEO, Geoffrey Tate, and Respondent's Directors, Dr. Mike Farmwald and Professor Mark Horowitz ("Rambus Personnel").

On April 29, 2003, the Court afforded *in camera* treatment under Rule 3.45(b), 16 C.F.R. Section 3.45(b) to several documents produced by non-party Micron. On that same date, the Court also ruled that Respondent's access to non-party *in camera* documents was governed by the terms of the August 5, 2002 Protective Order in this action, a copy of which is attached to Respondent's accompanying Declaration of Adam R. Wichman ("Wichman Decl.") at Tab 1. Respondent did not object to *in camera* treatment of these documents.

On May 13, 2003, Respondent, consistent with the terms of the Protective Order, notified Micron in writing that it disagreed with the Restricted Confidential designations that Micron had assigned the Challenged Documents (Copy attached to Wichman Decl. at Tab 2). In this letter, Respondent notified Micron of its intent, under terms of the Protective Order, to disclose the Challenged Documents to the named Rambus Personnel. The Federal Express delivery record indicates that counsel for Micron received this letter on May 14, 2003 (Wichman Decl at par. 8).

Micron did not respond to the Section 10(b) notice within five business days.[1] However, on May 22, 2003, within one day of the expiration of the time period for written objections, counsel for Micron left a telephone message with Respondent's counsel, advising him of Micron's intention to object (*See* Stone Decl. at par. 3; Micron Motion at p. 2). As of the date of the Rambus Notice, May 28, 2003, Respondent had not received any further communication from Micron (*See* Stone Decl. at par.3). On May 29, 2003, however, Micron filed its Motion for a Protective Order, asserting *inter alia*, that it had "inadvertently" failed to respond to Respondent's letter in writing within the time allotted under the Protective Order.

Thereafter, on June 9, 2003, Respondent filed a response to Micron's motion asserting two separate grounds: 1) that under the terms of the Protective Order, Micron's Motion is untimely; and 2) the fourteen documents at issue[2] are simply not entitled to the protection that Micron seeks, namely, to prevent their disclosure to Rambus Personnel. As such, Respondent asserts that Micron has forfeited its right to oppose Respondent's intended disclosure.

Discussion

On April 23, 2003 and April 29, 2003, the Court ordered *in camera* treatment, under Commission Rule of Practice 3.45(b), 16 C.F.R. Section 3.45(b), for one hundred and thirty (138) of Respondent's and Complaint Counsel's trial exhibits produced by third parties to this action.[3] One hundred sixteen (116) of these exhibits are Micron documents; fourteen (14) of these one hundred sixteen (116) are the subject of the instant motion.

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[1]Based on Micron's receipt on May 14, 2003, starting with May 15, 2003 (a Thursday), five business days from receipt expired on May 21, 2003.

[2]Since the filing of the Rambus Notice, Micron has agreed to allow seven (7) of the twenty one (21) questioned documents to be disclosed to the Rambus Personnel as requested (See, Discussion).

[3]*See* Order on Non-Parties Motions For *In Camera* Treatment of Documents Listed On Parties' Exhibit Lists, *In re Rambus Inc.*, Docket No. 9302 (Apr. 23, 2003); Additional Order on Non-Party Motions for *In Camera* Treatment of Documents Listed On Parties' Exhibit Lists, *In re Rambus Inc.*, Docket No. 9302 (Apr. 29, 2003).

Section 10(b) of the Protective Order provides five business days to respond to notice of intent to disclose Restricted Confidential or Confidential Discovery Material to "New Persons." *See* Protective Order, Section 10(b). "If the Producing Party does not object to the disclosure of the Restricted Confidential or Confidential Discovery Material to the New Person within five (5) business days, the Disclosing Party may disclose the Restricted Confidential or Confidential Discovery Material to the identified New Person ."

Respondent argues that Micron has forfeited its right under Section 10(b) of the Protective Order to oppose Respondent's intended disclosure as Micron has offered no valid reason for its "default". Respondent asserts that federal courts may excuse a late filing on a showing of "excusable neglect", but that Micron's "inadvertence" fails to satisfy such a burden.[4] Respondent's citations however, speak generally to post trial motions and review of the "excusable neglect" standard under Rule 6 of the Federal Rules of Civil Procedure[5] and similar procedural rules.

The Advisory Committee Notes (1946 Amendment) to Rule 6(b), state that the purpose of the amendment "is to clarify the finality of judgments". The Advisory Committee under Rule 6(b) thus addressed the issue of how far should the desire to allow correction of judgments be allowed to postpone their finality. Given the fact that the deadline contained in the Protective Order does not involve the finality of judgments by this Court, the "excusable neglect" standard advocated by Respondent, is not binding under the facts of this case.

Rather, the Court is mindful of the fact that Micron is a non-party to this proceeding. As such, the Court must be particularly cautious with respect to its proprietary materials. Thus, despite the procedural "misstep" of not timely filing its objection under Section 10(b), the Court concludes that Micron has not waived its substantive right to oppose disclosure of its confidential

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[4]*See, e.g., Pioneer Inv. Servs. Brunswick Assoc.*, 507 U.S. 380, 392 (1993)("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); *Graphics Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270F.3d 1, 5-6(1st Cir. 2001)("although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing...[W]e have continued to uphold findings of 'no excusable neglect' where the court cited the absence of unique or extraordinary circumstances."); *Kyle v. Campbell Soup Co.*, 28 F.3rd 928,931 (9th Cir.1994)(even a showing of good faith, lack of professional incompetence, and lack of prejudice does not establish excusable neglect).

[5]Rule 6 "Time" provides in part "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion...(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;..."

information.[6] Respondent was on notice of Micron's intent to object to the Rambus Notice, within one day of the established deadline. As such, Respondent has not demonstrated how it has been substantially prejudiced by Micron's untimely filing under the terms of the Protective Order.

In addressing the merits of Micron's motion, the Court is faced with resolving competing interests, whereby Micron does not want the Challenged Documents disseminated to persons other than those listed in Paragraphs 7 and 8 of the Protective Order, Respondent asserts it needs such disclosure to fully litigate its case. In *Toys "R" Us*, 126 F.T.C. 415, 1998 FTC LEXIS 185(1998), it was found that an Administrative Law Judge ("ALJ") has discretion to deny a respondent access to "significant confidential information" of a business competitor upon balancing 1) the respondent's "need for direct access" to the confidential information "to adequately prepare its case," 2) "the harm disclosure would cause to the parties submitting this information," and 3) "the forum's interest in maintaining the confidentiality of the information." *Toys "R" Us*, 1998 FTC LEXIS at 198-99.

As previously noted, Micron's motion asserts that Micron is prepared to permit Rambus to disclose a limited number of the identified documents to the Rambus Personnel as requested. Specifically, Micron will not oppose disclosure to the Rambus Personnel of documents identified by Bates number as follows:

MR0082159-60
MR20005866-67
MR20005991-92
MR20005984-85
MR20005900-03
MR200007331-40
MR200007326

Accordingly, Rambus Personnel shall be granted access to these *in camera* documents as requested.

The documents that remain in dispute fall into four categories: (1) Micron's summary of Intel information ("Intel Documents")-- CX-2702 (MR0082150-51), CX-2708 (MR0082136-37), CX-2730 (MR0130011-12), and RX-1710 (MU00049188-89); (2) SyncLink ("SyncLink Documents")-- RX-0695(MR20005748), CX-2691(MR0135139-42); RX-0844 (MR20006342), and CX-2700 (MR20007188-90); (3) Advanced DRAM Technology ("ADT Documents")-- RX-1796 (MFTC200502-35), RX-1840 (MFTC100000229), CX-2780 (MFTC211248-58), CX-2781 (MFTC2111238-44), and RX-1677 (MFTC228549-51), and (4) an e-mail relating to Texas Instrument's agreements and correspondence with Rambus ("Rambus/Texas Instruments

[6]Paragraph 23 of the Protective Order provides that "[e]ntry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order."

Documents")--CX-2707(MR20006936-41).

A review of the disputed documents shows that with respect to Category 1 (Micron's summaries of the Intel documents), there exists certain documents consisting of internal Micron e-mails reporting on Intel's product development and JEDEC discussions. Each of these documents contain Intel product development information that was at issue in MR0082227-29, which the Court denied *in camera* treatment by order dated April 29, 2003. Although Micron is willing to reduce the level of protection of these documents to Confidential, the Court concludes that none of these exhibits pose the confidentiality concerns stated by Micron. Such arguments were previously rejected by the Court in denying *in camera* treatment to MR0082227-29, and there is evidence that the information contained in RX-1710, regarding the i870 server chipset has been publicly disclosed as early as August 24, 2001 on the internet[7].

Accordingly, as to the summaries of the "Intel Documents", Micron's request for a protective order to prevent disclosure of this information to the Rambus Personnel is DENIED.

As to the remaining categories of disputed documents, the Court finds that Rambus has not presented compelling justification in light of the *Toys "R" US* standard, for allowing disclosure of the Challenged Documents to the named Rambus Personnel.[8] Thus, Micron's request for a protective order for this "significant confidential information", as supported by the declaration of Robert Donnelly is hereby GRANTED.

ORDER

A. Micron's Motion for a Protective Order as to the "Intel Documents" is **DENIED.** The following documents, identified by Bates number shall continue to receive *in camera* treatment but shall be disclosed to the six Rambus Personnel named herein.

MR0082150-51
MR0082136-37
MR0130011-12
MU00049188-89

B. As to the remainder of the Challenged Documents, Micron's request for a protective order is hereby **GRANTED.**

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[7]See Tab 18 of Respondent's Opposition to Non-Party Micron Technology Inc.'s Motion For Protective Order.

[8]*See also Vesta Corset Co. v. Foundations, Inc.,* 1999 U.S. Dist. LEXIS 124 (1999)*1-3, citing *Quotron Systems, Inc. v. Automatic Data Processing, Inc.,* 141 F.R.D. 37, 40 (S.D.N.Y. 1992).

C. The following document, identified by Bates number, shall continue to receive *in camera* treatment and shall be treated as Confidential under the terms of the August 5, 2002 Protective Order entered in this matter for purposes of Respondent's access to it:

MR0135139-42

D. The following documents, identified by Bates number, shall continue to receive *in camera* treatment and shall be treated as Restricted Confidential under the terms of the August 5, 2002 Protective Order entered in this matter for purposes of Respondent's access to them:

MU00049188-90
MR20006936-41
MR20006342-43
MR20005748
MR20007188-89
MFTC228549-51
MFTC200502-35
MFTC100000229
MFTC211248-58
MFTC211238-44

ORDERED:

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Stephen J. McGuire
Chief Administrative Law Judge

June 11, 2003