

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN SEMICONDUCTOR CHIPS
AND PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-753

**ORDER NO. 50: GRANTING-IN-PART RESPONDENTS BROADCOM AND
MEDIATEK'S MOTION TO COMPEL RAMBUS TO COMPLETE
PRODUCTION OF PRIOR LITIGATION MATERIALS**

(September 1, 2011)

On July 22, 2011, Respondents Broadcom and Mediatek ("Respondents") filed a motion to compel Complainant Rambus to complete production of prior litigation materials. (Motion Docket No. 753-061.) Respondents argue that their discovery requests for prior litigation materials seek relevant, responsive documents and that Rambus has not yet completed its production of the prior litigation materials, even though fact discovery closed on July 11, 2011. Respondents assert that they have requested that Rambus provide: (1) all missing or unmarked exhibits from the prior litigation depositions; (2) marked (i.e., stamped) exhibits; and (3) prior litigation trial exhibits with an accompanying list identifying by Bates number which exhibits correspond to which trial transcripts. Respondents argue that it is Rambus' responsibility to preserve documents and files from prior litigations and produce such documents as kept in the normal course of business with transcripts and exhibits maintained in a logical fashion. Respondents assert that Rambus has admitted that its production is haphazard and that exhibits are frequently not produced in conjunction with transcripts. Respondents argue that because of Rambus' haphazard production, they have been unable to determine with finality whether or not Rambus' production of prior litigation materials is complete. Respondents argue that Rambus has stated in the past that its production was complete, only to continue to produce documents on a rolling basis. Respondents seek an order compelling Rambus to complete its production of prior litigation materials and that to

the extent Rambus is withholding documents based on third party confidentiality, provide a comprehensive list of the documents it is withholding on such basis. Respondents also seek an order compelling Rambus to provide a list of all prior litigation trial transcripts and exhibits, as well as deposition transcripts and exhibits, with identifying Bates numbers in the format of the partial list provide on July 20, 2011.

On August 03, 2011, Rambus filed an opposition to the present motion. Rambus argues that Respondents' motion should be denied because: (1) Respondent failed to comply with the ground rules in that Respondents never asked for "all litigation materials" or an index of all trial and deposition transcripts and exhibits during a teleconference with the Court; (2) Respondents' motion is moot as the parties have already resolved all issues regarding four of the six categories of documents in Respondents' June 28 letter to the Court and will soon resolve the other two categories of documents; and (3) Rambus has been diligently working with counsel for Respondents to ensure that its production is complete.

On August 16, 2011, Respondents filed a motion for leave to file a reply in support of their motion to compel. (Motion Docket No. 753-070.) For good cause shown, Respondents motion for leave to file a reply is hereby GRANTED. Respondents argue in their reply that Rambus' assertion in its opposition that Respondents have improperly asked for all litigation materials is incorrect and that Respondents have only moved to compel a subset of the prior litigation materials. Particularly, Respondents argue that they only requested the production of all remaining deposition exhibits listed as not yet produced on Exhibit 13, as well as any remaining unproduced prior litigation trial exhibits. Respondents note that Rambus has already produced a list identifying by Bates number prior litigation deposition transcripts and exhibits and prior litigation trial transcripts, but has failed to produce a list that identifies the trial exhibits that correspond with the trial transcripts that it has

already listed in Exhibit 5 of its opposition. Respondents also reiterate in their reply their request for a list of prior litigation materials being withheld on the basis of third party confidentiality.

On August 23, 2011, Rambus filed a motion for leave to file a sur-reply to respond to certain incomplete and inaccurate statements in Respondents reply. (Motion Docket No. 753-074.) For good cause shown Rambus' motion for leave to file a sur-reply is hereby GRANTED. Rambus argues in its sur-reply that its document production is complete except for third party confidential materials from Hynix and Micron. With regard to Respondents' request for all remaining deposition exhibits listed as not yet produced in Exhibit 13 to Rambus' opposition, Rambus argues that it has produced on August 03, 2011, each and every document listed in Exhibit 13 as "will be produced" and that the remaining exhibits listed in Exhibit 13 contain third-party Hynix confidential information, which Hynix will not allow produced. As for Respondents' request for all remaining unproduced prior litigation trial exhibits, Rambus argues that it has produced all admitted trial exhibits and that neither it nor its outside counsel maintain sets of documents that may have been marked as potential exhibits, but were never admitted. Rambus notes that there is a subset of FTC trial exhibits that were marked with *in camera* restrictions and that it requested permission from counsel for Micron on August 03, 2011, to produce those exhibits. Rambus asserts that counsel for Micron has not yet granted permission. With regard to Respondents' request for a comprehensive list of documents withheld on the basis of third party confidentiality, Rambus argues that it does not have a comprehensive list of such documents, but that it has provided this information in Exhibits 11 and 13 to its August 03, 2011 opposition. With respect to Respondents' request for a list identifying where in Rambus' production the prior litigation trial exhibits may be found, Rambus argues that Respondents continue to fail to explain why they could not address this issue in a timely fashion. Rambus asserts that it previously provided Respondents with a Bates range identifying the

trial exhibit locations on June 24, 2011, and that it also provided a spreadsheet identifying where all the privilege-pierced materials are located in the production. Rambus further asserts that it has provided an almost 16,000 page spreadsheet identifying where documents produced in prior litigations had been produced in the 661 investigation. Rambus argues that in an effort to resolve Respondents' request, Rambus re-produced all trial exhibits, except for FTC trial exhibits, on August 8, 2011, in one location for easy identification and that once it receives permission from Micron will also produce all the FTC exhibits in one location.

Having reviewed the parties motion papers, the Administrative Law Judge finds for the reasons discussed in detail below that Respondents motion should be GRANTED-IN-PART.

Respondents' motion, as initially filed, seeks an order compelling Rambus to complete its production of prior litigation materials by a date certain; provide a comprehensive list of prior litigation documents withheld on the basis of third party confidentiality; provide a list, identifying by Bates number, all prior litigation trial transcripts and exhibits; and provide a list, identifying by Bates number, all prior litigation deposition transcripts and exhibits. Some of these issues, however, appear to have been resolved as a result of Rambus' rolling production of prior litigation documents. As indicated in their reply, Respondents are now only seeking an order compelling Rambus to: (1) produce all remaining deposition exhibits listed as not yet produced in Exhibit 13, as well as any remaining unproduced prior litigation trial exhibits; (2) produce a list that identifies the trial exhibits that correspond with the trial transcripts that Rambus has already listed in Exhibit 5 of its opposition; and (3) provide a list of prior litigation materials being withheld on the basis of third party confidentiality.

With regard to Respondents' request for an order compelling Rambus to produce all remaining deposition exhibits listed as not yet produced on Exhibit 13, the evidence shows that

Rambus has already provided Respondents those documents listed on Exhibit 13 as “will be produced” and that the remaining listed documents contain third party Hynix confidential material that Hynix will not permit to be produced. Therefore, the ALJ finds nothing left to compel.

With regard to Respondents’ request for an order compelling Rambus to produce any remaining unproduced prior litigation trial exhibits, Rambus avers that it has produced all admitted trial exhibits, except a small-subset of FTC trial exhibits, and that neither it nor its outside counsel maintains sets of documents that may have been marked as potential exhibits, but were never admitted. Thus, with the exception of the FTC trial exhibits to which Rambus refers, there does not appear to be any other trial exhibits left to compel.

The FTC trial exhibits consist of a number of exhibits marked *in camera*, that allegedly contain third-party Micron confidential information. Rambus states in its sur-reply that it contacted Micron on August 03, 2011 seeking permission to produce the *in camera* FTC exhibits, but has not yet received permission from Micron. Fact discovery closed in this investigation on July 11, 2011. The Administrative Law Judge is at a loss as to why Rambus has waited almost a month after the close of fact discovery to contact Micron for permission to produce these exhibits. Rambus provides no explanation for the delay and the ALJ finds Rambus’ delay entirely unacceptable. Accordingly, the ALJ hereby orders that by September 5, 2011, Rambus shall produce the FTC trial exhibits that have not yet been produced or provide a detailed statement to Respondents attesting to why such exhibits cannot be produced.

With regard to Respondents’ request for a list that identifies, by Bates number, the trial exhibits that correspond with the trial transcripts listed in Exhibit 5 of Rambus’ opposition, the evidence shows that Rambus produced the sought after trial exhibits from the prior litigations and identified several Bates number ranges where the exhibits could be found, including Bates numbers

R-ITC-54559317 through R-ITC-54598190.¹ (*See* Sur-Reply, Ex. 4.) Rambus, however, did not identify the exhibits by exhibit number or by the prior litigation in which they were admitted. Thus, as produced, Respondents have no way to readily match up the trial exhibits with their corresponding trial transcripts or even know where each exhibit begins and ends in the document production. The ALJ is confident that if Rambus needed to find a specific trial exhibit listed in a transcript from a prior litigation that it would have no problem so doing. Thus, the ALJ finds it unreasonable that Rambus did not provide some way for Respondents to identify each exhibit in its document production and the prior litigation(s) in which the exhibit was admitted. Accordingly, the ALJ hereby orders Rambus to provide Respondents with a list identifying each trial exhibit in Rambus' production, by Bates number, exhibit number(s), and the prior litigation(s) in which it was admitted. Rambus is ordered to produce said list no later than September 5, 2011.

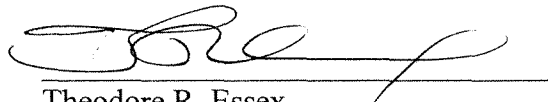
With regard to Respondents' request for an order compelling Rambus to provide a list of prior litigation materials being withheld on the basis of third party confidentiality, Rambus asserts that it has provided this material in Exhibits 11 and 13 to its opposition. Exhibit 11 indicates that a number of depositions containing Hynix confidential information and Micron confidential information were not produced.² (*Opp.*, Ex. 11 at 9-10.) Exhibit 13 lists a number of exhibits to various depositions that contain Hynix confidential information that were also not produced. (*Opp.*,

¹ The identified Bates number range consists of 38,873 Bates numbers.

² Rambus notes in Exhibit 11 that Micron has agreed to permit production of its deposition transcripts if they are labeled as containing CBI and Micron is given advanced warning before they are shown to any experts in this investigation. On August 19, 2011, Order No. 47 issued amending the protective order in this investigation to provide that Micron is to be given advanced notice before any of its transcripts are shown to experts in this investigation. As this amendment appears to satisfy Micron's concerns, the ALJ is confident that Rambus has by this time already provided to Respondents those deposition transcripts identified in Exhibit 11 to its opposition as being withheld on the basis that they contained third-party Micron confidential material. If Rambus has not already produced said transcripts, Rambus is hereby ordered to do so by no later than September 5, 2011.

Ex. 13.) Nowhere, however, does Rambus provide a list identifying any trial exhibits that have been similarly withheld. Thus, it appears that Rambus' production is incomplete. Accordingly, the ALJ hereby orders Rambus to provide no later than September 5, 2011, a list identifying any prior litigation documents, other than those already identified in Exhibits 11 and 13 to Rambus' opposition, that have not been produced in this investigation on the basis that they contain third-party confidential information or a detailed statement to Respondents attesting that there are no additional prior litigation documents that have not been produced on the basis that they contain third-party confidential information.

SO ORDERED.



Theodore R. Essex
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **ORDER 50** has been served by hand upon, the Commission Investigative Attorney, **Daniel L. Girdwood, Esq.**, and the following parties as indicated on **September 2, 2011**.



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