UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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

COMPLAINT COUNSEL'S AMENDED APPLICATION TO PLACE ON THE PUBLIC RECORD DOCUMENTS ATTACHED AS EXHIBITS TO COMPLAINT COUNSEL'S MOTION FOR DEFAULT JUDGMENT

Complaint Counsel hereby makes this Application to place on the public record the Exhibits attached to Complaint Counsel's Motion for Default Judgment and the Memorandum in Support thereof (filed Dec. 20, 2002) (together "Default Judgment Motion"), which contain documents previously designated by Respondent Rambus Inc. ("Rambus") as confidential pursuant to the protective order entered in this matter. Because the Exhibits attached to the Default Judgment Motion form part of a pleading upon which a ruling on the merits of the case is requested, the Commission's presumption favoring full public disclosure applies. Indeed, the public interest militates strongly for full disclosure of the Exhibits, as Rambus has sought to argue its case through the press. The public's ability to assess Rambus's arguments, and the press's ability to report fully and accurately upon them, would be greatly hampered in the absence of disclosure of the Exhibits. Because of the strong Commission policy and public interest favoring full disclosure, Rambus must demonstrate that each of the Exhibits for which it seeks to maintain confidentiality meet the requirements for *in camera* treatment

set out in Commission Rule 3.45.

Complaint Counsel believes that none of the Exhibits for which Rambus continues to seek confidential treatment meets the requirements of Rule 3.45, 16 C.F.R. § 3.45, based upon a careful consideration of those documents and Rambus's justifications offered for continuing confidentiality during the parties' "meet and confer" regarding this issue.[1] Complaint Counsel therefore respectfully requests that Your Honor designate all documents attached to Complaint Counsel Motion for Default Judgment as public.[2]

There is a strong presumption that the public has access to the record of the Commission's adjudicative proceedings. *In the Matter of Detroit Auto Dealers Ass'n*, D-9189, 1985 FTC Lexis 90, at *3 (June 7, 1985) (there is a "presumption of public access to any document filed in the record of an adjudicative proceeding"). FTC adjudicative proceedings should be open and on the public record. *Id.*, 1985 FTC Lexis 90, at *2 ("The principle of open proceedings and public records in Federal Trade Commission administrative adjudication is beyond dispute."); *accord In the Matter of*

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[1] Complaint Counsel and Rambus conducted, on January 17, 2003, a "meet and confer" telephonically, pursuant to Paragraph 11(b) of the Protective Order in this matter, in a good-faith effort to resolve the confidential treatment of the documents attached to the Default Judgment Motion. Counsel were unable to resolve their differences with respect to a substantial number of the Exhibits. The following Exhibits are not at issue, and Rambus does not assert a claim of confidentiality with respect to: Exhibits 1-4, 6-8, 10, 12, 14-16, 22-30, 33-37, 70, 72-78, 85, 94-96, and 110-116. Rambus and Complaint Counsel agreed to place on the public record a redacted version of Exhibit 81, the redacted version of which is attached in Exhibit J. Complaint Counsel have contacted Samsung to determine whether Samsung is willing to waive any claims of confidentiality with respect to Exhibit 93, which is a document authored by a former Samsung employee, and for which Rambus has waived any confidentiality claims of its own.

[2] The Exhibits are extensively quoted in the Default Judgment Motion. All quotations in the Default Judgment Motion from any Exhibit placed on the public record would also become public in the final public version of that Motion.

Intel Corp., D-9288, 1999 FTC Lexis 227, at *1 (Feb. 23, 1999); *see also In the Matter of H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961) ("There is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons."). Open and public proceedings permit the public to evaluate the "fairness of the Commission's work," and it "provide[s] guidance to persons affected by [the Commission's] actions." *Intel*, 1999 FTC Lexis 227, at *1 (citing *In the Matter of Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1714-15 (1967)); *accord H.P. Hood*, 58 F.T.C. at 1186; *In the Matter of Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984); *see also In the Matter of RSR Corp.*, 88 F.T.C. 734, 734-35 (1976) ("One reason for the requirement that proceedings of this sort be decided 'on the record' is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct."). Therefore, absent strong justification presented by Rambus, all of the Exhibits attached to the Default Judgment Motion should be placed on the public record.

The presumption of public access to evidence applies with equal force to documents filed in support of the Default Judgment Motion as to documents introduced into evidence at trial. *See In the Matter of Trans Union Corp.*, D-9255, 1993 FTC Lexis 310 (Nov. 3, 1993) (Commission Order). As the Commission explained in *Trans Union*, "confidential documents or information included in, or attached to" summary judgment filings are, "[f]or all practical purposes . . . 'offered in evidence' at that time." *Id.*, 1993 FTC Lexis 310, at *3-4 (citing Commission Rule 3.45). In other words, the "use of confidential information or documents in filings related to a ruling on the merits of the case is the same as offering them in evidence, because any documents or information so used may be relied on in deciding the case." *Id.*, 1993 FTC Lexis 310, at *4. Therefore, as the Commission made clear, "[t]he phrase in

Rule 3.45(b) 'offered into evidence,' should be read to include similar material that will become part of the adjudicative record in the case." *Id.*, 1993 FTC Lexis 310, at *4 n.3; *see also Detroit Auto Dealers*, 1985 FTC Lexis 90, at *3 n.5 ("The public record of adjudicative proceedings at the Federal Trade Commission includes not only the evidentiary record of documents admitted in evidence and the trial transcript but also pleadings, motions, orders, prehearing conference transcripts, and briefs."). Rambus therefore may not avoid publication of these Exhibits by contending that the Default Judgment Motion comes outside of the trial proceedings themselves. Rather, the Motion and the Exhibits thereto are documents that presumptively should be made available to the public.

The standard for keeping documents off of the public record is a high one. As Rule 3.45 makes clear, the party seeking *in camera* treatment must show that disclosure of the document will "likely result in a clearly defined, serious injury to" it. 16 C.F.R. § 3.45(b); *accord Intel*, 1999 FTC Lexis 227, at *2 (citing *H.P. Hood*, 58 F.T.C. at 1188). Accordingly, Rambus must show clearly that "'the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.'" *Intel*, 1999 FTC Lexis 227, at *3 (citing *Volkswagen of America*, 103 F.T.C. at 538). Rambus cannot meet this burden.[3]

It is amply clear that the public has a great interest in the proceedings of this matter. The fact of Complaint Counsel's filing of its Default Judgment Motion resulted in numerous news-service articles. *See* Jeff Bater (Dow Jones Newswires), "FTC Wants Immediate Judgment in Rambus Antitrust Case"

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[3] A table of the Exhibits for which Rambus seeks to maintain confidentiality, which was supplied to Complaint Counsel by Rambus, along with Rambus's reason for confidentiality with respect to each Exhibit, is attached hereto as Exhibit A. Exhibits for which Rambus did not assert a claim of confidentiality, or with respect to which it has withdrawn its objection to having the Exhibit placed on the public record subsequent to the conference between counsel, have been deleted from the table.

(Jan. 15, 2003) (Exhibit C); Susan Decker (Bloomberg.com), "Rambus Should Be Found Liable In Fraud Case, FTC Says" (Jan. 15, 2003) (Exhibit D); Tom Krazit (IDG News Service), "FTC Pushes Penalties for Rambus" (Jan. 16, 2003) (Exhibit E); Peter Kaplan (Reuters), "FTC Asks for Antitrust Ruling Against Rambus" (Jan. 16, 2003) (Exhibit F); Alex Romanelli (Electronic News), "FTC Seeks Immediate Antitrust Ruling Against Rambus" (Jan. 17, 2003) (Exhibit G); Peter Kaplan (Reuters), "Rambus Shredded Potential Evidence, FTC Says" (Jan. 17, 2003) (Exhibit H); Therese Poletti (San Jose Mercury News), "FTC: Rambus Destroyed Evidence" (Jan. 18, 2003) (Exhibit I).

As the news reports demonstrate, Rambus has contributed its views of the case to the press, which frequently quote Rambus's Vice President and General Counsel, John Danforth. *See, e.g.*, Jeff Bater, "FTC Wants Immediate Judgment in Rambus Antitrust Case" (Exhibit C) ("'We regard the motion as baseless,' [Danforth] added.") Tom Krazit, "FTC Pushes Penalties for Rambus" (Exhibit E) ("'Unless intended simply as character assassination, this motion likely reflects a growing recognition . . . that there are serious holes in their case,' Rambus said in a response it released."); Susan Decker, "Rambus Should Be Found Liable In Fraud Case, FTC Says" (Exhibit D) ("FTC attorneys 'are in no position to make judgments,' . . . Danforth said."). Keeping the Exhibits off the public record, however, precludes the press and the public from gaining a *full* understanding of Complaint Counsel's Motion for Default Judgment. Indeed, Rambus's efforts to keep these Exhibits off the public record appear to be motivated, at least in part, to hide from the public the evidence against it, while allowing it to present its own case openly and publicly. *See, e.g.*, Peter Kaplan, "FTC Asks for Antitrust Ruling Against Rambus" (Exhibit F) ("'There's no basis in law of fact for what they're seeking,' Danforth said.").

Even a cursory review of the interim public version of the Default Judgment Motion makes

obvious that Rambus would have only very limited portions of the Motion become public, while keeping the rest hidden from public view.[4] *See* Memorandum in Support of Complaint Counsel's Default Judgment (Interim Public Version) 25-73 (filed Jan. 16, 2003) (Exhibit B). The public is entitled to far more. As explained below, there is no reason that any of the Exhibits attached to the Default Judgment Motion should be withheld from the public record in this matter.

In particular, Rambus seeks to maintain as confidential a large number of Exhibits that it claims contain business strategy or patent strategy, even though all of these Exhibits contain documents that are several years old. The Commission presumes that "information that is three or more years old" is not entitled to *in camera* treatment. *Intel*, 1999 FTC Lexis 227, at *6 (citing *In the Matter of General Foods Corp.*, 95 F.T.C. 352, 353 (1980)). Furthermore, even with respect to business and marketing plans, *in camera* treatment generally extends only for two to five years. *E.g.*, *In the Matter of Hoescht Marion Roussel, Inc.*, D-9293, 2000 FTC Lexis 157, at *7 (Nov. 22, 2000). Nearly every one of the documents Rambus seeks to keep confidential is more than four years old, and some are close to ten years old. Therefore, there is a presumption that they may be placed on the public record.

While the Exhibits are presumptively not entitled to *in camera* treatment because of their age, a closer inspection of the documents confirms that there is no reason why the presumption should not apply in this case. Many of the documents do not relate to business strategy at all. Other documents relate to Rambus's internal operating plans (*i.e.*, its plans for document retention or document destruction), and thus do not relate to other companies or competitors (other than discussing Rambus's

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[4] The interim public version of the Default Judgment Motion was placed on the public record after Rambus agreed to allow a significantly redacted version of the sealed version to be placed on the record, pending discussions among counsel regarding further disclosures of Exhibits. *See* Exhibit B.

preparations to pursue other companies for patent infringement). Some documents contain assessments of Rambus's then-current strategy in 1993 to 1996, but the need for secrecy of these documents has long passed. In rare instances, documents allude to then-future strategies, but even these relate to strategies that were to be implemented by 1999.

Rambus's contentions belie the public nature of its business model: to the extent these documents reveal Rambus's plans to assert its intellectual-property rights by publicly suing companies for patent infringement, the public, and particularly DRAM manufacturers, are amply aware of its strategy. Nothing of commercial sensitivity could be revealed by these documents. Rambus cannot meet its burden because, regardless of the materials' previously confidential status, they are sufficiently old that they have no possible bearing on Rambus's future strategies. As a result, their disclosure cannot possible cause competitive injury to Rambus.

Rambus cannot meet the standard for *in camera* treatment because, as explained below with respect to each of the categories of Exhibits for which it seeks continued confidentiality, its potential arguments fail. With respect to the significant majority of the Exhibits, Rambus has claimed that they contain either business strategy or patent strategy, yet Rambus cannot articulate a reason as to why assessments and planning that is many years in the past could possibly reveal any future strategies that would harm its competitive position. With respect to the remainder of the Exhibits, there is no basis for confidentiality in the first place. Rambus's confidentiality designations therefore should fail upon a motion for *in camera* treatment.

A. White Papers Submitted to Commission

Rambus objects to the disclosure of excerpts from white papers it submitted to the Commission prior to the issuance of the Commission's complaint in this matter, which are Exhibits 117 and 118.

The fact that these Exhibits are excerpts of white papers — the basis Rambus provided for confidentiality — is irrelevant to a determination of whether they are entitled to *in camera* treatment. As Rule 3.45 makes clear, that determination is governed by the standard set out in *H.P. Hood*, 58 F.T.C. at 1188, and cases following it. 16 C.F.R. § 3.45(b). Any documents otherwise entitled to confidential treatment, such as those submitted pursuant to compulsory process, are governed by the *in camera* standard of Rule 3.45 once the documents are entered into evidence in Part III litigation. (Indeed, if a document's submission in confidentiality alone was determinative, the *in camera* rules would never have application.) Because there is no free-standing basis for confidentiality, let alone a competitive harm that could result from their disclosure, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 117 and 118.

B. Deposition Transcripts Containing Allegedly Privileged Discussions

Rambus objects to the disclosure of excerpts from deposition transcripts in the *Infineon* trial, Exhibits 9, 13, and 21, on the ground that they contain discussions of legal advice given to Rambus. Rambus also objects to an excerpt from a deposition transcript in the *Micron* trial, Exhibit 80, on the ground that it contains information "about the circumstances surrounding Rambus's engagement of outside counsel." The basis for Rambus's contention regarding Exhibit 80 does not appear to asset that the testimony contains legal advice provided to Rambus. Accordingly, it is not privileged and need not remain confidential. With respect to the *Infineon* deposition transcripts, all claims of privilege by Rambus have been voided by the trial court's ruling in *Infineon*. Moreover, counsel for Rambus informed Complaint Counsel that it would not seek to assert the privilege with respect to that information in this proceeding during the deposition of Mike Farmwald (Jan. 13, 2003). Absent a claim of privilege, Rambus has no basis for maintaining these deposition excerpts in confidence.

Because there is no basis for continuing claims of privilege, any grounds for confidentiality no longer exists. Accordingly, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 9, 13, 21, and 80.

C. Exhibits Relating to Rambus's Document-Retention Policy

Rambus objects to the public disclosure of several documents describing its document retention policy or the adoption thereof.[5] There is no basis for continued confidential treatment of these Exhibits, and they therefore are not entitled to *in camera* status. There is nothing competitively sensitive about a company's document-retention policy or its adoption thereof. Indeed, no competitor could gain an advantage by knowing another company's policies with respect to document retention. Furthermore, the Exhibits are more than four years old, and relate to events in 1998. Accordingly, the documents are presumptively not confidential.

Rambus has specifically made public its own justifications for adopting its document-retention policy, further undermining any justifications for confidentiality. These public statements show both that the policy is not competitively sensitive and that it is properly considered by the public. First, John Danforth, Rambus's General Counsel, called Complaint Counsel's contentions "old news," because they had also been alleged in the *Infineon* trial. Susan Decker, "Rambus Should be Found Liable in Fraud Case, FTC Says" (Exhibit D). Furthermore, Rambus maintains publicly that the document destruction in which it had engaged was part of the company's document-retention policy. *See* Peter Kaplan, "Rambus Shredded Potential Evidence" (Exhibit C). Rambus's public defense of its document-retention policy shows that it clearly is not confidential in itself. Moreover, its reasons for

[5] Rambus asserts this basis for confidentiality with respect to Exhibits 57, 67, 82-84, 86-91, 97, and 101-102.

implementing that policy, which Rambus claims were legitimate, have plainly been put before the public by Rambus. To deny the public the other side of the story, the one advanced by Complaint Counsel, would emphatically violate the Commission's policy on conducting its proceedings in public to allow the public to evaluate the Commission's decisionmaking.

Because there is no basis for the confidentiality of Exhibits relating to Rambus's document-retention policy, and no competitive harm from their disclosure, and because Rambus's public statements about its policy have waived any possibly claims of confidentiality, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 57, 67, 82, 83, 84, 86, 87, 88, 89, 90, 91, 97, 101, and 102.

D. Exhibits Containing Personnel Information

Rambus objects to the disclosure of documents that ostensibly contain personnel information, Exhibits 61 and 64. Even a cursory review of those documents shows that there is no confidential personnel information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *See* 16 C.F.R. § 4.10(a)(4). Indeed, neither of the documents is itself a personnel file; rather, each contains statements referring to Rambus personnel. Rambus's position appears to Complaint Counsel to be frivolous. Exhibit 64, excerpts from a deposition of Mr. Karp, appear to be entirely devoid of personnel information. At most, it alludes to the financial benefits Mr. Karp would have lost had Rambus [ ] Rambus was unable to articulate any "serious" harm that would likely result from disclosure of that information. Similarly, Exhibit 61, an email from Geoff Tate, Rambus's CEO, evaluates whether to hire Mr. Karp. That document shows Tate's assessment of Mr. Karp's [ ], but nothing more. It, too, is devoid of information the disclosure of which would cause "serious harm." In short, any possible injury

is neither "clearly defined" nor "likely," as required by Rule 3.45(b).

Because there is no basis for Rambus's claims that some of the Exhibits to the Motion for Default Judgment contain "personnel" information, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 61 and 64.

E. Exhibits Containing Business and/or Patent Strategy

Rambus seeks to maintain the confidentiality of a substantial number of Exhibits that purportedly contain business strategies.[6] Rambus also seeks to maintain the confidentiality of a number of Exhibits that contain patent "strategy" or relate to its patent portfolio.[7] Every one of these Exhibits is either more than four years old, or relates to events that occurred more than four years ago. That alone provides reason to deny these Exhibits *in camera* treatment. Closer inspection, however, demonstrates clearly that there is no reason whatsoever to disregard the usual presumption that older documents should not be maintained *in camera*. These Exhibits simply do not contain competitively sensitive information.

The number of Exhibits for which Rambus seeks continued confidentiality makes impossible a comprehensive description of why they do not contain competitively sensitive information. Indeed, in many instances it is impossible to locate any information that is competitively sensitive, let alone

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[6] Rambus has asserted the confidentiality of the following Exhibits on this ground: 11, 17, 20, 31, 32, 38, 40-41, 44-55, 57-63, 65-66, 69, 92, 98, 100, and 103-109.

[7] Rambus has asserted the confidentiality of the following Exhibits on this ground: 5, 39, 42-43, 56, 67-68, 71, 79, and 99. In many instances, Rambus has asserted that a document contains both business and patent strategy information, which reflects the interrelationship between Rambus's patent portfolio and its business strategy. The claims of confidentiality fail whether they are based on the patent contents of the documents or the business content of the documents, and are therefore addressed only with respect to their business contents.

confidential.[8] Nevertheless, a few documents highlight the baselessness of Rambus's claims of confidentiality.

Business Strategy. Exhibit 20, an email from Richard Crisp, sets out his observations about and critique of a JEDEC meeting that took place in December 1995. The document contains no strategy; rather, it describes the treatment Rambus received at that meeting. Exhibit 32 is even more lacking in strategic content: it is a simple three-line email from Geoff Tate requesting information about certain of Rambus's patent claims. Exhibit 39, another email, from August 1997, discusses Rambus's decision not to publicize a certain patent, but notes that since it had been issued, the company should be prepared to respond to inquiries about it. As with the others, there is no strategic information contained in the five-year-old email.

Patent Strategy. Exhibit 68, like the "business strategy" documents, is similarly devoid of any strategic or forward-looking information: it is an email noting the issuance of two patents to Rambus and congratulating the inventors. Exhibit 43 contains only slightly more information: it is an August 1997 email discussing Rambus's public response to news of the issuance of a patent. Rather than containing confidential information, it contains information that is specifically intended for public consumption. Finally, Exhibit 71 is an August 1994 email expressing the author's opinion that it would be desirable to [ ]. This email contains the well-known fact that "Rambus is an IP company" — there is nothing in the fact that ten years ago Rambus [ ]

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[8] Complaint Counsel acknowledges that it has had difficulty assessing whether some of the Exhibits may contain some information that is competitively sensitive because, during the conference between counsel, counsel for Rambus were unable to identify information in any of the documents specifically considered that appeared to be competitively sensitive. Complaint Counsel will be in a position to respond to Rambus's assertions of confidentiality once Rambus makes those claims with particularity in its motion seeking *in camera* treatment.

that could possible enable a competitor to compete on unfair terms against Rambus.

In short, Rambus has asserted confidentiality with respect to a very large number of Exhibits, yet appears not to have considered carefully how they are in fact competitively sensitive. Complaint Counsel's review of these Exhibits establishes two things clearly: 1) the documents all relate to events or planned undertakings from no later than 1998; 2) there are no obvious trade secrets or intellectual property contained in the documents themselves. Counsel for Rambus has not identified with any particularity how disclosure would cause competitive harm. *In camera* treatment of Exhibits 5, 11, 17, 20, 31, 32, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 71, 79, 92, 98, 99, 100, 103. 104, 105, 106, 107, 108, and 109 is therefore not warranted.

* * *

Complaint Counsel, after its conference with Rambus, determined that it is appropriate to redact from all deposition transcripts any material that is not cited or quoted in the Motion for Default Judgment, nor immediately surrounds quoted material the inclusion of which is necessary for the public to understand the context of the quotation. Complaint Counsel has therefore attached redacted versions of Exhibits 9, 13, 21, 57, 64, 67, 80, 84, 86-88, 90-91, 97-98, and 100-102, which are the Exhibits containing deposition transcripts for which Rambus maintains a claim of confidentiality. *See* Exhibit J. For the reasons stated above, the material that has not been redacted is not entitled to *in camera* treatment, even to the extent it contains business strategy, patent strategy, personnel information, or information about internal business operations.

Based on the forgoing, Complaint Counsel respectfully requests that the Exhibits attached to the Motion for Default Judgment be placed on the public record and that Rambus be ordered to prepare a

motion for *in camera* treatment with respect to each of the Exhibits that it seeks to have withheld from the public record, along with support therefore, so that Complaint Counsel may adequately respond to Rambus's specific claims of competitive harm that would likely result from disclosure. Because the public interest warrants prompt access to all materials that should be publicly available, Complaint Counsel respectfully requests that Your Honor direct Rambus to file its motion for *in camera* treatment by January 31, 2003.

Respectfully submitted,

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COUNSEL SUPPORTING THE COMPLAINT

Dated: January 29, 2003

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER

Upon consideration of the Complaint Counsel's Amended Application to Place on the Public Record Documents Attached as Exhibits to Complaint Counsel's Motion for Default Judgment, dated January 29, 2003,

IT IS HEREBY ORDERED that Complaint Counsel's Application is Granted.

IT IS FURTHER ORDERED that the Respondent Rambus Inc. shall file no later than January 31, 2003, a motion for *in camera* treatment with respect to any Exhibits to Complaint Counsel's Motion for Default Judgment for which it seeks such treatment.

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James P. Timony
Chief Administrative Law Judge

Date: _____

Exhibit A redacted from public-record version

Exhibit J redacted from public-record version