PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

RAMBUS INC.'S RESPONSE TO COMPLAINT COUNSEL'S AMENDED APPLICATION TO PLACE EXHIBITS TO THE MOTION FOR DEFAULT JUDGMENT ON THE PUBLIC RECORD

I. INTRODUCTION

Despite purporting to engage in good-faith negotiations to narrow the scope of the documents in dispute, Complaint Counsel have not reconsidered their position on confidentiality with respect to a single document discussed during the meet-and-confer process. Rambus, on the other hand, in an attempt to avoid burdening the Court with protracted collateral proceedings, agreed to withdraw its confidentiality designations altogether with respect to several exhibits (31, 70, 81, 85, 93), and agreed to withdraw its designations as to many additional exhibits if Complaint Counsel would redact those portions of the exhibits that were not cited or otherwise relied on in their motion. Complaint Counsel rejected Rambus's proposal to narrow the class of documents in dispute and filed this application instead.

Complaint Counsel contest every one of Rambus's remaining designations, albeit by applying the wrong legal standard. As Rambus explained during the meet-and-confer process, the standard Complaint Counsel seek to apply here – that governing the issuance of *in camera* orders under 16 C.F.R. § 3.45 – has no application at this stage of the proceedings. Complaint Counsel nonetheless continue to insist that it does, rendering their entire discussion of Rambus's confidentiality designations irrelevant. Confidential treatment of the Rambus documents in dispute is governed solely by the terms of the Protective Order issued by the Court in this action, and all of the documents for which Rambus seeks continued confidential treatment are covered by that Order.

II. ARGUMENT

A. The Standard Governing *In Camera* Treatment of Documents During an Administrative Hearing Does Not Apply Here.

Complaint Counsel erroneously contend that they are free to make public all of the exhibits to their motion for default judgment – notwithstanding the fact that Rambus has designated many of the documents as confidential – unless Rambus demonstrates that each document is entitled to *in camera* treatment under 16 C.F.R. § 3.45(b).[1] That provision, however, governs the treatment of material "offered into evidence" at administrative hearings, as its placement within the subpart of the Commission's Rules of Practice governing "hearings" reflects. That § 3.45(b) does not apply as a general matter to evidence submitted in connection with motions is confirmed by § 3.45(e), which governs the inclusion of confidential information in "briefs and other submissions." Section 3.45(e) makes clear that a party must file two versions of a brief and supporting submissions, one public and one non-public, whenever they contain "specific information that has been granted in camera status pursuant to § 3.45(b) *or is subject to confidentiality protections pursuant to a protective order*." 16 C.F.R. § 3.45(e) (emphasis added). Thus, the public version must omit not only information that has been granted *in camera* treatment pursuant to § 3.45(b), but also information appropriately designated as confidential under the terms of a protective order.

[1] Section 3.45(b) provides in relevant part: "A party . . . may obtain in camera treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge."

The Protective Order entered by the Court in this case makes the same distinction between evidence submitted in connection with motions and evidence introduced at trial. Paragraph 17 of the Order states that if confidential material "is contained in any pleading, motion, exhibit or other paper" filed with the Secretary, it must be filed under seal and "shall remain under seal until further order of the Administrative Law Judge." Paragraph 18, in contrast, governs material to be "introduce[d] as evidence at trial," and states that with respect to such material a party must apply for an *in camera* order pursuant to 16 C.F.R. § 3.45(b). Thus, the Protective Order itself specifies that the standard for *in camera* treatment of documents applies only to those documents introduced into evidence at trial.

Complaint Counsel point out that the Commission has held § 3.45(b) applicable to evidence submitted in connection with summary judgment motions. App. at 3 (citing *Trans Union Corp.*, 1993 FTC Lexis 310 (1993)). But the Commission's reasoning in *Trans Union* makes clear that its decision has no bearing on the motion for default judgment at issue here. The Commission held that although § 3.45(b) applies only to material that is "offered into evidence," the use of documents "in filings related to a ruling *on the merits* of the case is the same as offering them in evidence." *Trans Union*, 1993 FTC Lexis 310 at *4 (emphasis added). Since the summary judgment motion at issue in that case obviously sought a ruling "on the merits," the Commission held that the parties were required to seek *in camera* treatment under § 3.45(b) for any material submitted in connection with the motion which a party sought to withhold from

the public record. *Id.* at *5; *see also Detroit Auto Dealers Ass'n, Inc.*, 1985 FTC Lexis 90 at *1 (1985) (involving evidentiary submission by Complaint Counsel "specifying their proof and arguments on the merits of this case").

Complaint Counsel's motion for default judgment, of course, does not seek a decision "on the merits" of this case. In fact, the very reason Complaint Counsel have filed the motion is to *avoid* a decision on the merits. What Complaint Counsel seek instead is the imposition of litigation sanctions for alleged misconduct that has nothing to do with the "merits" of any of the issues raised by Complaint Counsel's allegations, such as whether Rambus owed JEDEC any duty to disclose its patent applications, whether JEDEC would have adopted the same standard if Rambus had disclosed such applications, and whether Rambus's alleged non-disclosure caused any anticompetitive harm. Section 3.45(b) is therefore inapplicable here.

Even if Complaint Counsel were correct in asserting that the standard for *in camera* orders applies here, there is no urgent need for any such determination to be made *now*. As the Commission has previously recognized, it is perfectly appropriate "to grant in camera treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *Bristol-Myers Co.*, 90 F.T.C. 455 (1977). Complaint Counsel have offered no justification warranting an intensive line-by-line review of Rambus documents at this stage of the proceedings in order to make a final determination as to which documents should be accorded *in*

camera treatment. Any such review – before the Court has heard the evidence at trial – would be cumbersome and inefficient given the absence of any context within which to assess the significance that specific documents may have to Rambus's business operations. Moreover, prior to the Court's ruling on the motion, there is no basis for assessing the importance (or irrelevance) of particular documents to the public's understanding of the Court's decision. Thus, any final determination as to which documents should be made part of the public record should await the conclusion of adjudicative proceedings in this matter, or at the very least issuance of the Court's ruling on the motion.

The hollowness of Complaint Counsel's claim of urgency is highlighted by the one reason they give for seeking public release of all documents immediately: that Rambus "has sought to argue its case through the press." App. at 1. That charge is patently absurd. Rambus has been forced to respond to press inquiries generated by Complaint Counsel's own inflammatory pleading, which they captioned: "Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence." Rambus has vigorously asserted, as it has every right to, that the allegations implied by this caption are baseless and will be proved so. To the extent Complaint Counsel believe the press clippings they have collected do not "fully and accurately" report the parties' positions in this matter (App. at 1), that is a problem of their own making.

Nor is it the case, as Complaint Counsel assert, that Rambus's motivation for contesting the disclosure of the company's confidential information is a desire

"to hide from the public the evidence against it." App. at 5. As Complaint Counsel were informed during the meet-and-confer process, Rambus has agreed to withdraw its confidentiality designations with respect to all documents and deposition testimony that relate to the terms of its document retention policy or the implementation of that policy. Those are the very subjects that form the basis of Complaint Counsel's motion, and the only subjects in which the public and the press would presumably have any legitimate interest. As explained in the next section, Rambus has sought to prevent public disclosure only of those documents that reveal competitively sensitive information. The public does not need access to such information at this stage of the proceedings "to assess Rambus's arguments." App. at 1.

B. All of the Documents for Which Rambus Seeks Continued Confidential Treatment Are Covered by the Terms of This Court's Protective Order.

Paragraph 1(n) of the Protective Order issued by the Court on August 5, 2002, defines the material entitled to confidential treatment at this stage of the proceedings. That provision defines confidential material as information "which is not generally known and which the Producing Party would not normally reveal to third parties or would normally require third parties to maintain in confidence." That category of information includes "non-public commercial information, the

disclosure of which to . . . Third Parties would likely cause substantial commercial harm or personal embarrassment to the disclosing party."[2]

All of the remaining exhibits at issue contain confidential information covered by the Protective Order, and Rambus seeks continued confidential treatment of that information. The exhibits fall into two broad categories that may assist the Court in ruling on Complaint Counsel's application: (1) those in which the passages cited by Complaint Counsel contain confidential information; and (2) those in which the specific passages cited by Complaint Counsel do not contain confidential information but other portions of the exhibits do.

With respect to the exhibits that fall into the first category (5, 11, 38, 42, 45, 48, 53, 54, 58, 59, 60, 65, 79, 104, 105, and 108), redacting the uncited portions will not avoid the disclosure of confidential information and Rambus requests that these exhibits be withheld from the public record. As explained in the Declaration of Edward H. Larsen, each of these exhibits contains competitively sensitive information that would cause Rambus substantial commercial harm if disclosed to third parties.

[2] Although Rambus continues to believe that the following exhibits contain confidential information within the scope of this definition, in the interest of focusing this proceeding on the documents that are of greatest concern, Rambus agrees to withdraw its confidentiality designations with respect to exhibits 17, 20, 39, 44, 55, 62, 63, 66, 68, 82, and 83. Rambus also agrees, again solely in the interest of streamlining these proceedings, to withdraw its confidentiality designations with respect to Exhibits 117 and 118, which are excerpts from white papers Rambus submitted to the Commission. Rambus strongly disagrees with any suggestion by Complaint Counsel that, as a general matter, such white papers are not entitled to confidential treatment.

With respect to the exhibits in the second category, any issues concerning disclosure of confidential information can be avoided by simply redacting those portions of the exhibits that Complaint Counsel do not cite. There is, of course, no justification for not doing so.[3] Recognizing this, Complaint Counsel have now made the necessary redactions to the deposition transcripts at issue (Exhibits 9, 13, 21, 57, 64, 67, 80, 84, 86, 87, 88, 89, 90, 91, 97, 98, 100, 101, and 102), and Rambus therefore withdraws its confidentiality designations with respect to the redacted versions of those exhibits (attached as Exhibit J to Complaint Counsel's Amended Application). The remaining exhibits in this second category (32, 40, 41, 43, 46, 47, 49, 50, 51, 52, 56, 61, 69, 71, 92, 99, 103, 106, 107, and 109) should similarly be redacted, and the Court should order Complaint Counsel to make such redactions if they continue to refuse to do so. Following an opportunity to review the redacted versions of these exhibits, Rambus expects that it will be able to withdraw its confidentiality designations with respect to them as well.

III. CONCLUSION

For the reasons stated above, Complaint Counsel's application should be denied.

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[3] For example, Complaint Counsel do not explain why it would be important for the public to know, in assessing the fairness and wisdom of these proceedings, Rambus CEO Geoffrey Tate's assessment of Joel Karp as a prospective employee. *See* Tab 61. Yet Complaint Counsel seek to make this entire document part of the public record, despite the personal nature of some of this information and despite the fact that Complaint Counsel do not even rely on this portion of the document. App. at 10-11.

DATED: January _____, 2003 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on January 31, 2003, I caused a true and correct copy of *Rambus Inc.'s Response to Complaint Counsel's Amended Application to Place Exhibits to the Motion for Default Judgment on the Public Record* to be served on the following persons by hand delivery:

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