

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
RAMBUS INC.,
a corporation.

Docket No. 9302

**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 and

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

Trans Union
in camera

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-

“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

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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:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.

M. Sean Royall
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-378
600 Pennsylvania Avenue, N.W.