

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONDENT RAMBUS INC.'S OPPOSITION TO NON-PARTY
HYNIX'S MOTION TO AMEND THE PROTECTIVE ORDER**

In an effort to obtain access to *in camera* testimony provided by others, including their competitors such as Micron, non-parties Hynix Semiconductor, Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., and Hynix Semiconductor Deutschland GmbH (collectively, “Hynix”) have moved this Court to amend the August 5, 2002 Protective Order to permit the disclosure of *in camera* testimony taken in this proceeding. Hynix’s motion must be denied.

First, the August 5, 2002 Protective Order, which Hynix seeks to amend, does not govern the taking of *in camera* testimony. Rather, the protection accorded to testimony taken *in camera* is set forth in the Commission’s Rules of Practice § 3.45, 16 C.F.R. § 3.45, and in *in camera* Orders entered by this Court in advance of the taking of such testimony. Rather than seeking to amend the Protective Order, Hynix must seek relief from the provisions of § 3.45 and this Court’s applicable *in camera* Orders. Hynix thus has failed to seek relief that would accomplish its goal of allowing it access to *in camera* testimony of others.

That Hynix has failed to pursue the appropriate procedural path is difficult to understand, since the proper path was outlined in some detail at the June 23, 2003 hearing before the Court where this issue was addressed and where Hynix appeared through its counsel. At pages 6581-82 of the Trial Transcript, attached as Exhibit B to Hynix’s motion, Rambus’s counsel stated as follows:

As to the testimony, however, the only order that governs the testimony is Your Honor’s *in camera* order, and as we understand that order and the FTC’s general regulations, there’s no provision for us providing *in camera* testimony to third parties, and we think some provision needs to be made for that. We thought perhaps Hynix might propose an amendment to that *in camera* order that would then permit us to provide access to them after I think they perhaps should give notice to the third parties.

And, as was discussed at that hearing, Hynix should give notice to the third parties whose testimony it seeks to obtain and Hynix should be afforded relief from the provisions of 16

C.F.R. § 3.45 and this Court's *in camera* Orders, if at all, only after those third parties have had an opportunity to be heard.¹

Since the Protective Order does not govern the taking of *in camera* testimony, Hynix's efforts to amend the Protective Order, even if successful, would not allow Rambus to provide that testimony to Hynix. Indeed, the Commission's Rules of Practice provide that only the Administrative Law Judge, the Commission or reviewing courts may disclose to others testimony taken *in camera*; Rambus would not be authorized to make such disclosure in any event. 16 C.F.R. § 3.45(a).

Second, Hynix's motion should be denied because the relief Hynix seeks – to have *in camera* testimony treated as Confidential Discovery Material under the terms of this Court's Protective Order – is wholly inconsistent with the protection accorded to such testimony by this Court. As the Court (and Hynix) are aware, all persons other than outside counsel and counsel for the witness were excluded from the courtroom when testimony was being taken *in camera*. For instance, Rambus's in-house counsel were not permitted to be present and were required to leave the courtroom just as were Hynix's counsel. Yet, were such testimony to be designated Confidential Discovery Material, as Hynix seeks, Rambus's in-house counsel, as well as in-house counsel for Hynix and others who might seek access to the testimony, would be allowed to review the

¹ Rambus does not oppose this motion because it has a particular interest in the testimony provided *in camera* by various third parties. Rather, Rambus is concerned that third parties provided such testimony expecting that the testimony would not be shared with others, and particularly not with their competitors, and Hynix seeks to upset those expectations without giving notice to the third parties and without following the appropriate procedures as required by the Commission's Rules of Practice. Since much of the *in camera* testimony in question was elicited from witnesses called by Complaint Counsel, and often during Complaint Counsel's questioning, we expect that Complaint Counsel share Rambus's concern that all third parties be notified by Hynix of the relief it seeks.

testimony. It is surprising that Hynix seeks such relief without drawing any attention to the change in protection it seeks for *in camera* testimony. Perhaps even more surprising is that Hynix seeks to change this level of protection without having given any notice to the third parties whose testimony would be revealed to others.

Finally, Hynix's motion also should be denied because, after agreeing to meet and confer with Complaint Counsel and Rambus's counsel in an effort to address the issues raised by its motion, Hynix then failed to do so. At page 6583 of the Trial Transcript, attached as Exhibit B to Hynix's motion, this Court suggested "that Hynix offer the Court a proposed supplement to that Order [the *in camera* Order], and then the parties and any other third parties could . . . be free to comment on that as well, and then I could issue an Order either way and then determine how this ought to be handled." In response to this direction and to the offer of Rambus's counsel to meet to discuss these issues, Hynix's counsel indicated that he would "be happy to talk to Mr. Stone and Mr. Oliver to get this issue resolved." Trial Tr. At 6584. No such meet and confer has been held, nor has Hynix made any effort to initiate such a meeting. Further, Hynix has not made any showing that it has discussed its proposal with the third parties whose *in camera* testimony is at issue.

Hynix's pending motion should be denied. It should be directed to meet and confer with Complaint Counsel, counsel for Rambus, and counsel for the affected third parties in an effort to determine, first, whether there is an appropriate procedural vehicle by which to allow Hynix and other third parties access to *in camera* testimony and, second, what protections are appropriate to ensure that the legitimate interests of the third parties who provided such *in camera* testimony will be properly protected.

DATED: August 13, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca A. Williams, hereby certify that on August 13, 2003, I caused a true and correct copy of *Respondent Rambus Inc.'s Opposition to Non-Party Hynix's Motion to Amend the Protective Order* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission, Room H-112
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Rebecca A. Williams

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CERTIFICATION

I, Rebecca A. Williams, hereby certify that the electronic copy of *Respondent Rambus, Inc.'s Opposition to Non-Party Hynix's Motion to Amend the Protective Order* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on August 13, 2003 by other means.

Rebecca A. Williams
August 13, 2003