

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

RESPONDENT RAMBUS INC.'S MOTION
FOR IN CAMERA TREATMENT OF CERTAIN
TRIAL EXHIBITS AND DEMONSTRATIVES

I. INTRODUCTION

Respondent Rambus Inc. (“Rambus”) moves for *in camera* treatment of certain trial exhibits and demonstratives introduced under a provisional *in camera* ruling last week. Rambus also includes in this motion a summary of draft license terms, and four financial forecasts, that were inadvertently omitted from earlier motions seeking *in camera* protections of Rambus’s sensitive business information.

As described more fully below and in the accompanying Declaration of Robert Eulau (“Eulau Decl.”), Rambus’s Chief Financial Officer (“CFO”), each exhibit and demonstrative contains current, highly-sensitive, non-public information that would cause Rambus serious competitive injury if published in this proceeding. In response to motions by Rambus and by several third parties, the Court has previously afforded *in camera* treatment to documents containing the same type of sensitive, confidential business information. For the same reasons, the Court should afford these exhibits *in camera* treatment under 16 C.F.R. § 3.45(b).

II. BACKGROUND

The documents that require *in camera* treatment fall into four general categories:

A) license agreements; B) settlement letters; C) financial forecasts; and D) trial demonstratives reporting SDR/DDR patent license terms.¹

A. License agreements

Two exhibits – CX1680 (Tab 1)² and CX1681 (Tab 2) – are current Rambus patent license agreements for SDRAM and DDR SDRAM memories and controllers (“licenses”).³ A third exhibit – RX2124 (Tab 3) – summarizes draft license terms to new Rambus products that are not involved in this proceeding.

B. Settlement letters

Three letters, each granted provisional *in camera* treatment during Professor McAfee’s examination, were exchanged as part of settlement discussions between Rambus and Infineon. The first, dated January 31, 2001, was entered as RX2307 (Tab 4). The other two, each dated February 9, 2001, were marked as CX3111 (Tab 5) and CX3112 (Tab 6).⁴

C. Financial forecasts

Four exhibits – CX527 (Tab 7), CX528 (Tab 8), CX529 (Tab 9), and CX530 (Tab 10) – are nearly identical copies, or slightly modified versions, of an internal Rambus

¹ Because these documents contain highly-sensitive, Rambus confidential information, they are filed in a separate confidential appendix.

² Tab references indicate the document’s location in the simultaneously filed confidential appendix.

³ The Court granted these two exhibits provisional *in camera* treatment at the beginning of the hearing on June 25, 2003.

⁴ Complaint Counsel originally marked these documents as CX3092 (RF0203604) and CX3093 (RF0203605-06). On June 30, 2003, Complaint Counsel marked – and the Court entered – RF0203604 as CX3111, and RF0203605-06 as CX3112.

financial document providing forecasts, operating budgets and market share estimates for current Rambus products, extending through 2005 (“financial documents”).

D. Demonstratives

The Court afforded three demonstratives – DX228 (Tab 11), DX242 (Tab 12), and DX244 (Tab 13) – provisional *in camera* treatment during Professor McAfee’s examination. These demonstratives report confidential Rambus license terms.

The sensitive and confidential nature of each of these documents is described in the accompanying, non-public Declaration of Robert Eulau.

III. ARGUMENT

A. Standard.

The documents that are described in this motion clearly warrant *in camera* treatment as provided by Commission Rule 3.45(b), 16 C.F.R. § 3.45(b).

As set forth in *General Foods*, Commission Rule 3.45(b) properly affords *in camera* treatment on a clear showing “that the information concerned is sufficiently secret and sufficiently material” to Rambus’s business “that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352 (1980), 1980 FTC LEXIS 99, at *10.

The Commission weighs six factors in considering the secrecy and materiality of documents under Rule 3.45(b): 1) the extent to which the information is known outside of respondent’s business; 2) the extent to which the information is known by employees and others involved in respondent’s business; 3) the extent of measures taken by respondent to guard the secrecy of the information; 4) the value of the information to respondent and his competitors; 5) the amount of money or effort expended by respondent in developing the information; and 6) the ease or difficulty with which the information could be

properly acquired or duplicated by others. *See Bristol-Myers*, 90 F.T.C. 455, 456, 1977 FTC LEXIS 25, at *4-5 (Nov. 11, 1977) (citing *Restatement of Torts* § 757, cmt. b at 6 (ALI 1939)).

Using these criteria, the Court should afford *in camera* treatment to the documents in question so that Rambus does not needlessly suffer serious competitive injury from their disclosure in this action.

B. The documents in question should be afforded *in camera* treatment.

The documents that are the subject of this motion contain highly sensitive information that Rambus, and its business partners, need to maintain in confidence. For each document at issue, the factors set forth above compel the conclusion that the documents are secret and material within the meaning of the Commission's Rule 3.45(b) analysis. As described below, each document should be afforded *in camera* protection.

1. The documents contain sensitive information.

The documents in question contain highly sensitive, current, and confidential Rambus business information. *See* Eulau Decl. ¶¶ 4, 12-37 (license agreements), ¶¶ 5, 38-45 (settlement letters), ¶¶ 6, 46-53 (financial forecasts), and ¶¶ 7, 12-29, 54-58 (demonstratives). The Court recognized as much on May 6, 2003, when – without opposition from Complaint Counsel – it afforded Rambus *in camera* treatment for several exhibits containing both final or draft SDR/DDR patent licenses,⁵ and several others

⁵ *See, e.g.*, CX1376, CX1377, CX1676, CX1677, CX1679, CX1683, CX1684, CX1685, CX1686, CX1687, CX1689, and CX1692 (SDR/DDR license agreements); *see also* CX1381, CX1384, and CX1397 (Rambus presentations on SDR/DDR license terms); *see generally* Order On Respondent's Motions For *In Camera* Treatment of Trial Exhibits, *In re Rambus Inc.*, No. 9302 (May 6, 2003) (Slip Op.).

containing Rambus financial forecasts with much the same information at issue here.⁶

The Court similarly afforded *in camera* treatment to financial and market-related information of third parties.⁷

2. The documents are not widely known.

The information contained in these documents has limited circulation. It is not widely known even within, let alone outside of, Rambus. *See* Eulau Decl. ¶¶ 13-16, 24-29, 33-34 (license agreements), ¶¶ 39-42, 45 (settlement letters), ¶¶ 46-47, 49-50, 52 (financial forecasts), and ¶¶ 13-16, 24-29, 54-58 (demonstratives). Rambus expends significant effort to guard the secrecy of the information in these documents. *Id.*; *see also* Eulau Decl. ¶ 10.

3. The information is highly valuable to Rambus, its competitors, and its existing or future licensees.

The information in these documents is highly valuable to Rambus, to its business partners, and – if disclosed in this proceeding – to Rambus’s competitors or future business partners. *See* Eulau Decl. ¶ 9; ¶ 12, 15, 17-23, 31-33, 35 (license agreements), ¶¶ 38-39, 42-44 (settlement letters), ¶¶ 47, 50-52 (financial forecasts), and ¶¶ 12, 15, 17-23, 54-57 (demonstratives).

For example, because the license agreements, settlement letters and demonstratives contain Rambus’s business partner cost information, it would be inappropriate to publish – to all of these licensees’ competitors – the royalty costs and

⁶ *See, e.g.*, CX531, CX557, CX563, CX564, CX566, CX567, CX610, CX611, CX612, CX617, CX629, CX632 and CX633 (Rambus forecasts, projected operating expenses, estimated royalty revenues, and projected market shares).

⁷ *See, e.g.*, Order On Non-Parties’ Motions For *In Camera* Treatment Of Documents Listed On Parties’ Exhibit Lists, *In re Rambus Inc.*, No. 9302 (Apr. 23, 2003) (Slip Op.); Additional Order On Non-Party Motions For *In Camera* Treatment Of Documents Listed On Parties’ Exhibit Lists, *In re Rambus Inc.*, No. 9302 (Apr. 29, 2003) (Slip Op.).

royalty structures that they hold with Rambus.

4. The information could not easily be acquired by others.

The contents of these exhibits could not easily be acquired by others. *See* Eulau Decl. ¶ 10; ¶¶ 13-16, 18, 24, 28, 33-34 (license agreements), ¶¶ 39-42 (settlement letters), ¶¶ 46, 48-50 (financial forecasts), and ¶¶ 13-16, 18, 24, 28, 55, 57 (demonstratives).

5. Publishing the documents will cause Rambus clearly defined, serious competitive injury.

For all the reasons set forth above and in the Eulau Declaration, Rambus will suffer serious injury should the documents in question be published. *See* Eulau Decl. ¶ 9; ¶¶ 12-37 (license agreements), ¶¶ 38-45 (settlement letters), ¶¶ 46-53 (financial forecasts), and ¶¶ 13-29, 54-58 (demonstratives).

6. Duration of *in camera* protection.

The Court already afforded several similar Rambus financial and licensing documents *in camera* protections in its May 6, 2003, Order. Complaint Counsel did not oppose that *in camera* treatment.

The same considerations that were at issue in the May 6, 2003, Order, are at issue here. In particular, the SDR/DDR SDRAM license agreements – and the demonstratives discussing terms from those (and other similar) agreements – should be afforded the same 10 year period of protection as the SDR/DDR patent license agreements already afforded *in camera* treatment (*supra* note 4). *See* Eulau Decl. ¶ 29 (SDR/DDR license agreements), ¶ 58 (demonstratives).

The summary of draft Yellowstone and Redwood license agreement terms, RX2124, requires longer protection. Since Rambus intends to license this technology throughout the life of its relevant patents, and relevant patents continue to issue that

Rambus will incorporate into existing and future licenses, the contents of RX2124 will remain sensitive for quite some time. A period of fifteen years is an appropriate starting point for *in camera* protections for RX2124. See Eulau Decl. ¶¶ 35-37.

The settlement letters should be afforded *in camera* treatment for an indefinite period. See Eulau Decl. ¶ 45. At a minimum, the settlement letters require the same 10 year period of protection as the SDR/DDR patent license agreements that relate to the subject of that patent litigation. See *id.*

Finally, consistent with the Court’s previous treatment of Rambus’s confidential financial documents (*supra* note 5), the financial forecasts at issue here should be afforded *in camera* treatment for at least a 5 year period. See Eulau Decl. ¶ 53.

IV. CONCLUSION

For the foregoing reasons, the Court should afford these documents *in camera* treatment, for the following periods:

CX1680	10 years
CX1681	10 years
RX2124	15 years
RX2307	indefinite
CX3111 (RF0203604)	indefinite
CX3112 (RF0203605-06)	indefinite
CX527	5 years
CX528	5 years
CX529	5 years
CX530	5 years
DX228	10 years
DX242	10 years
DX244	10 years

DATED: July __, 2003

Respectfully submitted,

Gregory P. Stone
Steven M. Perry
Peter A. Detre
Adam R. Wichman
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100

Douglas Melamed
Kenneth A. Bamberger
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Sean C. Cunningham
John M. Guaragna
Gray, Cary, Ware & Freidenrich LLP
401 "B" Street, Suite 2000
San Diego, California 92101
(619) 699-2700

Attorneys for Respondent Rambus Inc.

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**ORDER GRANTING RESPONDENT RAMBUS INC.'S
MOTION FOR IN CAMERA TREATMENT OF
CERTAIN TRIAL EXHIBITS AND DEMONSTRATIVES**

Rambus has demonstrated that the documents listed below contain sensitive, non-public information that, if published, will cause Rambus clearly defined, serious competitive injury within the meaning of 16 C.F.R. § 3.45(b).

Accordingly, Rambus's Motion For *In Camera* Treatment Of Certain Trial Exhibits is hereby GRANTED. These trial exhibits and demonstratives shall be afforded *in camera* treatment for the periods listed below:

CX1680	10 years
CX1681	10 years
RX2124	15 years
RX2307	indefinite
CX3111 (RF0203604)	indefinite
CX3112 (RF0203605-06)	indefinite
CX527	5 years
CX528	5 years
CX529	5 years
CX530	5 years
DX228	10 years
DX242	10 years
DX244	10 years

IT IS SO ORDERED.

Date: _____

Stephen J. McGuire
Chief Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, James M. Berry, hereby certify that on July ____, 2003, I caused a true and correct copy of *Respondent Rambus Inc.'s Motion for In Camera Treatment of Certain Trial Exhibits and Demonstratives* be served on the following persons by hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

M. Sean Royall, Esq.
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Malcolm L. Catt, Esq.
Attorney
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Richard B. Dagen, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

James M. Berry