UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Public

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

MOTION AND MEMORANDUM OF RESPONDENT RAMBUS INC. IN SUPPORT OF MOTION TO COMPEL MICRON TECHNOLOGY CORPORATION TO PRODUCE DRAM PRICE-RELATED DOCUMENTS

To the Honorable James P. Timony, Chief Administrative Law Judge:

Respondent Rambus Inc. respectfully submits this Motion and Memorandum in Support of Motion to Compel Micron Technology Corporation to Produce DRAM Price-Related Documents in accordance with Commission Rule § 3.38(a)(2). An Order granting this motion and requiring prompt compliance with Rambus's discovery requests is attached as Appendix A.

I. INTRODUCTION

In their Complaint, Complaint Counsel allege that Rambus has violated Section 5 of the Federal Trade Commission Act by allegedly: (1) concealing from JEDEC its intent to file patent applications concerning its DRAM technology while participating in JEDEC's standard setting activities; (2) seeking to perfect its patent rights over the technologies being incorporated in JEDEC standards; and (3) enforcing its patents against companies manufacturing products in compliance with JEDEC standards once such products had become commonplace. Complaint, ¶ 2. The Complaint alleges that Rambus has (1) unlawfully monopolized, (2) unlawfully attempted to monopolize, and (3) unreasonably restrained trade in, the synchronous DRAM technology market and narrower markets allegedly included therein. Id., ¶¶ 122-24. The

Complaint seeks a broad cease and desist order permanently enjoining Rambus from asserting many of its current or future patents against technology designed or manufactured to be compliant with JEDEC's SDRAM and DDR SDRAM standards. Id., Notice of Contemplated Relief, ¶¶ 1-5.

This discovery dispute arises from Micron Technology Corporation's refusal to produce documents relating to the prices of the DRAM chips and modules that it manufactures.[1] As discussed below, these documents are plainly relevant in light of the Complaint's allegations that Rambus's licensing program has caused or threatens to cause "increases in the price . . . of synchronous DRAM chips, as well as products incorporating or using synchronous DRAMS. . . ." Complaint, ¶ 120. Although Rambus has narrowed its original document requests in an effort to satisfy Micron's purported concerns about burden and over breadth, Micron has refused to produce the requested documents.

For the reasons set out below, Micron's objections to Rambus's discovery are without merit and should be overruled.

II. PROCEDURAL BACKGROUND

Rambus served a subpoena duces tecum upon Micron on October 4, 2002 ("the Subpoena"). The Subpoena specifies twelve categories of documents in Micron's possession related to DRAM pricing, production and sale between January 1, 1998 and June 30, 2002. A copy of the Subpoena is attached to the Declaration of Truc-Linh Nguyen ("Nguyen Decl.") as exhibit 1 (see request nos. 15(b), 54-65).

Micron objected to the production of the pricing and production-related documents described in the Subpoena. Nguyen Decl., ¶¶ 3-4. Between October 11, 2002 and November 12, 2002, counsel for Rambus and Micron exchanged numerous letters and held numerous telephone

[1] As a major DRAM manufacturer, Micron stands to benefit substantially should the Commission prevail in this action. Micron is also currently involved in patent litigation with Rambus, Micron Technology, Inc. v. Rambus, Inc., Civ. No. 00-792 RRM, in the United States District Court for the District of Delaware.

conferences in an attempt to resolve Micron's objections. Id. Despite Rambus's efforts to narrow the scope of the disputed discovery identified in the Subpoena, Micron has continued to object to production, leaving Rambus no option but to file this motion.

III. SUMMARY OF ARGUMENT

Rambus's document requests are highly relevant to the Complaint's allegations of anticompetitive impact and consumer injury. The Complaint specifically points to DRAM pricing, production and supply issues as a basis for these allegations, and the Complaint's proposed relief focuses on the specter of financial harm to consumers. Moreover, as described below, Complaint Counsel have demanded production from Rambus of numerous documents relating to DRAM pricing, and Complaint Counsel sought and received price-related information from Micron just a month before filing the Complaint.

Under Commission Rule § 3.31(c)(1), Rambus has a right to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to [its own] defenses …." 16 C.F.R. § 3.31(c)(1). "The practice of the Commission has been to uphold subpoenas duces tecum upon a showing … that the requested information is generally relevant to the issues raised by the pleadings." Kaiser Aluminum & Chemical Corp., No. 9080, 1976 FTC LEXIS 68, at *4 (Nov. 12, 1976)(Timony, J.)(denying motions to quash in case involving twenty-six (26) third-party subpoenas to industry participants where the specifications bore a "general relevancy to the defenses raised by the respondent"). See also R.R. Donnelly & Sons Co., No. 9243, 1991 FTC LEXIS 268, at *1 (June 6, 1991)(denying third party's motion to quash or limit subpoena and rejecting relevance argument in light of the "broad scope of discovery in Commission proceedings").

As explained below, the documents sought by Rambus are far more than "generally relevant" to the issues raised in the Complaint; they relate directly to issues that are explicitly

raised in the pleadings. Rambus believes that the documents in Micron's possession will demonstrate both that Rambus's royalty payments have caused no consumer injury at all and that any DRAM price increases in recent years are attributable to factors other than Rambus's royalties.

Micron's burden objection also lacks substance. It appears that much of the DRAM price and production-related material specified in the Subpoena has already been collected by Micron and produced to the Department of Justice in a price-fixing investigation, and it will likely be produced again in the price-fixing class actions pending against Micron in state and federal court. The marginal cost of additional production in this action is therefore relatively low. Moreover, Rambus has made proposals to narrow the scope of responsive material, and Rambus seeks by this Motion only these narrowed categories of documents.[2] The requested documents should be produced.

IV. ARGUMENT

A. Rambus's Subpoena Seeks Highly Relevant Information.

The factual allegations in the Complaint make it clear that the requested pricing and production information is highly relevant. The Complaint alleges that: "[t]he threatened or actual anticompetitive effects of Rambus's conduct include …b. increases in the price, and/or reductions in the use or output, of synchronous DRAM chips, as well as products incorporating or using synchronous DRAMs or related technology …." Complaint, ¶ 120 (emphasis added). In addition, Complaint Counsel opposed Rambus's earlier motion to stay this action by arguing in part that consumers were presently being injured as a result of DRAM manufacturers' royalty payments to

[2] Rambus has requested: 1) all documents analyzing, reflecting, or describing the factors that influenced Micron's DRAM pricing decisions between January 1, 1998 and June 18, 2002; 2) all documents that reflect or refer to communications with any other DRAM manufacturer about DRAM pricing; and 3) all documents that Micron has provided to or received from the Department of Justice ("DOJ"), any grand jury, or any other person in connection with the DOJ's investigation of alleged price-fixing by certain DRAM chip manufacturers. See Nguyen Decl., exh. 2.

Rambus. Commission's Opposition to Rambus's Motion to Stay, July 15, 2002, at 12. It is thus apparent that Complaint Counsel intends to argue – or at least reserves the right to argue – that Rambus's patent royalties have already had an impact on DRAM prices and on the price to consumers of electronic devices incorporating DRAMs. Rambus is therefore entitled to take discovery from third parties regarding DRAM pricing and production issues.

Complaint Counsel's own discovery efforts demonstrate the relevance of the disputed DRAM pricing and production documents at issue here. Just one month prior to filing the Complaint in this matter, Complaint Counsel sought and received DRAM pricing information from Micron. Nguyen Decl., n.1. Moreover, Complaint Counsel's First Request for Production to Rambus requested production of "[a]ll documents relating to ... any analysis of DRAM supply, demand, or prices …." Nguyen Decl., exh. 4.

The Rules clearly give Rambus the right to take discovery regarding the determinants of DRAM pricing. Micron, as the only major U.S. DRAM manufacturer, has documents crucial to Rambus's efforts to understand the industry's pricing mechanisms.[3] In fact, Rambus has reason to believe that the requested documents may demonstrate that DRAM prices have been affected by the concerted action of DRAM manufacturers such as Micron.[4] But regardless of whether the requested documents reveal concerted action, they are still highly relevant to issues raised in the

[3] It is also worth noting that Complaint Counsel has designated four Micron executives, including Steve Appleton – Micron's Chief Executive Officer – on their Preliminary Witness List. The Courts and the Commission both recognize that discovery of a third party is particularly appropriate where the third party's witnesses will appear at the hearing and where that party has a material interest in the dispute. See, e.g., Federal Trade Commission v. United States Pipe and Foundry Co., 304 F. Supp. 254, 1257-58 (D.D.C. 1969), citing Koppers Co., Inc., No. 8755, 1968 FTC LEXIS 286, at *8 (Nov. 1, 1968)(opinion of the Commission).

[4] This alleged conduct is the subject of both a Justice Department investigation and numerous class actions currently pending against Micron and other DRAM manufacturers. See, e.g., Advanced Technology Distr., Inc. v. Micron Technology, Inc. et al., United States District Court, Northern District of California, No. C 02-3546 JCS; Dolphin Consulting, Inc. v. Micron Technology, Inc. et al., United States District Court, Northern District of California, No. C 02-3903 BZ; Wilsker v. Micron Technology, Inc. et al., United States District Court, Northern District of California, No. C 02-4004 EDL; 5207 Inc. v. Micron Technology, Inc. et al., United States District Court, Northern District of California, No. C 02-4358 SBA; Glaser v. Micron Technology, Inc. et al., Los Angeles Superior Court, No. BC281947.

pleadings and should be produced. See Kaiser Aluminum & Chemical Corp., 1976 FTC LEXIS 68, at *6-7 (noting that "[i]nformation in the files of competing companies is *frequently crucial*" and that an FTC action "'would be crippled if neither the Commission nor the party charged could produce by compulsory process the essential industry data,'" quoting FTC v. Bowman, 149 F. Supp. 624, 628 (N.D. Ill. 1957)).

B. Micron Has Not Shown, and Cannot Show, That the Subpoena Is Overly Burdensome.

There is no merit in Micron's claims of undue burden. It is well settled that a subpoena "seeking relevant data will not be quashed on grounds that the burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise." General Motors Corp., No. 9077, 1977 FTC LEXIS 18, at *1 (Nov. 25, 1977)(citing FTC v. Texaco, Inc., 555 F.2d 862, 881-83 (D.C. Cir. 1977)). As noted above, Rambus has narrowed its pricing-related requests in response to Micron's claims of undue burden. See also R.R. Donnelly & Sons Co., No. 9243, 1991 FTC LEXIS 272, at *1 (June 12, 1991)(rejecting third party claims of undue burden "in light of complaint counsel's offer to modify some of the subpoena's specifications").

The burden of showing that the document requests impose an unreasonable burden lies with Micron. See Commission Rule § 3.38(a)(1) (burden of justifying objection on party opposing subpoena); FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977)("The burden of showing that [a] request is unreasonable is on the subpoenaed party …. [T]hat burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena.").

Micron cannot meet its burden of showing that Rambus's requests, as narrowed, are unduly burdensome. The first category – documents analyzing or describing the factors that

influenced Micron's DRAM pricing decisions between January 1, 1998 and June 18, 2002 – does not involve the production of mountains of costs and production data, but rather seeks analyses of the factors that have influenced pricing decisions. As for the second category – documents reflecting or referring to communications between Micron and other DRAM manufacturers about DRAM pricing – it would be remarkable (and highly relevant) if Micron's files contained such a large number of communications with competitors about pricing issues that their production would be burdensome. Finally, it is apparent with respect to the third category of documents – those that Micron has already produced to the DOJ or to a grand jury – that the marginal burden of production on Micron is low. After all, the material in question has already been produced.[5]

Even if the expense to Micron were not *de minimus*, that would not satisfy Micron's burden on this motion, for "it is sometimes inevitable in antitrust litigation that innocent third parties must incur expenses in complying with subpoenas. … [and] those in the very industry involved in the proceeding have a special stake in seeing that an informed judgment is rendered." Coca-Cola Bottling Co., No. 8992, 1976 FTC LEXIS 33, at *6 (Dec. 7, 1976)(denying third party motion to quash, citing United States v. IBM, 1974 Trade Cases P75,093 (S.D.N.Y. 1974))(emphasis added). The documents should be produced forthwith.

[5] On November 11, 2002, Micron's counsel offered to produce documents "sufficient to show" its DRAM prices and costs. Nguyen Decl., exhibit 3. Because such documents would be an inadequate substitute for documents that analyze the factors that influence Micron's pricing decisions, Rambus declined Micron's last-minute offer. Id., ¶9. On November 12, 2002, Micron's counsel for the first time suggested that Rambus's request for documents produced by Micron to the Dept. of Justice or to a grand jury in connection with a price-fixing inquiry was somehow improper. If counsel was referring to the secrecy concerns that underlie Rule 6(e) of the Federal Rules of Criminal Procedure, he is mistaken, for "documents are not cloaked with secrecy merely because they are presented to a grand jury." United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983). Several courts have held that where subpoenaed documents were "created for purposes unrelated to the grand jury," and their disclosure would not "elucidate the inner workings" of the grand jury, Rule 6(e) does not bar disclosure. See, e.g., U.S. v. Benjamin, 852 F. 2d 413, 417 (9th Cir. 1988) (citation omitted). Here, of course, the documents were created for purposes unrelated to the grand jury, and Rambus seeks their production only as a means of easing the burdens that Micron claims would surround the gathering and production of documents pursuant to Rambus' subpoena as originally served. Under these circumstances, it would be inappropriate to cloak these clearly relevant business records with Rule 6(e) secrecy. Micron should either be required to produce the already-gathered set of documents or to withdraw its burden objections to the subpoena as originally framed.

V. CONCLUSION

The DRAM price and production-related documents that Rambus has requested are highly relevant to Complaint Counsel's theories of causation, anticompetitive impact and consumer harm. The same information is also highly relevant to the Complaint's proposed relief. DRAM pricing and production data has already been the subject of Complaint Counsel's discovery. For these reasons, and because the narrowed requests would not impose an undue burden on Micron, the requested documents should be produced.

DATED: November __, 2002

Respectfully submitted,

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ORDER

Upon consideration of the Motion of Rambus Inc. to Compel Micron Technology Corporation to Produce DRAM Price-Related Documents, dated November 13, 2002, and Micron's Response thereto,

IT IS HEREBY ORDERED that Rambus's Motion is GRANTED.

IT IS FURTHER ORDERED that, commencing no later than one week from the date of this Order, and concluding no later than three weeks from the date of this Order, Micron shall comply with the October 4, 2002 subpoena issued to them by Rambus in this proceeding, as modified by Rambus's proposal in its November 1, 2002 letter to counsel for Micron, as relates to the discovery of DRAM price-related documents and except as to matters that have been withdrawn by Rambus.

James P. Timony
Chief Administrative Law Judge

Date: _____

COMMISSION RULE § 3.22(f) STATEMENT
AND DECLARATION OF TRUC-LINH N. NGUYEN

I, Truc-Linh N. Nguyen, do hereby state:

1. I am an associate with the firm of Munger, Tolles & Olson LLP and am licensed to practice law in the State of California and the Commonwealth of Massachusetts. I make this statement regarding the efforts by Rambus's counsel to resolve the disputed discovery requests discussed in the Memorandum in Support of Rambus's Motion to Compel.

2. On October 11, 2002, my colleague Michael Murphy and I held a telephone conference with Richard Rosen, counsel for Micron, to discuss the scope of the Subpoena and Micron's objections. (A true copy of the Subpoena is attached as exhibit 1). During that call, we agreed to extend Micron's time to respond to the subpoena from October 16 to October 24, 2002. Although this conference included discussion of other subpoenas served on Micron in this matter, and other objections to items identified in the Subpoena, only the DRAM pricing, production and demand document requests comprise the subject of this Motion.

3. During our October 11, 2002 conference, we specifically discussed Micron's concerns about the relevance and volume of pricing documents responsive to Subpoena requests 15(b) and 54 to 65. Micron's counsel agreed to investigate these issues further, and Rambus's counsel stated that it was willing to negotiate a further extension for these items if, after further investigation, Micron determined that the issues so required.

4. Mr. Rosen and I held another telephone conference at approximately 10:30 a.m. PST on October 22, 2002. Micron repeated its relevance and burden objections to the DRAM pricing, production and demand document requests. I pointed out the relevance of the requests. The conference did not resolve the dispute, and Mr. Rosen stated that he would further advise Rambus 'whether it would make sense for Micron to continue negotiating.'

5. Mr. Rosen and I attempted to resolve this dispute with another telephone conference at

approximately 6 p.m. PST on October 28, 2002, and through an exchange of letters on October 28, October 29 and November 1, 2002, without further resolution. Several of my suggestions at reaching a quick and motion-free resolution of this dispute were rejected by Mr. Rosen. As a consequence, in my November 1, 2002 letter to Mr. Rosen, I proposed limiting the Subpoena's production requests number 15(b) and 54-65 to three items: 1) all documents analyzing, reflecting, or describing the factors that influenced Micron's DRAM pricing decisions between January 1, 1998 and June 18, 2002; 2) all documents that reflect or refer to communications with any other DRAM manufacturer about DRAM pricing; and 3) all documents that Micron has provided to or received from the Department of Justice ("DOJ"), any grand jury, or any other person in connection with the DOJ's investigation of alleged price-fixing by certain DRAM chip manufacturers. I also pointed out in my letter that Complaint Counsel had themselves requested some pricing-related documents from Micron prior to filing the Complaint.[1] A true copy of my November 1 letter is attached as exhibit 2.

6. By a faxed letter to me on November 4, 2002, Micron proposed it would limit its production of DRAM pricing related documents to materials responsive to request number 58 in Rambus's Subpoena, which calls only for the production of documents that support or relate to the proposition that royalties paid by Micron to Rambus impacted Micron's DRAM sale price.

7. At approximately 1:15 p.m. PST on November 6, 2002, I conferred by telephone again with Mr. Rosen. My colleagues Andrea Weiss Jeffries and Adam Wichman also attended this telephone conference. I suggested that Rambus would be willing to remove the qualifier "reflect" from the first item mentioned in my November 1 letter. Mr. Rosen rejected this proposal as inadequate to address his burden concerns, and he reiterated his belief that the second and third categories mentioned in the letter were not relevant.

[1] This pricing data is contained in the documents produced by Complaint Counsel to Rambus and labeled FTC-COR 73-107.

8. Mr. Rosen sent me a letter on November 11, 2002, again refusing to produce documents responsive to the second and third categories, but offering to produce summaries containing Micron's pricing, costs and royalties paid. A true copy is attached as exhibit 3.

9. I sent another letter to Mr. Rosen on November 12, 2002 in which I explained that the summaries would not satisfy Rambus's needs. A true copy of this letter is attached as exhibit 4. In a subsequent call on November 12, Mr. Rosen continued to refuse to produce the requested documents.

10. I have also attached, as exhibit 5, a true copy of a request for pricing-related data (Request No. 37) that Complaint Counsel served upon Rambus after the Complaint was filed. I am informed and believe that Rambus agreed to produce the requested documents.

Executed on November __, 2002, at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Truc-Linh N. Nguyen