

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**REPLY BRIEF OF RAMBUS INC. IN SUPPORT OF ITS MOTION
TO COMPEL MICRON TECHNOLOGY, INC. TO PRODUCE
DRAM PRICE-RELATED DOCUMENTS**

I. INTRODUCTION

On November 13, 2002, respondent Rambus Inc. (“Rambus”) filed a motion to compel Micron Technology, Inc. (“Micron”) to produce documents relating to the pricing and production of DRAM chips and modules. On or about November 25, 2002, Micron filed a brief in opposition to Rambus’s motion to compel.

Micron acknowledged in its opposition that Your Honor has previously ruled in this matter that DRAM pricing and production issues are relevant. See Micron Opposition, pp. 3, 9 (referencing November 12, 2002 Order requiring Mitsubishi Electronic & Electronics USA, Inc. (“Mitsubishi”) to produce documents relating to DRAM pricing and production). Micron argues, however, that Your Honor’s ruling “should not control the result here” because Complaint Counsel have recently sent several letters that supposedly demonstrate that DRAM pricing is not relevant to any triable issue in this case. Micron Opposition, p. 10.

Micron’s position is not supported by the letters of Complaint Counsel that Micron cites. The letters do not demonstrate any intent by Complaint Counsel to amend the Complaint in this matter to withdraw the Complaint’s allegations referencing the pricing and production of DRAM

chips, nor do they contain any representation that Complaint Counsel will not raise pricing and production issues at the hearing in this matter. Instead, the letters state clearly that Complaint Counsel believe such issues to be “material” to the remedy they seek.

In short, the recent letters that Micron relies upon both confirm and reinforce the correctness – and fairness – of Your Honor’s prior ruling with respect to the documents in question. This motion to compel should therefore be granted.

II. DISCUSSION

As Rambus’s opening brief pointed out, the Complaint in this matter alleges that “[t]he threatened or actual anticompetitive effects of Rambus’ conduct include . . . increases in the price, and/or reductions in the use or output, of synchronous DRAM chips, as well as products incorporating or using synchronous DRAM or related technology” Complaint, ¶ 120. Given these allegations of anticompetitive effect, and their importance to the remedy sought by the Complaint, Your Honor previously required that Mitsubishi produce documents relating to DRAM pricing and production. Despite that ruling, Micron has refused to produce its own documents on those issues, relying upon statements made by Complaint Counsel in two recent letters.

The correspondence that Micron cites began with a November 5, 2002 letter from Rambus’s counsel to Complaint Counsel. That letter described Rambus’s ongoing efforts to obtain documents from third parties relating to DRAM pricing and production issues and the position taken by several third parties that such issues were irrelevant to the issues in dispute. In order to avoid potentially unnecessary motion practice in this area, the letter asked Complaint Counsel to confirm that they had raised – and were likely to raise at the hearing – issues relating to DRAM module and chip pricing.

In two letters dated November 15, 2002 and November 19, 2002, Complaint Counsel reaffirmed that they do indeed intend to raise such issues. According to Complaint Counsel’s November 15 letter, they intend to argue that Rambus’s patent royalties are likely “to cause increases in the prices of synchronous DRAM devices themselves, as well as downstream products that use or incorporate synchronous DRAM devices, in part due to the potential for

DRAM manufacturers to pass through to their customers some or all of the increased costs associated with Rambus' conduct." Micron Opposition, ex. B, p. 1. Complaint Counsel's November 19, 2002 letter is even clearer. The November 19 letter contends that "downstream price effects are inevitable in the long term" and that "[t]he potential for consumer harm in downstream markets therefore is material to this case." See Micron Opposition, ex. A (emphasis added), p. 1.¹

Complaint Counsel's November 19 letter goes on to state – in a passage quoted by Micron – that "the presence or absence of proof of actual downstream effects" is not "determinative of liability." *Id.*, p. 2 (emphasis added). But the letter nowhere suggests that evidence regarding DRAM pricing and production is not relevant. Moreover, the November 15 letter pointed out that third party documents that might support Complaint Counsel's allegations, because they discuss the possibility that DRAM manufacturers would pass on Rambus's royalties to their customers, may be "highly relevant" to Complaint Counsel's case. Micron Opposition, ex. B, p. 1 (emphasis added). It cannot be the case that documents that support Complaint Counsel's position are "highly relevant," but documents that would undermine that position are completely irrelevant and may be withheld from production.

In addition, as Your Honor pointed out in denying Mitsubishi's motion to quash, the Rules do not limit discovery to evidence that may be "determinative of liability." Instead, the Rules "allow parties to 'obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of [the] respondent.'" Mitsubishi Opinion, p. 3, quoting 16 C.F.R. § 3.31(c)(1). In this case, the Complaint alleges that Rambus's conduct has caused or will cause "increases in the price, and/or reduction in the use or output," of DRAM chips, modules and related devices. Complaint, ¶ 120. While Complaint Counsel's letters suggest that their own focus at the hearing will be the

¹ Complaint Counsel's November 19 letter also objected to what counsel perceived as "accusatory" and "facetious" language in a November 15, 2002 letter by Rambus's counsel. While not relevant here, Rambus's counsel has assured Complaint Counsel that his letter was not intended to be either facetious or accusatory.

possibility of future impact from Rambus's royalties, and that they believe that any past impact is "not likely to be discernable," they do not explain how future DRAM pricing and production issues can be knowledgeably addressed by the parties' experts and by Your Honor without an understanding of the past and current determinants of such pricing.

The relevance of the requested documents is also demonstrated by Complaint Counsel's argument to Your Honor a few months ago, in successfully opposing Rambus's motion for a temporary stay of this case, that "manufacturers and consumers" had already felt the impact of Rambus's royalties. See Complaint Counsel's Opposition To Rambus's Motion To Stay, July 15, 2002, at 12-13 (referring to an ongoing, daily "transfer of wealth from manufacturers and consumers into the pockets of Rambus"). While Complaint Counsel assert in their recent letters that the "consumers" they had referred to were manufacturers who "consume" DRAM technology, rather than ordinary consumers of PC's and other products, the relevant point is the same: Complaint Counsel has previously taken the position that Rambus's royalties have already had an impact on DRAM prices, and their letters contain no representation that they will not take that position or a similar position in the future.

Moreover, while Complaint Counsel's letters express their "understanding" that the DRAM market is "highly competitive" and that prices are "dictated primarily by supply and demand," they do not contend that Rambus and its experts should be required to accept these assertions as true, without the opportunity for discovery. Finally, Complaint Counsel do not explain why they have demanded that Rambus produce "[a]ll documents relating to . . . any analysis of DRAM supply, demand, or prices . . ." since 1989, Nguyen Decl., ex. 4, if such documents are not relevant to issues raised by the pleadings.²

² Rambus's requests to Micron for documents relating to DRAM pricing seek documents dating back only to 1998, not 1989. On a related issue, Micron suggests that Rambus is seeking "mountains" of detailed pricing and production data. Although Your Honor previously rejected Mitsubishi's similar claims of burden, it should be noted that Rambus is not seeking underlying transactional data from Micron. This motion instead seeks the production of "documents analyzing or describing the factors" that influenced Micron's pricing decisions, as well as communications with other manufacturers about pricing issues and the documents already produced by Micron to the DOJ or a grand jury.

III. CONCLUSION

Complaint Counsel's recent letters make it clear that pricing and production issues are "material" issues that will be raised at the hearing in this matter. The requested discovery is thus plainly relevant, and Micron should be ordered to produce the documents in question forthwith.

Respectfully submitted,

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

A. Douglas Melamed
Jay Palansky
Kenneth A. Bamberger*
Jacqueline M. Haberer
WILMER, CUTLER & PICKERING
2445 M Street, NW
Washington, DC 20037-1402
(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

Counsel for Respondent Rambus Inc.

December 3, 2002

* Admitted in MA and NY only

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on December 3, 2002, I caused a true and correct copy of the *Reply Brief of Rambus Inc. in Support of its Motion to Compel Micron Technology, Inc. to Produce DRAM Price-Related Documents* to be served by hand delivery to Arnold & Porter, counsel for Micron Technology Corporation, at 555 Twelfth Street, N.W., Washington, D.C. 20004, and 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.
Washington, D.C. 20580

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

Joseph J. Simons
Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Malcolm L. Catt
Attorney
Federal Trade Commissions
Room 3035
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

M. Sean Royall
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-378
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Richard B. Dagen
Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Room 6223
Washington, D.C. 20580

Geoffrey D. Oliver
Deputy Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Jacqueline M. Haberer