COPY

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	**PUBLIC**
RAMBUS INCORPORATED,	)	Docket No. 9302
a corporation.	)	

UNITED STATES DEPARTMENT OF JUSTICE'S MOTION FOR *IN CAMERA* TREATMENT OF DOCUMENTS

Non party United States Department of Justice, Antitrust Division ("DOJ") hereby moves, under Federal Trade Commission ("FTC") Rule of Practice 3.45(b), 16 C.F.R. § 3.45(b), for an order directing *in camera* treatment of the United States Department of Justice's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury, as well as the Declaration of R. Hewitt Pate in support of the Confidential Motion. Additionally, because these materials contain information before the grand jury, we also request that these documents not be disclosed to any party in this action.

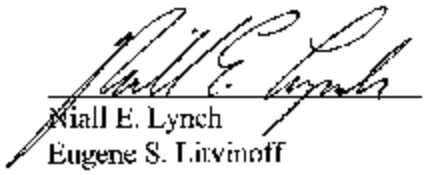
Under 16 C.F.R. § 3.45(b), the standard for granting *in camera* treatment requires a finding that public disclosure "will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment." Further, the determination of "clearly defined, serious injury" is to be made on the basis of the standards articulated in H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961), and Bristol-Myers Co., 90 F.T.C. 455, 456 (1977), as modified by In the Matter of General Foods Corp., 95 F.T.C. 352, 355 (1980). The required showing of injury "may consist of extrinsic evidence or, in certain instances, may be

inferred from the nature of the documents themselves." H.P. Hood & Sons, 58 F.T.C. at 1188. In this case, the injury is documented in the United States Department of Justice's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury, as well as in the Declaration of R. Hewitt Pate.

Additionally, the DOJ requests *in camera* treatment of the documents pending conclusion of DRAM grand jury proceedings for reasons also provided in the United States Department of Justice's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury and the Declaration of R. Hewitt Pate.

Dated: December 27, 2002

Respectfully submitted,



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In the matter of	)	**PUBLIC**
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RAMBUS INCORPORATED,	)	Docket No. 9302
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a corporation.	)	
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ORDER GRANTING UNITED STATES DEPARTMENT OF JUSTICE'S MOTION FOR *IN CAMERA* TREATMENT OF DOCUMENTS

Upon consideration of the United States Department of Justice, Antitrust Division's ("DOJ") motion for *in camera* treatment of documents, it is hereby ORDERED that the DOJ's motion is GRANTED.

IT IS FURTHER ORDERED that the United States Department of Justice's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury, as well as the Declaration of R. Hewitt Pate, will receive *in camera* treatment pending conclusion of DRAM grand jury proceedings.

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IT IS FURTHER ORDERED that the United States Department of Justice's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury, as well as the Declaration of R. Hewitt Pate, will not be disclosed to any party in this action.

_____
James P. Timony
Chief Administrative Law Judge

Date: _____

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BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	
RAMBUS INCORPORATED,	)	Docket No. 9302
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UNITED STATES DEPARTMENT OF JUSTICE'S MOTION TO LIMIT DISCOVERY RELATING TO THE DRAM GRAND JURY

Pursuant to Rules 3.31(c)(2) and 3.31(d) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission, the United States Department of Justice, Antitrust Division ("DOJ") moves for an order prohibiting (1) any discovery relating to any communications with the DOJ concerning the ongoing DRAM grand jury investigation; (2) discovery requests of materials produced to the grand jury; and (3) any witness depositions on communications between DRAM manufacturers regarding pricing to DRAM customers prior to the conclusion of all grand jury proceedings.

INTRODUCTION[1]

The DOJ is conducting an important criminal antitrust investigation of possible price fixing in the DRAM industry. Rambus' attempts to take broad discovery of DRAM manufacturers will, if left unchecked, cause significant disruption to the grand jury investigation and potential harm to the Antitrust Division's criminal enforcement program. Of greatest concern to the DOJ is discovery on communications between DRAM manufacturers and the DOJ concerning the grand jury. This discovery request, and discovery of documents produced to the grand jury, will reveal the scope and direction of the grand jury investigation and identify potential grand jury witnesses. Additionally, depositions of witnesses on possible price fixing among DRAM manufacturers, during the pendency of the grand jury, will interfere with the grand jury's ability to gather truthful and complete testimony. In the context of the FTC's allegations of patent fraud in a standard-setting body, the requested limitation is a reasonable balancing of the DOJ's strong interest in enforcement of the criminal antitrust laws and Rambus' ability to defend itself in the current action.

SUMMARY OF ARGUMENT

A. Discovery of Communications with the DOJ Should Be Prohibited.

The law enforcement investigatory privilege prohibits any discovery of communications with the DOJ concerning the DRAM grand jury investigation. The privilege serves "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of

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[1] The DOJ has filed additional material *in camera* to The Honorable James P. Timony, Administrative Law Judge. This additional confidential information contains grand jury material, for which the DOJ received an order from the District Court permitting disclosure solely to Judge Timony for the purpose of ruling on this motion. Fed. R. Crim. P. 6(e)(3)(E)(i); In re Sealed Case, 856 F.2d 268, 270 & n.1 (D.C. Cir. 1988).

sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." In re Dep't of Investigation, 856 F.2d 481, 484 (2nd Cir. 1988) (citing Aspin v. Dep't. of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973).

Rambus' discovery requests cover information protected by the privilege, including: (1) documents exchanged between the DOJ and third parties, including DRAM manufacturers, relating to subpoena compliance, and other issues concerning the grand jury; and (2) deposition testimony relating to any communications with the DOJ concerning the DRAM grand jury investigation. Disclosure of this information will interfere with the grand jury investigation. Disclosure of all correspondence between the DOJ and subpoena recipients will reveal the specific documents reviewed by the grand jury and will identify potential grand jury witnesses. Deposition testimony will reveal the same information. To allow Rambus to conduct such discovery and circumvent the law enforcement investigatory privilege by serving document and deposition subpoenas on the major DRAM manufacturers -- as they have done in this case -- would render the privilege meaningless.

Against the DOJ's compelling need for secrecy, Rambus can offer no credible need for this privileged material. Communications between the DOJ and third parties relating to the grand jury investigation are completely irrelevant to the allegations in the FTC complaint.

B. Request for All Documents Produced to the Grand Jury Is Prohibited

The DOJ also objects to Rambus' sweeping request, served on the major DRAM manufacturers, for "all documents that the company has provided to . . . any grand jury." Federal Rule of Criminal Procedure 6(e)(2), protecting "matters occurring before the grand jury,"

prohibits this request. By focusing solely on those documents reviewed by the grand jury, Rambus impermissibly seeks "matters occurring before the grand jury." Because this request will inevitably disclose the scope of the investigation, as well as which individuals are likely to be brought before the grand jury, it should be prohibited.

C. Discovery on Price-Fixing Allegations Will Interfere with the Grand Jury.

Finally, the DOJ objects to Rambus conducting its own parallel price-fixing investigation before the conclusion of all DRAM grand jury proceedings. To preserve the integrity of and prevent interference with the DRAM grand jury investigation, an order limiting deposition discovery on price-fixing allegations is warranted. It is well established that a court may limit discovery where the interest of a grand jury proceeding outweighs the requestor's need for information.

The DRAM grand jury has a compelling need for secrecy and freedom from interference until it has completed its investigation. The DOJ has interviewed knowledgeable individuals in the industry and identified witnesses to bring before the grand jury. Having Rambus question witnesses who have been contacted by the DOJ, or who will be brought before the grand jury, will severely impair our ability to investigate this matter. Moreover, some witnesses forced to testify in a deposition will be faced with the untenable "choice" of asserting their Fifth Amendment privilege against self-incrimination or testifying and subjecting themselves to self-incrimination, threats, or retaliation by an employer, competitors, or customers.

FACTUAL BACKGROUND

A. The DRAM Grand Jury Investigation

The DOJ is responsible for investigating and prosecuting both civil and criminal antitrust investigations. A grand jury has been convened to investigate possible price fixing in the DRAM industry.

The DOJ has served grand jury subpoenas duces tecum on many of the major DRAM manufacturers. The DOJ has also served grand jury subpoenas for testimony on several individuals in the DRAM industry. The subpoenas duces tecum include broad requests for documents relating to the pricing of DRAM and contacts between competitors regarding pricing. In the last few months, the DOJ has negotiated subpoena compliance with those companies served. From those negotiations, we have identified particular relevant documents to produce, and identified specific employees who, based on our investigation, have information relating to the the conduct under investigation. Most of these negotiations have been memorialized in letters between the DOJ and the subpoena recipients and amount to approximately 325 pages of correspondence. Disclosure of the subpoenas and related correspondence will reveal the direction, scope, and nature of our grand jury investigation.

Also, as part of its investigation, the DOJ has contacted and interviewed several knowledgeable people in the industry. The dates and substance of those interviews were memorialized in correspondence between the DOJ and these third parties. Disclosure of our interviews and the correspondence relating to those interviews also would interfere with our investigation.

B. Rambus Discovery Dispute

On December 9, 2002, the DOJ learned, through the FTC web site, that Rambus requested from some DRAM manufacturers: (1) "All documents that the company has provided to or received from the Department of Justice ("DOJ"), any grand jury, or any other person in connection with DOJ's investigation of alleged price fixing by certain DRAM chip manufacturers"; and (2) "All documents that reflect or refer to communications with any other DRAM manufacturer about DRAM pricing." Rambus' document request directly covers all correspondence between the DOJ and the DRAM manufacturers relating to subpoena compliance and other issues concerning the grand jury.

ARGUMENT

A. The Law Enforcement Investigatory Privilege Precludes the Disclosure of All Discovery Relating to Communications with the DOJ Relating to the DRAM Grand Jury Investigation.

The DOJ asserts the law enforcement investigatory privilege and moves for an order prohibiting any discovery relating to communications with the DOJ concerning the DRAM grand jury investigation. The DOJ's assertion of privilege is limited, covering only: (1) documents exchanged between the DOJ and third parties, including DRAM manufacturers, relating to subpoena compliance and other issues concerning the grand jury; and (2) deposition testimony relating to communications with the DOJ concerning the DRAM grand jury investigation. This information is irrelevant to Rambus' defense since the subpoena negotiations and other communications occur in a completely different factual and legal context than the FTC's lawsuit. With respect to corporate documents that were shown to DOJ personnel in compliance with the DOJ's subpoenas, or other requests for information, we do not assert any privilege over those

pre-existing documents themselves in the hands of third parties; rather, we contend only that the identification of which documents were shown to DOJ personnel is privileged.

The law enforcement investigatory privilege is a well-established creation of common law. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); Black v. Sheraton Corp. of America, 564 F.2d 531, 541-42 (D.C. Cir. 1977). The privilege serves "to prevent . . . interference with an investigation." In re Dep't of Investigation, 856 F.2d 481, 484 (2nd Cir. 1988) (citing Aspin v. Dep't. of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973)). The privilege is admittedly a "qualified" one: the "public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988). To overcome the privilege, Rambus must show a "necessity sufficient to outweigh the adverse effects the production would engender." Black, 564 F.2d at 545. Moreover, there exists a "pretty strong presumption against lifting the privilege." Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997) (citing Black, 564 F.2d at 545-47).

The DOJ's assertion of the privilege over documents in the hands of a third party does not alter the existence of the privilege. See In re Sealed Case, 856 F.2d at 271 (DOJ permitted to assert investigatory privilege where SEC subpoenaed information in a civil suit between private parties); In re Polypropylene Carpet Antitrust Litigation, 181 F.R.D. 680, 686-89 (N.D. Ga. 1998) (DOJ successfully asserts investigatory privilege over documents inadvertently furnished to defendant after completion of criminal investigation and later obtained from defendant through discovery by plaintiff in civil action); Snierson v. Chemical Bank, 108 F.R.D. 159, 160 n.2 (D. Del. 1985) ("Ordinarily, a party has no standing to object to discovery of a nonparty. However,

an exception exists where a party claims some personal right or privilege in respect to the subject matter of a subpoena duces tecum directed at a nonparty.") (internal quotations omitted). To hold otherwise would allow civil litigants to make an end-run around the DOJ's investigatory privilege through third-party discovery, rendering the privilege meaningless. Had the DOJ been directly subpoenaed for the very same documents, there would be no question that the investigatory privilege applies. If Rambus is successful in obtaining the subpoenaed information, "denial of the privilege would itself lead to routine disclosure" and would expose the DOJ's criminal investigations in future cases. In re Dep't of Investigation, 856 F.2d at 486 (permitting withholding of report under law enforcement privilege despite previous leaks regarding its contents).

In assessing the law enforcement investigatory privilege, the D.C. Circuit has looked to the ten factors considered in Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973), in balancing the parties' interests. In re Sealed Case, 856 F.2d at 318. These factors include:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the [defendant's claim or defense] is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the [defendant's defense].

Id. This list is merely "illustrative" or "helpful." Id. at 272; Friedman, 738 F.2d at 1342. Additionally, "exclusive reliance on one factor does not satisfy the 'essential balancing process.'"

Tuite v. Henry, 98 F.3d 1411, 1418 (D.C. Cir. 1996) (internal citation omitted).

First Factor: The extent to which disclosure will thwart governmental process by discouraging citizens from giving the government information

Requiring third parties to disclose "[a]ll documents that the company has provided to or received from the Department of Justice" will have a significant effect on the DOJ's ability to investigate both present and future criminal antitrust activity. The disclosure of documents revealing communications with other parties and the DOJ, during the pendency of an investigation, could jeopardize the criminal investigation and deter individuals and corporations from providing information in future cases. Public disclosure of such information would alert co-conspirators to the scope, focus, and strength of the Division's investigation. The risk that disclosure of subpoena documents, related correspondence, and other information supplied by third parties poses to an ongoing investigation is very real.

Second Factor: The impact upon persons who have given information of having their identities disclosed

As discussed above, the impact on persons who have given information of having their identities disclosed is a major concern to the DOJ.

Third Factor: The degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure

The third factor is not applicable.

Fourth Factor: Whether the information sought is factual data or evaluative summary

To the extent that Rambus phrases its discovery request as seeking "[a]ll documents that the company has provided to or received from the Department of Justice ("DOJ"), any grand jury . . . in connection with DOJ's investigation of alleged price fixing by certain DRAM chip

manufacturers," the information is evaluative, not factual. As previously explained, with respect to corporate documents that were shown to DOJ personnel either as part of compliance with the DOJ's subpoenas, or other requests for information, we do not assert any privilege over the documents themselves in third parties' hands; rather, we contend that the identification of which documents were shown to DOJ personnel is privileged. Rambus is free to subpoena factual documents; they are not, however, entitled to request all documents that have been provided to the government and grand jury. See Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) ("There is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers . . . the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation,' such matters as 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'") (some internal quotations omitted). As drafted, Rambus will be able to obtain information in a manner that will, in fact, reveal the identities of witnesses, the substance of testimony, and the strategy and direction of the investigation.

Fifth Factor: Whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question

Rambus is not an actual or potential defendant in the DOJ's DRAM investigation. Nor, of course, is the FTC. The focus, however, should not only be on who is requesting the information, but who may ultimately obtain the information. Trial in the Rambus case is set for March 2003. If Rambus introduces as evidence in trial the information obtained through the challenged discovery request, then the subjects of the DOJ's criminal investigation could become

privy to the information at a point when the DOJ is in the thick of its investigation. Thus, one of the bases for the privilege -- keeping the information out of the hands of targets and potential targets of the investigation -- would be circumvented.

Sixth Factor: Whether the police investigation has been completed

The Antitrust Division's criminal investigation into the DRAM industry is ongoing. Antitrust investigations are complex matters that often consume large amounts of time and government resources. The duration of the investigation should not form the basis for vitiating the privilege. Dellwood Farms, 128 F.3d at 1125 (it is not the role of the judiciary to order the government to expedite criminal prosecution for purpose of facilitating civil litigation). Indeed, the law enforcement investigatory privilege is valid even after the government's investigation concludes, with or without an indictment. Black, 564 F.2d at 546; see also Tuite, 181 F.R.D. 175, 181 (D.D.C. 1998).

Seventh Factor: Whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation

The seventh factor is inapplicable because no intradepartmental disciplinary proceedings are involved.

Eighth Factor: Whether Rambus' claim or defense is non-frivolous and brought in good faith

The DOJ does not ascribe any bad faith to Rambus' potential defense that increased prices to consumers in the DRAM market were due to collusion among DRAM manufacturers and not its own extraction of royalties from manufacturers. Nor do we dispute the previous finding that factors driving DRAM pricing are relevant to the Rambus case. See In the Matter of Rambus Incorporated, Docket No. 9302, Opinion Supporting Order Denying Motion of

Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow Subpoena, Nov. 18, 2002, p.5. However, we note the FTC's assessment that, at best, factors driving DRAM pricing are "of subsidiary importance to the overall litigation." DOJ Mot. to Intervene at Ex. B. Moreover, even if it turns out that increases in prices of DRAM chips and modules are partly attributable to collusion by DRAM manufacturers, this does not necessarily translate into a finding that Rambus' allegedly excessive royalties were not also a contributing factor to increased down-stream prices.

Ninth Factor: Whether the information sought is available through other discovery or from other sources

As previously discussed, the DOJ seeks a modest limitation on discovery. We do not assert any privilege over pre-existing documents themselves in the hands of third parties; rather, we merely contend that the identification of which documents were shown to DOJ personnel is privileged. It appears that many of the materials covered by Rambus' subpoenas are pre-existing corporate documents, some of which, to the best of our knowledge, have already been produced to Rambus. What has not been provided to Rambus are any indices identifying which documents were produced to the DOJ. The harm to Rambus from not receiving such indices will be de minimis. Rambus will merely be forced to sort through the documents it receives in order to locate any "silver bullets," rather than receiving them on a silver platter. See United States v. Sells Engineering, Inc., 463 U.S. 418, 431 (1983) (rejecting argument that saving time and expense for civil litigant can justify a breach of grand jury secrecy). Rambus is put in no worse situation by the government's assertion of the privilege here -- it will get the same pre-existing corporate documents either way -- but the government's enforcement program will be much worse off if the privilege is denied. As for correspondence with third parties relating to the

DRAM investigation, Rambus has no legitimate need for these materials for its defense. There is virtually no possibility that they will lead to admissible evidence.

Tenth Factor: The importance of the information sought to Rambus' defense

The pre-existing corporate documents may be important to Rambus and, as already explained, are not being denied to them. Identification of which documents were shown to prosecutors, rather than the documents themselves, however, is irrelevant to Rambus' defense. As to the subpoena compliance correspondence, and other requests for information, Rambus has not identified why these documents are necessary to its defense. The correspondence relates to the factors that the Division has determined should guide the exercise of its prosecutorial discretion. How the Division has elected to exercise its prosecutorial discretion toward a particular subpoenaed party or other third party of interest to the Division has absolutely no relevance to the merits of a private antitrust case. In any event, in the required balancing of interests, "need" is more than mere "relevance."

> When an agency properly claims that documents are privileged, . . . the Court . . . must look beyond the issue whether the documents sought are simply relevant. If that were the only test, the rules of privilege would be relatively meaningless -- especially since discovery normally extends not only to relevant matter but also to material that may lead to the discovery of relevant matter. . . . Relevance is not enough.

Collins v. Shearson/American Express, Inc., 112 F.R.D. 227, 229-30 (D.D.C. 1986). In the give-and-take inherent in negotiating subpoena compliance, and other requests for information, crystallizing one side's thoughts by putting them on paper should be expected and encouraged; making such correspondence discoverable, however, would have the opposite effect.

Besides requesting all documents that a third party has provided to or received from the DOJ, Rambus has served deposition subpoenas on a number of persons in the DRAM industry

whom the Division intends to interview in the course of its criminal investigation. For the same reasons that the balance of interests favors maintaining the privileged status of documents exchanged between third parties and the Division, so too should the privilege apply to deposition testimony regarding communications with the DOJ concerning the grand jury investigation. The investigatory privilege would be rendered utterly meaningless if information contained in protected documents could alternatively be obtained by deposition.

B. Discovery Request for All Grand Jury Documents Is Prohibited under Federal Rule of Criminal Procedure 6(e)(2).

Federal Rule of Criminal Procedure 6(e)(2), protecting "matters occurring before the grand jury," embodies the traditional policy and practice of according secrecy to grand jury proceedings. The Supreme Court has recognized several interests served by protecting the secrecy of grand jury proceedings, including the encouragement of free and unhindered disclosure of information by potential witnesses, as well as the protection of witnesses and persons investigated, but exonerated, from public embarrassment that would result if the fact of the investigation were disclosed. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979); Matter of Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079, 1090 n.14 (7th Cir. 1982), on reh'g 717 F.2d 1136 (7th Cir. 1983). Rule 6(e) provides an exception to the rule of secrecy for disclosures pursuant to an order of "a court preliminary to or in conjunction with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). Under this exception, the secrecy of grand jury materials must be maintained unless the party seeking disclosure can demonstrate "compelling necessity" or "particularized need" for disclosure. Miller, 687 F.2d at 1088. The court must weigh the need for continued secrecy against the party's need for the documents.

The secrecy requirement does not apply to documents created for a purpose other than the

grand jury's investigation when such documents are specifically sought "for [their] own sake -- for [their] intrinsic value in furtherance of a lawful investigation." United States v. Interstate Dress Carriers, 280 F.2d 52, 54 (2nd Cir. 1960); United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). The Rule 6(e) secrecy requirement does, however, apply to a general request for documents produced to the government during an investigation because the requestor is not seeking the documents "for their own sake," but rather because the documents were examined during the investigation, thereby disclosing something about the investigation. Accordingly, a requestor who makes such a generalized request for documents must demonstrate, as with other grand jury materials, particularized need outweighing the need for continued secrecy. See Alexander v. FBI, 186 F.R.D. 102, 109 (D.D.C. 1998) (quashing a blanket request for production of all material produced to a grand jury); see also Miller, 687 F.2d at 1089-90; Stanford, 589 F.2d at 291 n.6.

Rambus' request for "all documents provided to . . . any grand jury" served on DRAM manufacturers should be denied. Because disclosure of documents in response to Rambus' request would reveal information about the grand jury investigation, grand jury secrecy considerations apply with full force. Moreover, before disclosure is allowed, Rambus must establish a "compelling necessity" or "particularized need" outweighing grand jury secrecy considerations. The DOJ does not contend that business documents are beyond the reach of discovery merely because they have been produced to the grand jury. However, the DOJ does object to a request for all documents produced to the grand jury since this would clearly disclose the focus and direction of the grand jury. The DOJ frequently requests documents from specifically identified individuals who are likely to have information bearing on the

investigation. Disclosure of all grand jury documents would immediately identify likely witnesses before the grand jury. Such an intrusion into the grand jury process should not be allowed.

Rambus' request is exactly the type of sweeping, general request implicating "matters occurring before the grand jury" that courts have identified as evoking grand jury secrecy concerns to their fullest extent. As one court stated, "A general request for 'all documents collected or received in connection with the investigation of antitrust violations . . .' would be in effect a disclosure of grand jury proceedings." Stanford, 589 F.2d at 291. Rambus' request for third-party documents obtained by the grand jury should be denied.

Additionally, along with the law enforcement investigatory privilege, Rule 6(e) prohibitions against the disclosure of "matters occurring before the grand jury" also protect the disclosure of the grand jury subpoena itself and all communications between the DOJ and subpoena recipients relating to compliance with the subpoena.

C. Prior to the Conclusion of all Grand Jury Proceedings, Witness Depositions on Contacts Between DRAM Competitors Regarding Pricing Could Undermine the Grand Jury's Work.

"The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. § 3.31(d). A limitation on deposition discovery relating to price-fixing allegations is necessary to preserve the integrity of, and prevent interference with, the DRAM grand jury investigation. Permitting deposition discovery to proceed, prior to the conclusion of all grand jury proceedings, could lead to disclosure of grand jury material, expose cooperating witnesses to threats and intimidation

from their employer, competitors, or customers, and encourage non-cooperating witnesses to manipulate their grand jury testimony to conform to the publicly available testimony of deposed witnesses.

It is well established that a court may limit civil discovery to protect the interests of a grand jury proceeding. Founding Church of Scientology v. Kelley, 77 F.R.D. 378, 380-81 (D.D.C. 1977) ("In some situations it may be appropriate to stay the civil proceeding, while in others, the trial judge 'should use his discretion to narrow the range of discovery.'") (quoting Cambell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962)). In Founding Church of Scientology, the court held that narrow limits on discovery were appropriate because the government's need to prevent interference with a criminal investigation was greater than the civil plaintiff's need for the information sought. Id. The court reasoned that, although the information requested was relevant, the plaintiff's "need for the information is not as urgent as they claim." Id. To determine if limiting discovery is warranted, the Court must balance the DOJ's need to prevent interference with a criminal investigation against the requestor's need for the information. Capital Engineering & Manufacturing Co., Inc. v. Weinberger, 695 F. Supp. 36, 41 (D.D.C. 1988) ("[T]he court must determine the extent to which the civil discovery threatens the secrecy and integrity of criminal proceedings, and, if the discovery could prove meddlesome, whether to stay discovery entirely or to narrow the range of discovery so as not to impinge upon the criminal proceedings." (emphasis added).

In this case, the DOJ has a strong interest in protecting the secrecy and integrity of the grand jury investigation. Allowing Rambus to engage in deposition discovery of potential grand jury witnesses or potential cooperating individuals, prior to the conclusion of all grand jury

proceedings, will interfere with the investigation and violate the grand jury secrecy provisions of Federal Rule of Criminal Procedure 6(e). During the course of their deposition testimony, individuals who are cooperating with an investigation may be forced to reveal the scope and direction of the criminal investigation as well as the identity of others who may be providing evidence to the grand jury or the government. Rambus wants to question witnesses on possible price-fixing activity, which is the sole focus of the current grand jury investigation. If that happens, it is inevitable that information gathered by the government and the grand jury will be disclosed.

The DOJ is not the only one with an interest in this dispute. Witnesses scheduled to be deposed in this case also have a strong interest in limiting deposition discovery. In criminal grand jury investigations, it is common for the government to bring before the grand jury numerous witnesses from the companies under investigation. If employees are required to testify on price-fixing allegations in a civil deposition, they will be forced to choose between asserting their Fifth Amendment right against self-incrimination or testifying and run the risk of self-incrimination in the criminal matter. Such an unenviable "choice" weighs in favor of a narrow limitation on deposition discovery until all grand jury proceedings are concluded.

The DOJ cannot adequately assess the relevance of a price-fixing scheme in the DRAM market to Rambus' defense against the allegations in the FTC complaint. Only the Court can determine whether Rambus can be afforded a fair trial in the Rambus litigation without access to the discovery in dispute.

CONCLUSION

Maintaining the confidentiality of matters before the DRAM grand jury is of paramount importance to the integrity of the grand jury process and effective enforcement of the criminal antitrust laws. Accordingly, we respectfully request that the Court grant the DOJ's motion to limit discovery relating to the DRAM grand jury investigation.

Dated: December 27, 2002

Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
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RAMBUS INCORPORATED,	)	Docket No. 9302
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a corporation.	)	
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ORDER GRANTING UNITED STATES DEPARTMENT OF JUSTICE'S MOTION TO LIMIT DISCOVERY RELATING TO THE DRAM GRAND JURY

Upon consideration of the Motion of the United States Department of Justice, Antitrust Division ("DOJ") to Limit Discovery Relating to the DRAM Grand Jury, dated December 27, 2002,

IT IS HEREBY ORDERED that the DOJ's Confidential Motion to Limit Discovery Relating to the DRAM Grand Jury is GRANTED;

IT IS FURTHER ORDERED that any discovery relating to any communications with the DOJ concerning the ongoing DRAM grand jury investigation is prohibited;

IT IS FURTHER ORDERED that discovery requests of materials produced to the grand jury are prohibited;

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IT IS FURTHER ORDERED that, prior to the conclusion of all grand jury proceedings, any witness deposition on communications between DRAM manufacturers regarding pricing to DRAM customers is prohibited.

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James P. Timony
Chief Administrative Law Judge

Date: _____