UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public

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

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO BAR PRESENTATION OF TESTIMONY AND ARGUMENTS REGARDING PURPORTED COLLUSION AMONG DRAM MANUFACTURERS

Complaint Counsel submits this Memorandum in support of its Motion *in Limine* to bar Rambus from presenting irrelevant and immaterial testimony or arguments suggesting the possibility of purported collusion among DRAM manufacturers. Such testimony and argumentation would merely be an attempt to exonerate Rambus's own anticompetitive conduct on the ground that other companies also engaged in anticompetitive conduct. Judge Timony has already ruled that such evidence is "irrelevant" to this proceeding. And the law unequivocally holds that the alleged "unclean hands" of third parties is not a defense in an antitrust action. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951). Moreover, any time spent on such issues would be a "needless consumption of time" and would lead to a "confusion of issues," "be misleading," create "undue delay," and constitute a "waste of time." Rule 3.43(b), 16 C.F.R. § 3.43(b). The only reason that Rambus has pursued these issues is to divert attention from its own wrongful conduct, which is the only relevant issue in this case. Accordingly, all evidence and argument offered to establish the existence or operation of

supposed collusion among DRAM manufacturers should be barred as "irrelevant" and "immaterial," pursuant to Commission Rule 3.43(b).

Factual Background

Rambus may attempt at trial to inject into this litigation the question of whether DRAM manufacturers colluded in some respect to affect the price or output of DRAM memory chips. Rambus, based on previous filings, apparently believes that this testimony may divert attention away from its own anticompetitive conduct before JEDEC, and perhaps even exonerate Rambus. Rambus thus may contend, as it has before, that the evidence will show "that the purported 'victims' of Rambus's alleged scheme [*i.e.*, DRAM makers] are not properly viewed as victims at all and instead appear to have engaged in joint boycott and price-fixing activities that are *per se* violations of the antitrust laws." Memorandum by Rambus Inc. in Response to Motion by Department of Justice to Limit Discovery Relating to the DRAM Grand Jury at 19-20 (filed Jan. 3, 2003) (contending DRAM manufacturers' collusion lead Intel and other consumers to reject RDRAM) ("Rambus Mem.").

Judge Timony has already considered Rambus's arguments about why it needed to obtain discovery of evidence relating to possible collusion, and he rejected all of them. As his Order held, "Rambus has not shown that any of these issues are directly relevant and material in this proceeding." Order Granting Motion of the United States Department of Justice to Limit Discovery Relating to DRAM Grand Jury at 7 (Jan. 15, 2003) ("Order"). Indeed, Judge Timony specifically rejected Rambus's explanations of relevance:

> It may be, as Rambus alleges, that DRAM manufacturers took actions to derail the acceptance of the RDRAM, a DRAM technology over which Rambus had even greater control. It may also be that DRAM manufacturers engaged in collusive price fixing conduct that had greater impact on the market for DRAMs than any action taken by Rambus.

> And it may be that, as a result of collusive actions by DRAM manufacturers, Intel rejected the RDRAM.

Id. at 6-7. In short, he concluded that any collusion "is immaterial to the issues in this case." *Id.* at 7 (emphasis added). It is thus clear that Judge Timony has already considered, and rejected, Rambus's claims of relevance of evidence of any DRAM manufacturer collusion.

Rambus should not be given a second opportunity to reargue relevance here. They have been heard, and lost, on this issue already.[1] Moreover, they did not seek reconsideration of Judge Timony's ruling (although such a motion would have been without merit). Even if Your Honor were to entertain Rambus's arguments from Rambus on this issue, Rambus's arguments should be rejected for the same reasons that Judge Timony rejected them previously. As explained below, testimony and arguments regarding possible DRAM collusion is simply immaterial to this case and should be excluded pursuant to Commission Rule 3.43(b).

Argument

A. Evidence of Possible DRAM Manufacturer Collusion Has Already Been Ruled Irrelevant and Immaterial

Judge Timony has already ruled that evidence of possible collusion among DRAM manufacturers is neither "relevant" nor "material" to this case. Order at 7. Rambus has already argued

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[1] Indeed, Rambus filed at least three substantive pleadings advancing reasons as to why evidence of possible collusion among DRAM manufacturers was relevant, and therefore subject to discovery. *See* Preliminary Further Response by Respondent Rambus Inc. to Motion by U.S. Department of Justice to Intervene and Stay Discovery at 2 (filed Dec. 18, 2002); Memorandum by Rambus Inc. in Response to Motion by Department of Justice to Limit Discovery Relating to the DRAM Grand Jury at 12-20 (filed Jan. 3, 2003); Rambus Inc.'s Reply to Complaint Counsel's Response Regarding Motion by the Department of Justice to Limit Discovery at 3 (filed Jan. 7, 2003). Rambus has therefore already had ample opportunity to present its arguments as to the relevance of this evidence, and has had its contentions squarely rejected.

that evidence of possible collusion is relevant, when it sought discovery on this issue. It has thus been fully heard on the question, and has had its position rejected.

We respectfully submit that Your Honor should not reconsider Judge Timony's careful, and well-supported conclusion that evidence of possible DRAM manufacturer collusion "is immaterial to the issues in this case." Order at 7. There has been no change in law or fact justifying a different result. Indeed, the law on this point has been well established for decades, as set out in Part B, below. Accordingly, Rambus should be barred from presenting at trial evidence and argument of alleged DRAM collusion, which has already been ruled to be irrelevant.

B. Ample Legal Precedent Establishes That Alleged Downstream Conspiracies Are Irrelevant to Determinations of Antitrust Liability

The United States Supreme Court and other lower courts uniformly have held that an antitrust defendant may not point to the anticompetitive or otherwise unlawful actions of others to excuse its own anticompetitive conduct. *See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (the "alleged illegal conduct of [plaintiff] . . . could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured"), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).[2] In *Kiefer-Stewart*, the defendant, a liquor producer, attempted to defend its anticompetitive conduct on the ground that the plaintiff had allegedly colluded with a competitor to fix wholesale prices. The Supreme Court held that evidence supporting such a defense was properly excluded. *Id.*; *see also Burlington*

[2] Complaint Counsel's argument here is substantially similar to that presented in its Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury (filed Jan. 3, 2003), upon which Judge Timony ruled that evidence of possible collusion was irrelevant.

Industries, Inc. v. Milliken & Co., 690 F.2d 380, 388 (4th Cir. 1982) ("'Defendants cannot avoid liability to [plaintiff] for their own antitrust conspiracy by alleging that [plaintiff] is culpable for a distinct infraction."), *cert. denied*, 461 U.S. 914 (1983); *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 604 (S.D.N.Y.) ("Since *Kiefer-Stewart*, the law has remained consistent that unclean hands is not a defense to an antitrust action."), *aff'd in part, rev'd in part on other grounds*, 822 F.2d 246 (2d Cir.), *cert. denied*, 484 U.S. 977 (1987); *Grason Electric Co. v. Sacramento Municipal Utility Dist.*, 1984-1 Trade Cas. (CCH) ¶ 66,022, 1984 WL 2954, at *2 (E.D. Cal., May 3, 1984) ("To the extent [the affirmative defense] asserts that Plaintiffs are or were engaged in a separate antitrust conspiracy, then, it is clearly an insufficient defense to the antitrust action."); *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977) ("[I]llegality is not to be recognized as a defense to an antitrust action when the illegal acts by the plaintiff are directed against the defendant.").

The reason for this rule is sensible: "The public interest in preventing anticompetitive injury would be dampened tremendously," a court has explained, "if defendants were allowed to raise the defense of unclean hands in antitrust actions." *Chrysler Corp. v. General Motors Corp.*, 596 F. Supp. 416, 419 (D.D.C. 1984); *see also Memorex*, 555 F.2d at 1382 ("A wrongful act committed against one who violates the antitrust laws must not become a shield in the violator's hand against operation of the antitrust laws."). Furthermore, it is of no consequence that these cases involved private litigation. As courts have held in the most unambiguous terms: "the doctrine of unclean hands is inapplicable as a defense to a suit brought by the Government in its sovereign capacity to enforce the federal antitrust laws." *United States v. Southern Motor Carriers Rate Conference*, 439 F. Supp.

29, 52 (N.D. Ga. 1977).[3] Any evidence of collusion or argument thereabout that Rambus might seek to present is therefore properly barred.

C. Rambus's Conspiracy Allegations Have No Relevance to Whether Rambus Did in Fact Engage in the Pattern of Deceptive Conduct Alleged in the Complaint

Rambus's collusion arguments, even absent the precedent discussed above, logically have no direct bearing on the issues presented by the Commission's complaint. As a consequence, they are not relevant and should be excluded. *See* Commission Rule 3.43(b) ("Irrelevant . . . evidence shall be excluded"); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). The Commission's principal contention is that Rambus, during the time it participated in JEDEC (*i.e.*, December 1991-June 1996), purposefully engaged in a pattern of misleading conduct designed to conceal the fact that the DRAM standards JEDEC was developing in that time period incorporated technologies over which Rambus believed it possessed, or otherwise was in the process of securing, patent rights.

The alleged DRAM conspiracies that Rambus may raise have nothing to do with the merits of the Commission's JEDEC-related contentions, or the legality of Rambus's knowing deception of JEDEC. The concerted actions claimed by Rambus all allegedly took place *after* Rambus withdrew from JEDEC. Of most importance here, Rambus has not alleged any conspiratorial conduct relating to the pricing or output of DRAM chips prior to 1999, some three years after it withdrew from JEDEC. *See* Rambus Mem. 12 (suggesting that "the failure of DRAM manufacturers to 'ramp up' RDRAM production in 1999 and 2000 was the result of concerted action"); *id.* at 17-18 (claiming that SDRAM

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[3] The doctrine of unclean hands developed as an equitable consideration to bar culpable plaintiffs from recovering against similarly culpable defendants. *See* BLACK'S LAW DICTIONARY 1524 (6th ed. 1991). Here, of course, the Commission is not a culpable party at all, and Rambus seeks to exonerate itself by pointing to yet another set of parties that allegedly violated the law. Rambus's putative defense is therefore completely misguided.

and DDR SDRAM prices went up in 2001 and 2002). Therefore, evidence of these alleged conspiracies, if any, has no logical relevance to these proceedings.[4] Because they have no relevance, they are properly excluded pursuant to Rule 3.43(b).

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[4] Even if Rambus's allegations of collusion had some relevance, they would properly be excluded as causing "undue delay" and simply being a "waste of time." *See* Rule 3.43(b). The injection of arguments about alleged wrongful or conspiratorial conduct on the part of those harmed by an asserted antitrust violation serves only to complicate the proper assessment of liability, leading to confusion, delay, and potentially erroneous determinations on the merits of the underlying antitrust claim. *See, e.g.*, *Chrysler Corp.*, 596 F. Supp. at 420 ("Permitting discovery and the development of the case under the unclean hands defense 'would serve only to divert and protract [the] litigation, with concomitant expense.'") (alteration in original). If there is merit to the claim that such companies have committed independent antitrust offenses, this can be addressed through separate legal actions outside of the FTC proceedings. *See, e.g.*, *Memorex Corp.*, 555 F.2d at 1382 (stating, in a private antitrust suit where defendant claimed that plaintiff acted unlawfully, "[Defendant's] proper course in this case would have been to assert a counterclaim against [Plaintiff] . . . ."). In short, if Rambus truly believes that it has been harmed by an alleged "group boycott" of its RDRAM technology by DRAM makers, the appropriate avenue by which to address such claims is through its own independent legal action.

Accordingly, Complaint Counsel respectfully requests that Your Honor bar Rambus from presenting evidence of possible DRAM collusion.

Respectfully submitted,

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