PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RAMBUS, INC.'S MOTION FOR ENTRY OF SCHEDULING ORDER

After several discussions, Complaint Counsel and counsel for Respondent have been able to agree on almost all terms of a Scheduling Order to be submitted for Your Honor's approval. Three important issues remain, however, on which the parties were not able to agree: (1) the deadline for the close of fact discovery; (2) the relationship between the timing of expert discovery and the close of fact discovery; and (3) the limitation on the number of depositions allowed per day during the discovery period. This brief Memorandum describes the areas of dispute and the reasons why Rambus's proposed Order should be adopted.

Much of Complaint Counsel's Motion is spent (i) giving their version of the discussions thus far, including attaching their various proposals, and (ii) comparing their initial proposal to the initial *Intel* schedule. As to the first, suffice it to say that both sides have submitted various proposals and shown some flexibility; that is why there are only 3 issues on which the parties disagree. Any suggestion to the contrary by Complaint Counsel is wrong and beside the point. The important point is not the back-and-forth about the discussions thus far, but rather the substance of the three matters on which the parties have not agreed.

As to the second, Complaint Counsel have it backwards. On the scheduling issues on which the parties disagree — the simultaneous close of fact and expert discovery and the length

of time between the close of discovery and the start of the hearing — it is Respondent, not Complaint Counsel, whose proposal is consistent with the *Intel* Scheduling Order.

I. The Deadline For The Close Of Fact Discovery.

The principal dispute between the parties concerns the deadline for fact discovery. Complaint Counsel propose a deadline of December 20, 2002, approximately four-and-a-half months from now and more than two months before the proposed hearing date. Respondent proposes a deadline of January 27, 2003, less than six months from now and one month before the proposed hearing date. The initial *Intel* schedule (*see* Attachment A) provided for only 20 days between the close of discovery and the hearing; the revised orders provided for 25 days.

This is an important and complex case. It is important because it involves unsettled legal issues of broad application to technology industries and because Complaint Counsel seek as a remedy the forfeiture of Respondent's most valuable assets. It is complex because the 35-page complaint raises – in addition to the ordinary antitrust issues about market definition, competitive effects and causation – new and difficult issues concerning Respondent's inventions and patents, the patent prosecution process, the standards setting process, allegations about oral statements and understandings involving dozens of participants in JEDEC, the importance of Respondent's inventions and the existence of alternatives, and network effects and manufacturing "lock-in" in the computer industry.

Although Respondent does not know what discovery Complaint Counsel have already completed in their 2-year investigation, it is clear that Respondent will require substantial discovery in order to prepare for trial. This discovery will include:

- Document requests: Respondent needs broad document discovery from JEDEC and other third parties regarding issues such as what was said and understood about JEDEC's disclosure rules and Respondent's inventions, whether there were any alternative technologies that JEDEC might have chosen for the standards, license

negotiations and royalties, manufacturing processes and network and lock-in effects, and a host of related technical and economic matters. Much of this is likely to include discovery from foreign companies that are JEDEC members and, thus, will likely necessitate time-consuming efforts to compel production of documents located abroad. Judging from the volume of document discovery that the much narrower private cases have required, this third party discovery will be voluminous. And of course, after the documents are provided, the parties will have to process, index for database purposes, review, and analyze them.

- Interrogatories and requests for admission: As is common for contention interrogatories and requests for admission, it is unlikely that the parties will be able to complete this aspect of the necessary discovery until after they have conducted substantial other fact discovery.

- Depositions: Although Respondent cannot know at this early stage how many depositions will be required, it seems clear that there will need to be fifty to seventy-five depositions, and perhaps many more. (This estimate might be modest. One of the important issues in the case concerns what was said at JEDEC meetings and understood about JEDEC's disclosure rules. A preliminary review of the pertinent minutes reveals that more than 300 different people attended the JEDEC committee meetings that Rambus attended and are potential witnesses on this issue alone.) Many of the depositions will be of foreign witnesses employed by JEDEC members. Depositions will be needed on the following critical issues, among others: JEDEC's disclosure requirements, non-infringing alternatives (or lack thereof) to Rambus's technology, the impact of JEDEC's standards in the marketplace, whether DRAM manufacturers were in fact "locked-in" to using Rambus's technology as a result of JEDEC's adoption of certain standards, and DRAM manufacturers' individual understandings regarding the scope of Rambus's patents.

Complaint Counsel's proposed discovery cut-off date leaves approximately 110 working days from today to complete all of this discovery. It is difficult to see how that will be possible. For example, even assuming that document discovery has progressed sufficiently to allow the parties to begin taking depositions in earnest by mid-September – a very optimistic assumption – less than seventy working days would remain to complete the fifty to seventy-five or more anticipated depositions. In that event, depositions would have to be taken at a rate of at least one per day every work day from mid-September until the close of fact discovery, a virtually impossible pace, especially given that almost all of the depositions will be taken from third parties.

Respondent's proposal would allow approximately 140 days for fact discovery – still a very short, and potentially too short, period given the breadth and complexity of the case. There is no good reason to deny Respondent this time for discovery.

In their Motion, Complaint Counsel acknowledge "the potential complexities of this case" (Complaint Counsel's Motion at 6) and do not dispute that Respondent needs a substantial amount of time-consuming discovery. Instead, Complaint Counsel argue that the four-and-a-half weeks between the close of fact discovery and the start of the hearing provided by Respondent's proposed Scheduling Order is insufficient. (*See* Complaint Counsel's Motion at 6-8.) Complaint Counsel's proposed two months between close of fact discovery and the hearing, however, is inconsistent with the very *Intel* order on which they purport to have based their proposal. Complaint Counsel grudgingly acknowledge this inconsistency, but seek to explain that away by noting that the hearing date in *Intel* was continued. (*See* Complaint Counsel's Motion at 8, n.3.) Complaint Counsel draw the wrong lesson from this extension. Although Your Honor did extend the hearing date in the revised *Intel* Scheduling Order to which Complaint Counsel refers, that Order also extended the date for close of discovery for a similar period, thus leaving the time between the close of discovery and the hearing at just over three weeks. The real lesson from *Intel* is that experience showed that more time was needed for discovery, not that more time was needed between the close of discovery and the hearing.

2. The Effect On Expert Discovery Of The Deadline For Fact Discovery.

Complaint Counsel's primary justification for proposing the December 20, 2002, deadline for the close of fact discovery is their desire to have all fact discovery completed before expert discovery begins. Complaint Counsel believe that it would be more convenient if fact discovery were finished prior to embarking on expert discovery. Although such a sequence

might be desirable if the hearing date were not just seven months away, that luxury cannot be afforded here because most of that time is needed for fact discovery.

In any event, Complaint Counsel's proposal is not needed for even its stated purpose – efficient expert discovery. Even under Complaint Counsel's proposal, initial expert reports would be due well before the close of fact discovery. Moreover, both parties have ample incentive to complete all pertinent fact discovery before expert reports are submitted and depositions are completed in order to ensure that their experts' opinions cannot be faulted for failing to take account of the relevant facts. Thus, while a later date for the close of discovery will give the parties more time to complete all discovery, it should not interfere with expert discovery.

The approach proposed by Respondent is neither uncommon nor unwieldy. In fact, several of Your Honor's recent Scheduling Orders in other matters have adopted that approach, including the very *Intel* Scheduling Order (*see* Attachment A) which Complaint Counsel argues Your Honor should follow here. *See In re Polygram Holding, Inc.* (Docket No. 9298), September 10, 2001 Scheduling Order; *In re Natural Organics Inc.* (Docket No. 9294), September 27, 2000 Scheduling Order; *In re Intel Corp.* (Docket No. 9288), July 14, 1998 Scheduling Order.[1]

3. The Limitation On The Number Of Depositions Allowed Per Day During The Discovery Period.

The first "Additional Provision" included in Complaint Counsel's proposed Order would limit the parties to two depositions per side per day. Although included in the name of efficiency, this provision has the potential to have the opposite effect. It certainly cannot be

---

[1] Just like Respondent's proposal, the *Intel* Order called for fact and expert discovery to be completed simultaneously, after all expert reports had been exchanged.

harmonized with Complaint Counsel's proposed December 20, 2002, date for the close of fact discovery.

There is little reason to believe that imposing an arbitrary limit of two depositions per side per day would make deposition discovery more efficient. The efficiency of deposition discovery will be dictated by a host of factors, including deposition duration, deponent availability, counsel availability, and flexibility of the parties. Limiting the number of depositions that can be conducted on any given day only complicates matters and threatens to make what will already be an onerous and complicated deposition schedule even more difficult.[2]

Especially in light of the magnitude of the discovery task facing Respondent, there is no basis for Complaint Counsel's suggestion that permitting more flexibility for depositions will give Respondent an incentive to delay depositions. To the contrary, Respondent has every incentive to proceed with discovery as expeditiously as possible so that it can prepare to defend itself against charges that Complaint Counsel have spent two years developing.

In any event, imposing the deposition restrictions proposed by Complaint Counsel in conjunction with their proposed December 20, 2002, discovery cut off would be a recipe for scheduling disaster. As indicated above, Respondent anticipates the need to take at least fifty to seventy-five depositions. If the December 20 deadline were adopted and the two deposition per day limit were imposed, it would require virtually perfect scheduling to ensure that all depositions were taken in accordance with the Order. Efficiency is not served by imposing such

---

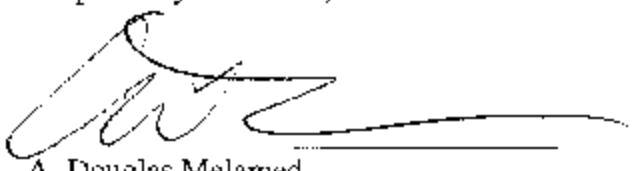
[2] For example, under Complaint Counsel's proposal, Respondent would not be able to take three short depositions of employees of a single DRAM manufacturer on the same day at the same location without permission from Complaint Counsel, even though doing so would be less burdensome on Complaint Counsel than the permitted taking of two full-day depositions at different locations across the country.

artificial limits.[3] The better and more common course would be to have no such limits and to trust that the parties (with Your Honor's guidance, if necessary) will not abuse the process either by needlessly impeding multiple depositions or by needlessly scheduling them on the same day.

CONCLUSION

For the foregoing reasons, Rambus, Inc. requests that Your Honor issue its proposed Scheduling Order.

Respectfully submitted,



A. Douglas Melamed
Robert B. Bell
Ilay Palansky
Kenneth A. Bamberger*
WILMER, CUTLER & PICKERING
2445 M Street, NW
Washington, DC 20037
(202) 663-6000

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

Counsel for Respondent Rambus, Inc.

*Admitted in MA and NY only.

Of counsel:

John D. Danforth
Robert G. Kramer
RAMBUS, INC.
4440 El Camino Real
Los Altos, CA 94022
(650) 947-5000

Dated: August 2, 2002

[3] Complaint Counsel's suggestion that the absence of a two deposition per party per day limitation would create "staffing difficulties" (Motion at 11) rings hollow in light of the fact that ten different attorneys have already entered appearances for Complaint Counsel in this case.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

SCHEDULING ORDER

It is HEREBY ORDERED that this matter shall proceed in accordance with the following Scheduling Order:

EVENT	DATE
Answer filed	7/29
Exchange initial disclosures	8/6
Last day for issuing document requests to the parties	8/30
Last day for issuing party interrogatories (except for those related to requests for admission)	9/23
Complaint Counsel provides preliminary witness list (excluding experts)	9/30
Respondent provides preliminary witness list (excluding experts)	10/14
Complaint Counsel identifies expert(s) and exchange vita, lists of publications and list of matters in which any expert has testified under oath	10/28
Complaint Counsel provides preliminary rebuttal witness list (excluding experts)	11/4
Respondent identifies expert(s) and exchange vita, lists of publications and list of matters in which any expert has testified under oath	11/11
Respondent provides preliminary rebuttal witness list (excluding experts)	11/18
Last day to file motions to compel regarding party discovery (except those related to requests for admission)	11/20
Complaint Counsel provides Expert Reports and produces or identifies documents and other written materials relied upon and considered by the experts	11/25
Last day to file requests for admission	12/9
Respondent provides Expert Reports and produces or identifies documents and other written materials relied upon and considered by the experts	12/16
Complaint Counsel provides Rebuttal Expert Reports and produces or identifies documents and other written materials relied upon and considered by the experts	1/6
Last day to file motions for summary decision	1/14

Last day to file motions to compel regarding responses to requests for admission Exchange proposed stipulations of law and fact, stipulations of authenticity	1/17
Close of discovery Last day to file responses to motions to compel regarding requests for admission	1/27
Last day to file motions *in limine* and proposed stipulations Exchange of final exhibit and witness lists	1/29
Last day to file responses to motions for summary decision	2/5
Exchange responses to proposed stipulations of law and fact, stipulations of authenticity	2/7
Meet and confer to resolve issues regarding proposed stipulations of law and fact, stipulations of authenticity	2/12
Last day to file responses to motions *in limine*	2/14
File and serve pretrial briefs	2/17
File final stipulations of law and fact and final stipulations of authenticity (additional stipulations may be filed as agreed between the parties or as offered by the Administrative Law Judge)	2/19
Final prehearing conference	2/21
Hearing begins	2/26

SO ORDERED this _ ___ day of August, 2002.

James P. Timony
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of INTEL CORPORATION, a corporation.	DOCKET NO. 9288

SCHEDULING ORDER

It is HEREBY ORDERED that this matter shall proceed in accordance with the following Scheduling Order:

EVENT	DATE
Exchange initial disclosures	July 20, 1998
Last day for issuing document requests to the parties	August 10, 1998
Exchange of preliminary witness lists (excluding experts) with description of proposed testimony	September 4, 1998
Last day for issuing party interrogatories (except for those related to requests for admission)	September 9, 1998
Last day to file motions to compel regarding responses to document requests issued to the parties	September 16, 1998
Last day to file responses to motions to compel regarding document requests issued to the parties (no reply briefs will be permitted absent an order of the Administrative Law Judge)	September 23, 1998
Last day for taking Rule 3.33(c) depositions of Respondent Intel	September 30, 1998
Exchange of preliminary rebuttal witness list (excluding experts) with description of proposed testimony	October 5, 1998

EVENT	DATE
Last day to identify expert(s) and exchange of vita, lists of publications and list of matters in which any expert has testified under oath	October 13, 1998
Last day to file motions to compel regarding party interrogatories (except for those related to requests for admission)	October 16, 1998
Last day to file responses to motions to compel regarding party interrogatories (except for those related to requests for admission)	October 23, 1998
Parties exchange Expert Reports and produce or identify documents and other written materials relied upon by the experts in his or her analysis or conclusions	November 2, 1998
Parties exchange Rebuttal Expert Reports and produce or identify documents and other written materials relied upon by the experts in his or her analysis or conclusions Last day to file requests for admission	November 23, 1998
Last day to file motions to compel interrogatories related to requests for admission	December 7, 1998
Last day for third party depositions other than of experts	December 11, 1998
Exchange proposed stipulations of law and fact, stipulations of authenticity Last day to file responses to motions to compel interrogatories related to requests for admission	December 15, 1998
Last day for filing motions for summary decision	December 18, 1998
Close of discovery, including experts Exchange final exhibit and witness lists	December 23, 1998
File motions *in limine* File responses to motions for summary decision	December 29, 1998
Exchange responses to proposed stipulations of law and fact, stipulations of authenticity	December 30, 1998
File and serve pretrial briefs	January 4, 1999

EVENT	DATE
Meet and confer to resolve issues regarding proposed stipulations of law and fact, stipulations of authenticity	January 5, 1999
File responses to motions *in limine*	January 6, 1999
File final stipulations of law and fact, final stipulations of authenticity (additional stipulations may be filed as agreed between the parties or as ordered by the Administrative Law Judge)	January 8, 1999
Final prehearing conference	January 11, 1999
Hearing begins	January 12, 1999

ADDITIONAL PROVISIONS

1. No more than two depositions per side shall be conducted on any day, unless otherwise agreed by the parties or ordered by the Administrative Law Judge.

2. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of December 23, 1998 that all responses and objections will be due on or before that date, unless otherwise noted. Unless a subpoena or discovery request specifically identifies each document it seeks (e.g., Widget Corporation's 1997 Annual Report), the return/response date shall be reasonable and at least ten (10) days after the date on which the subpoena or discovery request issues or is served. Additional discovery shall be permitted only for good cause upon application to and approval by the Administrative Law Judge or by agreement of the parties, including any third party discovery in the event that the opposing party fails to disclose the identity of a third party that may have information that may be relevant to this proceeding in a timely manner in response to a discovery request.

3. The preliminary and final witness lists shall represent counsel's good faith designation of all potential witnesses. Additional witnesses may be added after the submission of the final witness lists under the following circumstances:

(a) by agreement of counsel with notice to the Administrative Law Judge;

(b) by order of the Administrative Law Judge upon a showing of good cause;

(c) if the identity of the person or the relevance of the information to be provided were not reasonably known at the time the final witness lists were served; or

(d) if needed, to authenticate or provide evidentiary foundation for documents in

dispute, with notice to the opposing party and the Administrative Law Judge.

A party seeking to add witnesses shall promptly notify the other parties of its intention to do so. Opposing counsel shall have a reasonable amount of time to subpoena documents from and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing. Such discovery shall not be subject to the scheduling or notice provisions of paragraph 1 or the minimum return/response period for subpoenas/discovery requests of paragraph 2 unless otherwise ordered by the Administrative Law Judge.

4. The preliminary and final exhibits list shall represent counsel's good faith designations of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists under the following circumstances:

(a) by agreement of counsel with notice to the Administrative Law Judge;

(b) by order of the Administrative Law Judge upon a showing of good cause;

(c) if the exhibit or the relevance of the information to be provided were not reasonably known at the time the preliminary lists were served; or

(d) where necessary for purposes of impeachment.

5. At the time an expert is first listed as a witness by a party, the party will provide to the other party:

(a) materials fully describing or identifying the background and qualifications of the expert, and all prior cases in which the expert has testified or been deposed; and

(b) transcripts of such testimony in the possession, custody or control of the listing party or the expert.

6. The parties shall provide for each expert witness an Expert Report containing the information required by Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. The parties shall cooperate in scheduling the depositions of any rebuttal expert witnesses, whose depositions may be taken, if necessary, during the hearing in this matter.

7. It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition during the six-week period immediately preceding the last date for expert depositions.

8. All papers shall be served by hand or facsimile by 6:00 p.m. on the designated date. Hand deliveries shall be to Complaint Counsel John O'Hara Horsley, Federal Trade Commission, 601 Pennsylvania Ave., N.W., Room S-3303, Washington, D.C. 20580, and to

Respondent's counsel Joseph Kattan, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Ave., N.W., Suite 900, Washington, D.C. 20036-5306. All deliveries by facsimile shall be followed promptly by delivery of an original by hand or by U.S. mail, first-class postage prepaid. It shall be the obligation of the serving party to ensure that service by facsimile has been effected.

9. All pleadings, motions, supporting briefs, objections to discovery, responses to discovery, exhibit lists, witness lists, privilege lists, master lists of documents provided, expert reports, and similar material shall be provided in hard copy (paper) and on a 3.5" floppy disk in Microsoft Word, WordPerfect, Microsoft Excel, or Lotus 1-2-3 format if the party or its counsel uses one of these programs to generate the documents described in this paragraph.

10. The procedure for the marking of exhibits is as follows: a one-page exhibit is designated, e.g., CX-1 (for complaint counsel), RX-1 (for respondent's counsel). If there is relevant matter on the back of a page, the exhibit is marked CX-1-A for the front side and CX-1-B for the back side. Capital letters must be used in marking. In the event the document has many pages which are not bound together, each page and each back side of each page containing relevant matter must be numbered CX-1-A through CX-1-Z-1. Items thereafter are numbered CX-1-Z-2, Z-3, Z-4, etc., as necessary.

James P. Timony
Chief Administrative Law Judge

Dated: July 14, 1998

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Elay Palansky, hereby certify that on August 2, 2002, I caused a true and correct copy of *Rambus Inc.'s Motion for Entry of Scheduling Order* to be served on the following persons by hand delivery:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, NW
Washington, DC 20580

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

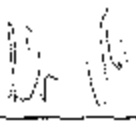
Joseph J. Simons
Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Avenue, NW
Washington, DC 20580

Malcolm L. Catt
Attorney
Federal Trade Commissions
Room 3035
601 Pennsylvania Avenue, NW
Washington, DC 20580

M. Sean Royall
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-378
600 Pennsylvania Avenue, NW
Washington, DC 20580

Richard B. Dagen
Assistant Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Geoffrey D. Oliver
Deputy Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, NW
Washington, DC 20580



Elay Palansky