**PUBLIC**

**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

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| **In the Matter of**<br><br>**RAMBUS INC.,**<br><br>**a corporation.** | **Docket No. 9302** |

**RAMBUS INC.'S ANSWER TO MICRON TECHNOLOGY'S MOTION TO LIMIT OR QUASH RAMBUS'S NOVEMBER 6, 2002 SUBPOENAS AD TESTIFICANDUM AND SUBPOENAS DUCES TECUM**

## I.

## INTRODUCTION

Respondent Rambus Inc. ("Rambus") respectfully submits this memorandum in response to the motion by Micron Technology, Inc. ("Micron") to limit or quash various document and deposition subpoenas served on Micron by Rambus. Micron's motion lacks merit and should be denied. Indeed, recent developments have largely mooted the motion. Micron's principal argument in support of its motion is that Rambus has previously deposed most of the Micron witnesses in question. What Micron's motion fails to acknowledge, however, is that Complaint Counsel in this matter had – prior to last week – taken the position that the many depositions taken in the private lawsuits *could not be used* at the hearing in this matter if the witness in question was unavailable for the hearing, because Complaint Counsel had not been present at the deposition. *See* Declaration of Andrea Jeffries ("Jeffries Decl."), ¶¶ 3, 4.

While this position finds support in the language of Rule 3.33(g), it placed

Rambus in the difficult position of explaining to third party witnesses and their counsel that Rambus wanted to take depositions not just to focus on new allegations and defenses and recently produced documents, but also to preserve the very same testimony that the witness had given in a prior deposition (in case the witness was later unavailable for the hearing). *Id*.

Fortunately, Complaint Counsel have recently reconsidered their position. On Tuesday, November 26, 2002, Complaint Counsel agreed that Rambus could essentially use depositions taken in the prior and pending lawsuits as though they were taken in this matter. This agreement, which has now been reduced to writing, *see* Jeffries Decl., ¶ 5 and Exh. A, will allow Rambus to conduct shorter, non-duplicative depositions in this proceeding.

Complaint Counsel's recent agreement does not, however, eliminate the need to take the depositions at issue here. As discussed below, Rambus needs to, and is entitled to, take depositions of knowledgeable Micron personnel regarding issues that were not explored in the prior depositions and regarding documents that were not available for use by Rambus's counsel at the time of those depositions. Given this narrower scope, Rambus will stipulate that it will limit its questioning of all but two of the proposed deponents to 4 ½ hours each.[1] With these limitations in place, and in light of the other accommodations Rambus has made, there is no rationale for depriving Rambus of the highly relevant deposition discovery that it seeks.[2]

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[1] The two witnesses for whom these limitations are not applicable are Keith Weinstock, who was not deposed in the private litigation between Micron and Rambus (hereinafter "the *Micron* case" or "*Micron*"), and Jeff Mailloux, whose deposition was not completed in *Micron*. *See* Section D below.

[2] In addition to these limitations, Rambus has already agreed to conduct the depositions in Boise, Idaho, the location most convenient for Micron and the witnesses, despite the substantial inconvenience to Rambus. Rambus also gave Micron several weeks notice of the depositions and has expressed its willingness to work with Micron's counsel to schedule the depositions for mutually agreeable dates. Jeffries Decl., ¶ 6.

Micron also seeks to limit or quash the individual document subpoenas that were directed to the Micron witnesses. As set out below, Micron's motion fails to make the requisite showing of burden to justify the relief it seeks. Accordingly, Rambus requests that Your Honor deny Micron's motion and order Micron to produce the requested witnesses for deposition and to produce the requested documents forthwith.

## II.

## ARGUMENT

### A. Complaint Counsel's Recent Change Of Position With Respect To The Use Of Prior Depositions Eliminates The Need For Duplicative Questioning And Thus Eliminates Micron's Principal Argument Regarding Burden

The FTC Rules of Practice allow a party to take a deposition so long as "such deposition is reasonably expected to yield information" relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. §3.33(a) (referring to the scope of discovery defined under 16 C.F.R. §3.31(c)(1)). Micron does not dispute that the subpoenaed individuals have knowledge relevant to the issues presented in this proceeding. Rather, it contends that because these individuals were deposed in the *Micron* case on at least some of the same issues, Rambus's attempt to depose them again is unjustified. *See* Mot. at 2-8.

Now that Complaint Counsel has agreed that Rambus can use the *Micron* deposition transcripts to the same extent as it could use a transcript of a deposition taken in this proceeding, Rambus will limit its questioning of all but two of the deponents (Keith Weinstock and Jeff Mailloux, discussed below) to 4 ½ hours (excluding breaks). *In addition*, Rambus will limit its questioning to those documents and/or topics that Rambus did not explore with these witnesses during their prior depositions. These limitations, coupled with the accommodations already afforded to Micron, cause Micron's arguments regarding burden to fall away.

**B. Rambus Has Not Had The Opportunity To Question The Micron Deponents On Issues Raised By Documents Produced By Third Parties**

Rambus is entitled to, and has not had the opportunity to, question the Micron witnesses about relevant documents produced by Micron and third parties *after* the deposition were taken in Micron. Since the time of the *Micron* depositions of Messrs. Appleton (April, July 2001), Cloud (June 2001), Lee (June, August 2001), Mailloux (April 2001, but not completed), Ryan (April 2001), Norwood (July 2001), Shirley (August 2001), Walther (May 2001), and Williams (April 2001), Micron and other third parties have produced over two hundred thousand pages of documents. Jeffries Decl., ¶ 10. In fact, Micron itself has recently produced over 25,000 pages of documents *that were not produced* in the *Micron* case, and it expects to produce "tens of thousands more." Response of Micron Technology, Inc. To Motion of Rambus Inc. To Compel, filed November 25, 2002, at 5. Jeffries Decl., ¶ 11. There is also a pending motion to compel Micron's production of additional pricing-related documents, and other third parties are expected to produce many new documents in the next 30 days as well. *Id.*

Many of the recently-produced third party documents identify Micron witnesses as senders or recipients or as participants in discussions relevant to the allegations raised by the pleadings. For example, in the *Hynix* case,[3] Hynix produced meeting minutes of the SyncLink Consortium that were *not* produced by Micron in the *Micron* case.[4] Those minutes contain numerous statements regarding the issues in this

[3] *Hynix Semiconductor, Inc., et. al. v. Rambus Inc.*, Case No. CV 00-20905 RMW, United States District Court for the Northern District of California.

[4] The SyncLink Consortium, later known as SLDRAM, Inc., was a consortium of DRAM manufacturers dedicated to the promotion of SyncLink or SLDRAM technology as an industry standard and alternative to Rambus. Despite the fact that Micron actively participated in the SyncLink Consortium, and that several of its employees (including the proposed deponents) are identified in SyncLink documents that pertain directly to issues raised by the pleadings in *Micron* (as well as here), Micron did not produce the minutes of the SyncLink consortium in the *Micron* case. Regardless of the reasons why these

case, such as a comment apparently made by Terry Walther of Micron at the May 13, 1996 Consortium meeting regarding the patent disclosure policies of various standards organizations, *including JEDEC*. Jeffries Decl., ¶ 10 and Exh. C. Rambus should be afforded the opportunity to question the Micron witnesses about these new documents and the issues they raise.

### C. Micron Previously Prevented Rambus From Obtaining Highly Relevant Deposition Testimony Regarding Alternative Technologies And Other Issues

Rambus is also entitled to question Micron's witnesses on issues that were *foreclosed* by Micron's counsel on relevance and confidentiality grounds in the prior depositions. In particular, Micron's counsel repeatedly instructed witnesses in the *Micron* case not to answer questions relating to the efforts of an industry consortium, ADT, to develop future generations of memory technology. *See* Jeffries Decl., ¶ 13; S*ee generally id.*, ¶ 15 and, Exh. E (describing the genesis of ADT).

Regardless of the propriety of counsel's instructions to witnesses not to answer questions in the private litigation, *see* F.R.C.P. 30(c), such instructions would very clearly be inappropriate here. ADT's design and development efforts are highly relevant here because the Complaint expressly alleges that the industry is now "locked in" to Rambus's patented technology and cannot "work around" Rambus's technology in order to avoid payment of royalties to Rambus. Complaint, ¶¶ 91, 105. ADT's efforts in the 1999-2000 time frame to develop the next generation of memory technology necessarily required it to have considered factors involving the availability of alternatives to Rambus's patented technologies. These efforts are obviously relevant to this case. Indeed, Your Honor recently ordered Mitsubishi to produce documents relating to ADT and other "industry efforts to promulgate alternative standards . . ." Opinion Supporting

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documents were not produced by Micron, Rambus is obviously entitled to question the proposed deponents about these minutes and other newly produced documents.

Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. To Quash Or Narrow Subpoena, at 5.

Although Micron was a founding member of ADT, Rambus has not had the opportunity to question Micron's witnesses on the important issues arising from Micron's involvement in that organization. Throughout the depositions conducted in the *Micron* case, Micron's counsel repeatedly instructed the Micron witnesses not to answer any questions regarding the technologies under discussion by the ADT consortium on the grounds that those technologies were irrelevant to the issues raised by the pleadings in *Micron* and were confidential. *See, e.g.*, Ryan dep., 62:17-22; 63:17-19 ("we are not going to allow the witnesses to answer questions about the details or technologies that ADT is working on . . . There is no relevance, superconfidential, past practice of deceptive conduct by Rambus with regard to such endeavors. That is our basis.") (Jeffries Decl., Exh. D).

Micron's objections to ADT-related discovery are inapplicable here. The relevance of ADT discovery to this proceeding is indisputable, as explained above. With regard to confidentiality, Your Honor has ruled that the Protective Order in this matter suffices to protect against the potential misuse of confidential information. *See* Opinion Supporting Order Denying Motion Of Mitsubishi Electric & Electronics Inc. To Quash Or Narrow Subpoena at 7 (*citing Coca-Cola Bottling*, 1976 FTC LEXIS 33 at *4, for the proposition that "'[P]rotective orders are routinely issued'" to prevent misuse of confidential information).[5] Because Micron's prior objections to ADT discovery are

[5] Micron's additional objection to the production of ADT discovery based on "past practice of deceptive conduct by Rambus," is nothing more than an unsupportable attempt to bolster its claims of confidentiality. To the extent Micron is truly concerned that Rambus will "steal" the ideas of ADT, it may designate these materials "Restricted Confidential Discovery Material" under the Protective Order governing discovery in this case, and thereby limit access to Rambus's outside counsel, outside experts and outside consultants. *See* Protective Order, ¶ 7. Rambus also understands that ADT has ceased its development efforts.

inapplicable here, Rambus is entitled to depose Micron's witnesses on these foreclosed issues.

**D. Rambus Is Entitled To Depose Keith Weinstock And Jeff Mailloux Without Limitations**

The limitations that Rambus has agreed to regarding the proposed depositions cannot be extended to Keith Weinstock or Jeff Mailloux. Mr. Weinstock was not deposed in the *Micron* case. Micron has never previously asserted, nor does it now assert, that Mr. Weinstock does not possess relevant information. In fact, during the initial meet-and-confer discussions between Rambus and Micron, Micron did *not* oppose the deposition of Mr. Weinstock on relevancy grounds. Jeffries Decl., ¶ 6. Thus, although Rambus does not seek to depose Mr. Weinstock immediately, it should be afforded the opportunity to do so if it determines his deposition to be appropriate.

[redacted].[6] Jeffries Decl., ¶ 8. Though Rambus need not duplicate the questions already asked, its questioning of Mr. Mailloux should not be restricted to documents received and/or issues raised after his *Micron* deposition because Mr. Mailloux's *Micron* deposition was not completed. Such a restriction would unfairly

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6 [redacted] Mot. at 13, footnote 6. This representation is inadequate to thwart the completion of Mr. Mailloux's *Micron* deposition or the taking of his deposition in this proceeding.

[redacted] Jeffries Decl., ¶ 9 and Exh. B.

deprive Rambus of testimony that it was unable to obtain due to the premature cessation of his *Micron* deposition.

### E. Micron's Attempt To Limit The Individual Document Subpoenas Is Without Merit

Citing no legal authority, Micron seeks to limit specifications 2, 3, and 4 of the individual document subpoenas solely because it claims that they are "generally subsumed within Specifications included in Rambus's subpoena to Micron." Mot. at 14. Micron apparently contends that because Rambus had agreed to certain limitations on the scope of its search of the entire company's files, those limitations should apply to the *much less burdensome* task of searching these *particular* individuals' files.

Micron has not come close to making the showing of burden required to quash a document subpoena. As Your Honor stated in denying Mitsubishi's motion to quash,

> The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that 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 . . . Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). The burden is no less for a non-party. *In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at *14 (Mar. 19, 1982). Mitsubishi, therefore, must put forth specific evidence that demonstrates such disruption; a 'general, unsupported claim [of burden] is not persuasive.' *Kaiser Aluminum*, 1976 FTC LEXIS 68 at *18.

Opinion Supporting Order Denying Motion Of Mitsubishi Electric & Electronics USA, Inc. To Quash Or Narrow Subpoena, November 18, 2002, at 6.

Like Mitsubishi, Micron has failed to meet its burden. Indeed, the specifications about which Micron complains are narrow in scope, are essentially identical to the specifications at issue in *Mitsubishi*, and only require a search of the files

of eleven specified individuals (i.e., the individuals to whom the subpoenas are directed), not the entire company. Moreover, as Micron admits, Rambus has worked with Micron to alleviate any burden, both in connection with the 67-specification subpoena and these eleven individual subpoenas. Mot. at 13 & 14, footnote 7 (Rambus agreed to limit four of the nine specifications as requested by Micron). Rambus's willingness to reduce the burden on Micron further undermines Micron's burdensomeness argument. *See* Opinion Supporting Order at 6 (*citing In re General Motors Corp*, Dkt. No. 9077, 1977 FTC LEXIS 18 at *1 (Nov. 25, 1977), and *In re R.R. Donnelley & Sons Co*., Dkt. No. 9243, 1991 FTC LEXIS 272 at *2 (June 12, 1991)). Accordingly, Micron's request to limit the individual document subpoena specifications 2, 3 and 4 lacks merit and should be denied.

With respect to Micron's application to quash specifications 8 and 9 of the individual subpoenas, neither of the issues raised in Micron's motion papers was raised with Rambus counsel during the discussions regarding the scope of the subpoenas. Jeffries Decl., ¶ 15. In light of the representations made by Micron, Rambus is willing to withdraw specification 8 and to limit specification 9 to seek only the identity of the documents provided to the FTC by the individual to whom the subpoenas were issued. While Rambus may have access to all of the documents provided by Micron to the FTC, those documents bear no identifying marks to indicate the files at Micron from which the documents were retrieved. This information is important to assist Rambus in understanding the knowledge possessed by each of the individual deponents with respect to the allegations of the Complaint.

## III.

## CONCLUSION

For the foregoing reasons, Rambus submits that Micron Technology's Motion To Limit Or Quash Rambus's November 6, 2002 Subpoenas Ad Testificandum and Subpoenas Duces Tecum be denied in light of Rambus's agreed-upon limitation to 4 ½ hours of non-duplicative questioning of Messrs. Appleton, Lee, Shirley, Williams,

Ryan, Walther, and Cloud and in light of the other accommodations referenced herein.

DATED: December 3, 2002 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
IJay Palansky
Kenneth A. Bamberger*
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(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

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