UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S STATEMENT IN SUPPORT OF DEPARTMENT OF JUSTICE'S MOTION TO LIMIT DISCOVERY RELATING TO DRAM GRAND JURY

Complaint Counsel submits this Statement in support of the Department of Justice, Antitrust Division's ("DOJ") Motion to Limit Discovery Relating to the DRAM Grand Jury ("DOJ Motion"), filed December 27, 2002. While taking no position on the merits of DOJ's specific contentions regarding the potential for interference with a sitting grand jury investigation, Complaint Counsel does, for basically two reasons, strongly urge Your Honor to grant DOJ's Motion. First of all, it is clear that the discovery at issue here – that is, Respondent Rambus Inc.'s ("Rambus") efforts to probe the merits of an alleged pricing-related conspiracy among DRAM manufacturers – has no bearing on or relevance to this case. Granting the DOJ Motion therefore not only would have the benefit of avoiding undue interference (it appears) with a pending federal grand jury investigation, but would do so without in any way prejudicing Rambus's ability to defend itself against the Commission's claims in this action. Our second reason for supporting the DOJ's Motion is that the discovery Rambus seeks, beyond being irrelevant, appears to be calculated to draw attention away from the issues that stand at the heart of this case – namely, Rambus's own deceptive and anticompetitive conduct – in part for the purpose of

adding unneeded complication to this proceeding and precipitating unnecessary delays. As explained further below, Complaint Counsel therefore respectfully urges Your Honor to grant DOJ's request for limitations on discovery in this action, and to do so without agreeing to Rambus's invitations for delay.

A. The Discovery That Rambus Seeks Is Irrelevant to This Action and Any Limitation on Such Discovery Will Not Prejudice Rambus's Defense in This Case

In the August 2, 2002, Scheduling Hearing, Complaint Counsel cautioned that Rambus and its lawyers would likely seek to defend against the Commission's claims by "pointing fingers at others," just as it has attempted to defend against allegations of fraud and other misconduct in related patent litigation. *See* Aug, 2, 2002, Tr. at 29. As Your Honor can see, that strategy now is being employed in this case. Indeed, Rambus has made it clear that – if allowed – one of its principal lines of defense in this action will be to point fingers at downstream DRAM makers, alleging that such companies may have engaged in inappropriate or even illegal conduct, as if that somehow provided a justification for Rambus's own wrongdoing.

With this in mind, Rambus has subpoenaed virtually all of the companies that make DRAM products worldwide, seeking among other things to capitalize on the fact that some of these companies may currently be the subjects of an unrelated DOJ antitrust investigation probing the possibility that such companies may have anticompetitively coordinated on the output or pricing of DRAM chips. Initially, Rambus sought to defend its discovery into DRAM output and pricing on the theory that it needed such information in order to respond to the Commission's claims of downstream price effects resulting from Rambus's anticompetitive conduct. *See* Letter from Steven M. Perry to M. Sean Royall and Geoffrey D. Oliver, at 1 (Nov. 5, 2002) (attached hereto as Exhibit A). Yet, in response to inquiries from Rambus's lawyers, Complaint Counsel has explained that this is not a valid justification for such

discovery, as there is no reason to believe that the anticompetitive impacts of Rambus's conduct on DRAM prices would be discernable until some time in the future. *See* Letter from M. Sean Royall to Steven M. Perry, at 1 (Nov. 15, 2002) (attached hereto as Exhibit B). Thus, Complaint Counsel explained, any effort by Rambus to conduct discovery into DRAM pricing would not yield any useful information pertaining to the merits of the Commission's claims in this case, but to the contrary would only add needless complication and result in the unneeded and futile expenditure of resources and time.

It appears that Rambus has since developed a new theory as to why it should be permitted to conduct discovery into the pricing of DRAM chips, and the potential that DRAM makers may have coordinated on such prices. According to Rambus, such discovery is relevant to another issue – namely, to show that DRAM makers somehow "conspired to remove Rambus and RDRAM products as a competitive force." Preliminary Further Response by Respondent Rambus Inc. to Motion by United States Department of Justice to Intervene and Stay Discovery 2 (Dec. 18, 2002) ("Rambus Further Response"). Rambus has merely asserted, without explanation, that "the DRAM manufacturers engaged in a group boycott of Rambus and its products in order to facilitate their collusive arrangement to raise prices." Response by Respondent Rambus Inc. to Request by U.S. Department of Justice for Order Delaying Deposition of Micron Chief Executive Officer Steve Appleton, Exh. A, at 1 (Letter from Gregory P. Stone, Rambus Counsel, to Niall Lynch, U.S. Department of Justice, dated Dec. 13, 2002) (Dec. 17, 2002).

The situation, therefore, can be summarized as follows: Rambus seeks to conduct discovery relating to the potential that DRAM makers may have anticompetitively coordinated with regard to the pricing and output of the products they sell. Such discovery, for reasons that Complaint Counsel has already explained (*see* Exhibit B), is not likely to yield anything of direct relevance to the Commission's

allegations in this case. Yet Rambus now contends that there is another reason to justify such discovery. Rambus's argument now is not that this discovery is directly relevant to the Commission's case. Rather, Rambus now argues that it is indirectly relevant inasmuch as it may have some (as yet unexplained) connection to a defense that Rambus hopes to make, focusing on what appear to be highly speculative allegations that DRAM makers may have somehow acted in a coordinated way to block Rambus's technology from being widely adopted within the memory industry.[1] How should Your Honor respond to this theory to support Rambus's requested discovery concerning DRAM pricing, which is doubly removed from any possible relevance to this proceeding? Complaint Counsel submits that this matter can be resolved quite easily, based on well established legal doctrines concerning the relevance and admissibility in an antitrust suit of evidence relating to the alleged wrongdoing of third parties.

The Supreme Court long ago established that "unclean hands" is not a permissible defense to liability in an antitrust suit. As the Court explained in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, the "alleged illegal conduct of [plaintiff], however, could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured." 340 U.S. 211,

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[1] This is not the first time that Rambus has alluded to the notion that DRAM makers may have coordinated in an effort to somehow disadvantage Rambus's technology. In his deposition in the *Infineon* case, Rambus's Chairman, William Davidow, repeatedly asserted that some form of coordination had occurred. Yet, at the same time, he was forced to admit repeatedly that his views in this regard were based on nothing more than rank speculation. *See* January 31, 2001, Deposition of William Davidow, *Rambus Inc. v. Infineon Technologies AG*, No. 3:00CV52 (E.D. Va.) (attached hereto as Exhibit C), at 85 ("It's my speculation that a group of manufacturers . . . have conspired . . . that they have . . . colluded to undermined the success of RDRAMs."); *id.* at 40 ("I have more just hearsay evidence of this – that the industry began to collude against Rambus."); *id.* (acknowledging that this assertions were "purely a speculation on my part"); *id.* at 41 ("I don't have factual data, but I'm reflecting a lot of gossip."); *id.* at 86 ("This is all speculation on my part.").

214 (1951), *overruled on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (reversing earlier cases holding wholly owned subsidiaries capable of conspiring with parent companies).[2] Accordingly, an antitrust defendant may not point to the anticompetitive or otherwise unlawful actions of a plaintiff to excuse its own anticompetitive conduct. *See, e.g.*, *Burlington 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."); *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 604 (S.D.N.Y. 1987) ("Since *Kiefer-Stewart*, the law has remained consistent that unclean hands is not a defense to an antitrust action."); *see also 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."); *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."). Thus, if this were a private antitrust suit brought against Rambus by one of the DRAM makers that Rambus claims may have engaged in anticompetitive coordination, such claims by Rambus would be entirely irrelevant to the determination of its own liability and any evidence in this regard would be properly excluded.

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[2] The rejected defense in *Kiefer-Stewart* bears a remarkable resemblance to the one Rambus seeks to assert here. The defendants, liquor producers accused of price fixing, sought to defend their conduct by pointing to the plaintiff's alleged participation in a conspiracy among liquor distributors to fix resale prices. The Supreme Court held that the trial court correctly ruled that any conspiracy in which the plaintiff was a part does not provide a defense. 340 U.S. at 214.

Of course, this obviously is not a private action instituted by a DRAM maker. It is a government action brought to protect the public interest against the harmful consequences flowing from Rambus's misconduct, consequences that not only have caused or threaten to cause substantial harm to DRAM makers, but to many others as well. In a government action like this do the same principles of unclean hands apply, resulting in the irrelevance and inadmissibility of any evidence relating to a third-party's alleged misconduct? Indeed, they do, but with even greater force.

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. 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) (emphasis added). Moreover, the Supreme Court's rationale for rejecting the invocation of unclean hands defenses in an antitrust suit further highlights why Rambus's argument is misguided. "The public interest in preventing anticompetitive injury would be dampened tremendously," the Court has stated, "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) (emphasis added); *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.") (emphasis added). Here, the FTC's statutory mission to vindicate the public interest in unfettered competition demands that Rambus not be permitted

to escape the consequences of its own wrongdoing, or even to attempt to do so through the type of discovery at issue here, by pointing to the alleged misdeeds of others.

The Supreme Court and other lower courts not only have consistently applied the principles discussed above to exclude or strike "unclean hands" defenses. *See, e.g.*, *Southern Motor Carriers*, 439 F. Supp. at 52 (striking "unclean hands" defense directed at government). But in addition, courts have intervened early on to block discovery aimed at developing such defenses, in order to eliminate the wasteful and unnecessary expenditure of time and resources. *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) (emphasis added). In short, it is entirely appropriate to preclude Rambus from engaging in discovery into matters that would support the type of unclean-hands argument that it seeks to develop, because such an argument is entirely misplaced – and, consistent with substantial precedent, should not be allowed – in this case.

Nor can Rambus justify pursuing the DRAM-pricing-related discovery it seeks on some other grounds. For instance, Rambus suggested that this discovery would be relevant to show bias on the part of DRAM makers. *See* Rambus Further Response 2 & n.2. But this claim defies logic and common sense. At the present time, DRAM manufacturers must license Rambus's technology in order to produce JEDEC-compliant memory chips (or, absent a license, subject themselves to potential liability for patent infringement). Any bias that being placed in such a position would create results from the monopoly-seller position that Rambus, through deceptive and anticompetitive actions, has acquired. Such bias, if it existed, however, would be wholly separate and unrelated to any alleged conspiracy among DRAM manufacturers to influence the output and pricing of the products they sell. In other

words, these witnesses, if biased at all, would be biased because of Rambus's anticompetitive conduct and the effect it has had on them as downstream purchasers, not as a result of their own alleged wrongdoing.

In short, the evidence Rambus seeks is in no way relevant to this proceeding. Indeed, that conclusion is logically obvious. The Commission has charged Rambus with engaging in a pattern of deceptive, anticompetitive conduct. The merits of those charges depend in no way on whether some of the companies harmed by Rambus's conduct happened to have engaged in other, separate wrongful conduct. Accordingly, the evidence sought by Rambus is not relevant because it does not have "any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probably that it would be without the evidence." Fed. R. Evid. 401. Because the evidence Rambus seeks is not relevant, it is not discoverable. Fed. R. Civ. P. 26(b)(1).

Finally, as follows logically from the fact that the discovery Rambus seeks is irrelevant, granting the DOJ's request to limit such discovery will cause no prejudice to Rambus in this case. Of course, if there were any merit to Rambus's as-yet-unsupported allegations of a group boycott of its technology by DRAM makers, the proper course of action for Rambus would be to bring an action of its own against the culpable DRAM makers, not to attempt to create diversions in this case by inappropriately focusing attention on matters that can have no bearing on the determination of Rambus's liability here. *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] . . . .").

B. Because Rambus Will Not Be Prejudiced by the Requested Limitation in Discovery, There Is No Need to Delay This Action From Proceeding on the Current Schedule

Rambus has sought to delay this proceeding from the outset, and now is using DOJ's Motion as yet another excuse to inject delay and to prevent a prompt resolution – as the Commission's rules require – of the instant litigation. Rambus's desire for delay is apparent from its proposal, in response to DOJ's motion to intervene, that Your Honor stay this proceeding in full for two months. *See* Rambus Further Response 3-4. This is entirely unwarranted.

The fact is that the limitations on discovery that DOJ seeks would not in any way interfere with Rambus's ability to defend itself in this action or to conduct proper discovery. Indeed, DOJ seeks to prevent Rambus from obtaining only documents and testimony relating to communications between DOJ and the DRAM manufacturers under investigation. *See* DOJ Motion 6. DOJ specifically does not seek to bar Rambus's discovery of documents already in existence and in the hands of the DRAM manufacturers, so long as there is no identification of whether those documents were provided to DOJ in the course of its investigation. *See id.* 6-7. DOJ's limitations, if granted, would therefore still permit Rambus to pursue through depositions and discovery its ill-defined and irrelevant theories of collusion among DRAM manufacturers. It would be barred only from gaining insight as to what DOJ thought was relevant to its investigation. Your Honor thus should not be deceived by Rambus's efforts to create an excuse for delay: Rambus will be able to obtain all the evidence it claims is relevant, whether or not in fact it is, even with the limitations requested by DOJ.

C. Conclusion

Because the discovery Rambus seeks is not relevant to this matter, either as to a defense or as to witness bias, and because DOJ's requested discovery limitations will not in any way prejudice Rambus's ability to develop its defenses in this proceeding, Complaint Counsel respectfully requests that Your Honor grant DOJ's Motion, and that Your Honor do so without agreeing to Rambus's invitations to delay.

Respectfully submitted,

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