UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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

COMPLAINT COUNSEL'S RESPONSE TO MEMORANDUM BY RAMBUS INC. IN RESPONSE TO MOTION BY DEPARTMENT OF JUSTICE TO LIMIT DISCOVERY RELATING TO THE DRAM GRAND JURY

In response to the Department of Justice, Antitrust Division's ("DOJ") Motion to Limit Discovery Relating to the DRAM Grand Jury ("DOJ Motion"), Respondent Rambus Inc. ("Rambus") has filed a memorandum ("Rambus Mem."), dated January 3, 2003, arguing that the DOJ Motion should be denied. To the extent that Rambus's memorandum makes claims about the supposed relevance to this case of alleged anticompetitive coordination among DRAM manufacturers, Complaint Counsel wishes to respond, out of concern that Rambus's arguments are, in some respects, seriously misleading and could erroneously influence Your Honor's ruling on the DOJ Motion.[1]

[1] Rambus's memorandum also contains a seemingly gratuitous statement regarding "Complaint Counsel's Allegations and Rambus's Responses." *See* Rambus Mem. 3-7. Considering that this statement has no possible bearing on the merits of DOJ's Motion, we presume that it will be ignored and hence have chosen, for present purposes, not to make an effort to respond. If Your Honor would entertain a response to this statement at some later date, however, Complaint Counsel would welcome the opportunity to be heard. Another point, again not directly relevant to DOJ's motion, that we would like to correct for the record relates to Rambus's statements in footnote 6 of its Memorandum, at page 21, that "Complaint Counsel concede for purposes of this matter that Rambus's patents are valid and that Rambus's founders did in fact invent revolutionary new approaches to

The structure and content of Rambus's argument can be summarized as follows:

Based on selective excerpts and quotations from the recently exchanged report of Complaint Counsel's expert economist – Professor R. Preston McAfee – Rambus contends, among other things, that Intel Corporation's selection (in the late 1990s, post-dating Rambus's involvement in JEDEC) of Rambus's RDRAM memory architecture for use with Intel microprocessors positioned RDRAM to possibly become a *de facto* industry standard. *See* Rambus Mem. 9.[2] Rambus then glosses over the reasons why Professor McAfee explains that this did not happen – among them, the fact that attempts to commercialize RDRAM were hobbled by a series of embarrassing technical setbacks and by Rambus's unwillingness (at odds with Intel's desires) to lower its RDRAM royalty rates to levels more consistent with industry norms. Instead, Rambus speculates that there may be an alternative explanation for RDRAM's marketplace failure: "concerted action" or a "group boycott" among DRAM manufacturers with hopes that DDR SDRAM (an "open" industry standard established by JEDEC) would win out over RDRAM in the competition for a new, high-performance memory standard. At this point, Rambus chronicles the

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improving the performance of memory devices." This statement is inaccurate. Complaint Counsel, in fact, takes no position in this case regarding the validity of Rambus's patents or the extent to which any Rambus inventions were novel, and hence patentable.

[2] Through its liberal citations to and quotations from Professor McAfee's report, Rambus seeks to lend credence to its arguments. Yet many, if not all, of the selective quotations are taken out of context. Perhaps realizing this, Rambus has withheld from Your Honor the full report, and has merely attached a disjointed collection of random pages of the report, from which the context of Professor McAfee's statements and his ultimate conclusions cannot possibly be understood. Complaint Counsel has therefore attached to this pleading the full version of Professor McAfee's report. *See* Exhibit A. Complaint Counsel respectfully urges Your Honor to review the report in its entirety before crediting any of the various arguments that Rambus makes in reliance upon selective and misleading quotations.

evidence from which it contends one might conclude that such a "group boycott" in fact did occur. *See* Rambus Mem. 12-17. Thereafter, Rambus argues that alleged concerted action of this sort materially contributed to Intel's decision, in 2000, to abandon its support for RDRAM. *See id.* at 17.

The flow of Rambus's argument at this stage makes an abrupt leap to the pricing not of RDRAM, but rather SDRAM and DDR SDRAM devices. In the late 2001-early 2002 time frame, Rambus claims, the prices for these devices Rambus Mem. 18 (emphasis in original). According to Rambus, "The evidence strongly suggests that these price increases" – meaning price increases on SDRAM and DDR SDRAM chips sold by downstream manufacturers – "were the product of concerted action." *Id.*

Notably, Rambus never provides a coherent explanation as to how, if at all, these two distinct allegations of concerted action are linked – that is, (1) the supposed concerted efforts (or "group boycott") by DRAM manufacturers to resist the adoption of RDRAM as a technology standard, and (2) the alleged concerted effort by DRAM manufacturers to increase the price of SDRAM and DDR SDRAM. Rambus simply asserts, "When Rambus was a competitive threat to the manufacturers' domination of 'main memory' products, the concerted action was targeted at Rambus. When Rambus was removed as a threat, the concerted action was intended to raise SDRAM and DDR SDRAM prices." Rambus Mem. 19.

The final stage of Rambus's argument is of course the most important – namely, Rambus's effort to explain why all this is relevant to the Commission's case, and more specifically, why it necessitates that Rambus be permitted to conduct discovery probing into whether DRAM manufacturers may have colluded to raise downstream prices (i.e., the type of discovery that DOJ seeks to limit). As shown below, Rambus's various attempts to defend the need for such discovery are

each invalid and should be rejected. Hence, Complaint Counsel submits, the DOJ Motion can and should be granted, and doing so will cause no prejudice to Rambus's ability to conduct relevant discovery and otherwise defend itself in this action.

1. Rambus's Arguments Ignore Decades of Legal Precedent Ruling That Alleged Downstream Conspiracies Are Irrelevant to Determinations of Antitrust Liability

As Complaint Counsel have already explained in a separate filing,[3] the U.S. Supreme Court and other lower courts uniformly have held that an antitrust defendant may not point to the anticompetitive or otherwise unlawful actions of a plaintiff 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); *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."); *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

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[3] *See* Complaint Counsel's Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury (filed Jan. 3, 2003).

defense] asserts that Plaintiffs are or were engaged in a separate antitrust conspiracy, then, it is clearly an insufficient defense to the antitrust action.").

As Complaint Counsel have further explained, this principle of law extends to antitrust cases brought by the government, in which the defendant seeks to defend its actions by pointing to the alleged misdeeds of other companies, including companies that may have suffered alleged injuries as a result of the defendant's misconduct. *See, e.g., United States v. Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 52 (N.D. Ga. 1977) ("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") (emphasis added). Rambus's argument here runs headlong into this well-established prohibition on any unclean-hands defense to charges of antitrust liability.

Why does Rambus claim it needs to conduct discovery into the potential existence of a conspiracy to inflate DRAM prices? According to Rambus, the principal reason to conduct such discovery is to 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." Rambus Mem. 19-20. In other words, Rambus desires to argue that the DRAM makers – one group of market participants that has been harmed by Rambus's deceptive and monopolistic practices – are somehow unworthy of protection through an antitrust enforcement action because they may have themselves engaged in anticompetitive conduct. Of course, this is precisely the kind of argument that the authorities cited above, on public policy grounds, have disallowed. *See, e.g., Chrysler Corp. v. General Motors Corp.*, 596 F. Supp. 416, 419 (D.D.C. 1984) ("The public interest in preventing anticompetitive injury would be dampened tremendously if defendants were allowed to raise the defense of unclean hands in antitrust actions.")

(emphasis added); *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); *Southern Motor Carriers*, 439 F. Supp. at 52 (striking unclean-hands defense directed at government).

Why are such arguments contrary to the public policies undergirding the antitrust laws? In this case, that is easy see. The Commission has alleged in its complaint that Rambus's deceptive, anticompetitive scheme threatens to ultimately harm not only DRAM makers who are effectively forced to license Rambus's technology at monopolistic royalty levels, but also – among others – purchasers of DRAM chips (*e.g.*, manufacturers of personal computers), purchasers of products that incorporate DRAMs (*e.g.*, anyone who buys a PC), companies that rely upon DRAM industry standards in developing their own products (*e.g.*, graphics card makers), and indeed all companies and consumers who benefit from participation in, and the proper functioning of, industry standard-setting collaborations. Given that the FTC must, consistent with the public interest, protect all persons who may be harmed by Rambus's monopolistic conduct, it would subvert the interests of public policy to allow the alleged "unclean hands" of one category of victims to result in the denial of any remedy to other categories of victims. The law, for good reason, simply will not allow this.

There is another reason why arguments of the sort Rambus seeks to make here are sensibly disallowed. 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) (emphasis added). Of course, this does not mean that victims of antitrust offenses may escape the consequences of their own improper or unlawful actions. On the contrary, if there is merit to the claim that such companies have committed independent antitrust offenses, this can be addressed through separate legal actions. Or, if the wrongdoing is one committed by a plaintiff and the defendant has standing to do so, the defendant may assert a counterclaim. *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 an independent legal action. However, it is not appropriate to needlessly complicate and delay the resolution of this proceeding by injecting claims of supposed wrongdoing by one of many groups harmed by Rambus's actions.

2. Rambus's Conspiracy Allegations Have No Bearing on Whether Rambus Did in Fact Engage in the Pattern of Deceptive Conduct Alleged by the Commission's Complaint

Even independent of the points made above, if one carefully inspects Rambus's conspiracy arguments it is apparent that these claims do not have any direct bearing on the issues presented by the Commission's complaint. As Your Honor knows, 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.

What do the alleged DRAM conspiracies now raised by Rambus have to do with the merits of the Commission's JEDEC-related contentions, or the legality of Rambus's knowing deceptions of JEDEC? Complaint Counsel submits that the answer is, quite simply, nothing. This is in part apparent from the fact that the concerted actions claimed by Rambus all allegedly took place after – and in some cases many years 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 (the focus of DOJ's Motion) prior to 1999, some three years after it withdrew from JEDEC. *See* Rambus Mem. 12

; *id.* at 17-18

3. Rambus's Apparent Claim That DRAM Makers Is Utterly Speculative and in Any Event Can Be Made Without the Aid of Any Discovery Relating to Downstream DRAM Pricing

Beyond the fact that Rambus's supposed conspiracy evidence post-dates by several years its participation in, and deception of, JEDEC, Rambus has not offered any coherent explanation as to how any such conspiracy could possibly serve as a justification for or defense of its JEDEC-related misconduct. The closest Rambus comes to establishing such a link (but it is hardly close enough) is the apparent contention that

The sum total of Rambus's contentions in this regard consists of the following two cryptic sentences:

Rambus Mem. 20.

Complaint Counsel disagrees with these contentions. Yet even assuming, hypothetically, that there was evidence – consistent with Rambus's assertions – suggesting that

, this would have no bearing on the merits of DOJ's Motion. It simply makes no sense to suggest that, because (again, assuming hypothetically)

Rambus in this action should be permitted to conduct discovery relating to a possible downstream DRAM pricing conspiracy. This is a complete *non sequitur*.

Stated differently, if Rambus wishes to argue that

, Rambus can attempt to make that argument, and can conduct discovery focused on that issue, regardless of whether Your Honor grants the DOJ's requested limitations on discovery. Hence, granting the DOJ's Motion will in no way cause prejudice to Rambus.

4. Contrary to Rambus's Claim, Discovery Relating to DRAM Pricing Is Not Relevant for Purposes of Rebutting Any Contention of Downstream Price Effects

Rambus contends that one reason it should be allowed to conduct discovery concerning allegations of downstream DRAM price fixing is that such discovery might allow Rambus to demonstrate

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Rambus Mem. 19 (second emphasis

added). This argument is self-defeating.

The fact is that Complaint Counsel has never made the contention alluded to by Rambus. That is, Complaint Counsel has never contended that the adverse effects that Rambus's monopolistic conduct naturally will have on downstream DRAM pricing in the future, absent the relief sought by the Commission's complaint, would be likely to have materialized by this point in time, or by the 2001-2002 period on which Rambus's pricing-related conspiracy allegations seem to focus. Rambus knows this to be true, as Complaint Counsel, in response to an inquiry by Rambus's counsel, has explained its precise contentions in writing. *See* Exhibit B to Complaint Counsel's Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury (filed Jan. 3, 2003). Even if Complaint Counsel had in the past made such a contention, Rambus – by referring to "Complaint Counsel's earlier allegations" – plainly understands that this is no longer an active contention in this case. As such, it is not a valid basis upon which to justify DRAM-pricing-related discovery.

5. Rambus's Arguments About Intel's Influence Over DRAM Technology Standards Can Be Made Without the Aid of Any Discovery Concerning Downstream DRAM Pricing

Another argument made by Rambus, presumably in an attempt to defend its need for discovery pertaining to an alleged DRAM-pricing-related conspiracy, relates to . According to Rambus, the evidence discussed in its motion "undermines Complaint Counsel's fundamental proposition that JEDEC standardization drives memory technology choices . . . .

Rambus Mem. 19.[4] Continuing the argument, Rambus states:

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[4] Complaint Counsel does not concede that it has ever advanced any such "fundamental proposition," so stated.

Id. at 19-20.

Without commenting on the merits of this argument from an evidentiary standpoint, it is not an argument that should have any bearing on Your Honor's resolution of DOJ's Motion, as it has no connection to allegations of a downstream conspiracy to influence DRAM prices. Thus, if Rambus desires to develop an argument along these lines, it may do so notwithstanding any DRAM-pricing-related discovery limitations sought by the DOJ. Hence, once again, despite the arguments made in Rambus's memorandum, it is clear that granting DOJ's Motion will in no way prejudice Rambus's ability to conduct the discovery it seeks or to make the arguments it wishes to make.

6. Rambus's Claim That the Possible Existence of an Alleged Downstream DRAM Pricing Conspiracy Is Relevant to Showing DRAM Maker Bias Against Rambus Is Logically Incoherent and Should Be Rejected

Rambus further argues, in its memorandum opposing DOJ's Motion, that it should be permitted to conduct discovery relating to a potential conspiracy affecting downstream DRAM prices, as such discovery, it claims, is relevant to show "bias" on the part of witnesses who may "have had involvement in or knowledge of unlawful concerted action." Rambus Mem. 20. In this regard, Rambus states: "If these witnesses are willing to ignore the antitrust laws to assist their employer in an effort to eliminate Rambus as a competitive threat, their testimony in this proceeding about such issues as their recollection of oral presentations about patent policy at JEDEC meetings, or their own awareness of Rambus's

patent rights, will be subject to serious doubt." *Id.*

Complaint Counsel frankly finds this argument to be incoherent. At best, this argument would appear to be a meritless attempt to circumvent the legal authorities discussed, which forcefully reject the admission of evidence relating to third-party conspiracies. If ill-constructed arguments about the need to challenge witness credibility were enough to evade such legal authorities, this is an exception that would swallow the rule.

Yet even assuming, for sake of argument, that there were some credible reason to suggest that participation in or knowledge of an alleged group boycott "to eliminate Rambus as a competitive threat" might be relevant to probing witness credibility or bias in this case, this still would not be grounds to deny the DOJ's Motion. In other words, it would not prejudice Rambus if Your Honor were to order limitations on discovery relating not to the existence of an alleged group boycott to resist adoption of RDRAM, but to a different alleged conspiracy to inflate downstream DRAM prices. Accordingly, this portion of Rambus's argument can be ignored for purposes of ruling on the DOJ's Motion.

7. Rambus's Claim That the Possible Existence of an Alleged Downstream DRAM Pricing Conspiracy Is Relevant to Evaluating the Proper Remedy in This Case Is Specious and Should Be Rejected

The final argument Rambus makes in an attempt to defend its need for discovery relating to an alleged downstream DRAM pricing conspiracy relates not to liability, but to remedies. Rambus seeks to explain this argument as follows:

Rambus Mem. 21.

The problem with this argument is simply this: It is not the DRAM manufacturers whose alleged conduct is on trial here. Nor, given the legal authorities discussed above, is it permissible for Rambus to attempt to put the DRAM makers, or their alleged misdeeds, on trial. Because the focus of this case is the allegedly deceptive and monopolistic conduct of Rambus, it follows that any remedy imposed in this case should seek to correct for the marketplace harms that conduct has caused, or threatens to cause in the future. As much as Rambus might like to avoid the legal consequences of its actions, and remedies tailored to address those consequences, this simply is not an option open to Rambus in this case. Accordingly, Rambus's remedies-related arguments for denying the DOJ's Motion have no merit and should be rejected.[5]

8. Because Rambus Would Suffer No Prejudice from DOJ's Requested Discovery Limitation, DOJ's Motion Should Be Granted, Without Any Accompanying Postponement or Delay in This Proceeding

As explained above, despite the many arguments Rambus has made in opposition to the DOJ's Motion, and the discovery limitations it seeks, it has failed to demonstrate any persuasive reason why – if Your Honor grants to the DOJ's Motion – this would prejudice Rambus's ability to defend itself against the Commission's claim, or its ability to conduct proper discovery. Because there is no reason

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[5] Complaint Counsel further notes that the relief proposed in this case would have no effect on Rambus's potential ability to enforce any of its patents with respect to the manufacture, sale, or use of the proprietary RDRAM architecture, or RDRAM devices. As a result, if Rambus were able in a separate action to substantiate its "group boycott" allegations, any remedy imposed in this case would not interfere with Rambus's ability, in such an action, to be made whole for reductions in any RDRAM-related royalties or license fees that Rambus can show were caused by such a boycott.

to believe that Rambus would be prejudiced by DOJ's requested limitations on discovery, there is likewise no reason to postpone or stay discovery in this case in the DOJ's Motion is granted.

Accordingly, Complaint Counsel respectfully urges Your Honor to grant DOJ's Motion and to do so without agreeing to Rambus's invitations for delay.

Respectfully submitted,

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Dated: January 6, 2003