UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER ON NON-PARTY MICRON TECHNOLOGY, INC.'S REQUEST TO LIMIT QUESTIONING OF WITNESSES

Respondent Rambus, Inc. ("Rambus") has made it clear that it intends to present evidence "that DRAM manufacturers have colluded on the price of SDRAM and DDR SDRAM . . ."[1] By correspondence dated June 17, 2003, non-party Micron Technology, Inc. ("Micron") requested the Court to preclude Respondent's questioning of Micron witnesses at trial concerning: (1) communications between Micron and the DOJ regarding the pending grand jury investigation of the DRAM industry; and (2) communications among DRAM manufacturers relating to pricing to DRAM customers. Micron asserts that questioning Micron witnesses on these subjects would be inappropriate because it is likely to interfere with an ongoing federal grand jury investigation and because any evidence of price collusion relating to DRAM, if it exists, is of no relevance to Rambus' defense.

[1] Memorandum of Respondent Rambus, Inc. In Opposition to Complaint Counsel's Motion *In Limine* to Bar Presentation of Testimony and Arguments Regarding Purported Collusion Among DRAM Manufacturers. (April 11, 2003).

On June 19, 2003, Respondent filed a response to Micron's request. Rambus asserts that it has no intention of asking Micron's witnesses about communications between Micron and the DOJ regarding the pending grand jury investigation. However, Rambus asserts that it should not be precluded from questioning witnesses about communications among DRAM manufacturers relating to pricing to DRAM customers.

In its opposition, Respondent further asserts that Micron's request should be rejected for at least three reasons: (1) the DOJ has not intervened to argue that the trial might interfere with the grand jury investigation and that Micron does not have standing to argue that Rambus' questioning of Micron witnesses might undermine the grand jury's work; (2) Micron, a non-party, is in no position to argue what is or is not relevant to Rambus' defense; and (3) Micron's request is untimely.

Discussion

Respondent framed its response as an opposition to Micron's request that the Court reconsider the April 21, 2003 Order regarding collusion among DRAM manufacturers. The April 21, 2003 Order denied Complaint Counsel's motion *in limine* to bar evidence of collusion among DRAM manufacturers. In doing so, the Court expressed doubts about the relevance of evidence regarding purported collusion among DRAM manufacturers, but deferred making a dispositive ruling on the issue until it could be decided in the proper context of trial.

The proper context of trial has now, at least in part, been provided. Complaint Counsel has elicited testimony during its direct examination of numerous witnesses about the industry's desire for "low cost" memory devices. *E.g.*, Trial Transcript, vol. 4 at 823:18 (testimony by Micron employee Brett Williams that "[k]eeping the cost low of the DRAM was the goal");

vol. 6 at 1155:1-4 (testimony by Infineon employee Henry Becker that memory manufacturers "can't control the selling price but can only control the cost" of DRAM, "which means we have to do a very good job of controlling those costs"); vol. 16 at 3008:25-3009:3 (Complaint Counsel asking Richard Crisp whether customers "might be willing to leave some performance on the table in order to achieve low cost."). In addition, Complaint Counsel has elicited testimony from trial witnesses about the purported "high cost" or "higher price" of the Rambus memory device. *E.g.*, Trial Transcript, vol. 24 at 4416:23-25 (testimony by Infineon employee Martin Peisl that the RDRAM had "a higher price which was based on the higher cost structure because the chip was bigger than the standard DRAM and there were increased test costs. . ."); vol. 13 at 2364:24-2365:3 (testimony by Hewlett-Packard employee Jackie Gross that "[i]t was our impression that the cost[s] to manufacture RDRAM were higher than the costs to manufacture the alternative technologies"); vol. 19 at 3697:15-17 (testimony by AMD employee Richard Heye that "every memory vendor that I spoke to would tell me that Rambus had a higher cost structure on a per part basis than DDR").

The price of RDRAM, and the purported reasons for the relative difference between the RDRAM price and the price of competitive memory devices, are issues that Complaint Counsel has raised in its case-in-chief. It would thus be fundamentally unfair to prevent Rambus from developing evidence that the industry failed to adopt RDRAM not as a result of any higher cost structure inherent to the RDRAM device, but as the result of discussions among DRAM manufacturers to restrict the supply and raise the price of RDRAM. Such evidence could refute Complaint Counsel's allegation that Rambus' conduct resulted in competitive harm and could refute Complaint Counsel's argument that Rambus' motives in attempting to license its patents

were anti-competitive.

When DOJ filed an earlier motion to preclude discovery of communications between DRAM manufacturers regarding pricing (filed December 27, 2002), DOJ argued that a limit on deposition discovery relating to price-fixing allegations was necessary to preserve the integrity of and prevent interference with the DRAM grand jury investigation. By Order issued January 15, 2003, the prior Administrative Law Judge in this litigation, Judge Timony, ruled that Rambus had not demonstrated that the discovery it sought concerning possible collusion among DRAM manufacturers was sufficiently relevant and material to the issues in this litigation to offset the burden on the targets of that discovery, who may have already been, or may yet be, subject to the grand jury investigation, or to overcome the DOJ's reasons for seeking protection. DOJ has not weighed in at this stage of the proceeding.

However, because Complaint Counsel has now placed the relative difference between the RDRAM price and the price of competitive memory devices at issue in its case-in-chief, Rambus has demonstrated compelling reasons for questioning witnesses at trial concerning communications among DRAM manufacturers relating to pricing to DRAM customers. Therefore, unless Complaint Counsel advises the Court that it does not intend to seek findings on these issues, or unless the DOJ establishes to the Court's satisfaction that such matters would in fact interfere with the ongoing grand jury investigation, Rambus will be allowed to do so on a witness by witness basis. *See In re Special Grand Jury 89-2,* 143 F.3d 565, 571 (10th Cir. 1998) (a court must conduct a witness by witness analysis in evaluating the particularized need standard).

ORDER

The parties to this proceeding are prohibited from questioning witnesses at trial concerning communications with the DOJ regarding the pending grand jury investigation of the DRAM industry.

The parties may be permitted, however, to conduct limited inquiry on a witness by witness basis on communications among DRAM manufacturers relating to pricing to DRAM customers. The Court will rule in court on the form and extent to which such questioning will be permitted.

Based on the assertion by Respondent that it does not intend to conduct further discovery on these matters, none shall be allowed.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

June 20, 2003