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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S STATEMENT IN PARTIAL SUPPORT OF DEPARTMENT OF JUSTICE'S MOTION TO INTERVENE AND STAY DISCOVERY

The Antitrust Division of the U.S. Department of Justice ("DOJ") has moved to intervene in this proceeding and sought leave to file a motion to limit discovery, citing concerns about potential interference with an ongoing federal grand jury investigation focusing on the pricing and output of dynamic random access memory ("DRAM") devices. *See* United States Department of Justice's Motion to Intervene and Stay Discovery (Dec. 17, 2002) ("DOJ Motion"). The DOJ Motion also seeks interim relief limiting discovery in this proceeding until such time as its proposed motion seeking permanent relief of a comparable nature has been resolved. *See id.* DOJ's Motion focuses specifically on depositions of persons employed by certain DRAM manufacturers, pursuant to subpoenas issued by Respondent Rambus Incorporated. For the reasons explained herein, Complaint Counsel supports the DOJ Motion in substantial part, but seeks to expedite the schedule upon which the ultimate issue raised by DOJ's request for intervention is briefed and resolved.

First, as concerns DOJ's request to intervene, Complaint Counsel believes that this request should be granted. The need to preserve the secrecy and integrity of a federal grand jury

proceeding is obviously a matter of considerable importance. Complaint Counsel has no desire to see this action, or discovery related to this action, lead to such interference. Moreover, Complaint Counsel is confident that the issue can be resolved, without prejudice to Rambus, in a manner that ensures that such interference will not result. Prompt and efficient resolution of this issue does, however, require DOJ's input and participation, and only through granting DOJ's request for intervention can this be achieved.

Second, as concerns DOJ's request for interim relief effectively barring any party from probing issues of relevance to the grand jury's work until such time as Your Honor reaches a final resolution of this matter, again, Complaint Counsel believes that DOJ's request should be granted. Complaint Counsel does not believe that interim limitations on discovery of this sort will impede appropriate discovery efforts in this case. Nor should such interim limitations require the postponement or rescheduling of any depositions. In the latter connection, we appear to be in agreement with Rambus. As Your Honor knows, even prior to the filing of DOJ's Motion, Rambus filed an anticipatory response seeking to proceed with the scheduled deposition of Mr. Steve Appleton, CEO of Micron, without any stay in discovery. *See* Response by Respondent Rambus Inc. to Request by U.S. Department of Justice for Order Delaying Deposition of Micron Chief Executive Officer Steve Appleton (Dec. 17, 2002) ("Rambus Response"). Complaint Counsel agrees with Rambus that the deposition of Mr. Appleton should proceed notwithstanding the pendency of any DOJ motion to limit discovery, and believes that any other depositions that have been scheduled, or may in the future be scheduled, should also proceed. On the other hand, Complaint Counsel believes that such depositions can and should proceed subject to the interim limitations requested by DOJ, until such time as Your Honor has had an opportunity to enter a final ruling.

Although Complaint Counsel will likely have much more to say about the merits of the DOJ's position as to the appropriateness of permanent limitations on discovery here, we will reserve the bulk of our comments until after the DOJ has filed its proposed motion to limit discovery, assuming Your Honor grants the motion for leave. For present purposes, we would simply note that the discovery that is at issue here – that is, discovery conducted by Rambus probing into potential price- and output-related coordination among DRAM manufacturers – is in our view not well justified. Indeed, as Complaint Counsel has already explained in a letter to Rambus's counsel, we believe that any discovery by Rambus focusing on downstream DRAM pricing and output (i.e., not merely discovery concerning potential coordination) is at best of marginal, if any, relevance to this case. *See* Letter from M. Sean Royall to Steven M. Perry (November 15, 2002) (attached hereto as Exhibit A).

Finally, as concerns DOJ's request to be given until January 10, 2003, to prepare and file its proposed motion to limit discovery, this aspect of DOJ's Motion Complaint Counsel does not support. Our hope, as noted above, is that this issue can be promptly and efficiently resolved, not only so as to ensure that this action causes no improper interference with the work of the grand jury, but also to ensure that DOJ's intervention causes no significant interference with discovery in this case. For these reasons, Complaint Counsel would like to see this matter resolved on a more expedited schedule than that proposed by the DOJ, and we are confident that this can be done.

Complaint Counsel thus proposes that DOJ be directed to file its motion to limit discovery by December 23, with a response by Rambus (if any) by December 30, 2002. We would hope that this schedule would permit Your Honor to make an expedited decision by January 3, 2003, thereby minimizing the impact on ongoing discovery in this case. Such a

schedule is reasonable, we believe, as both Rambus and DOJ are well situated to file their papers promptly. Rambus raised this issue in November, and DOJ became aware of the issue in early December. Furthermore, counsel for DOJ indicated to Complaint Counsel in conferring about its anticipated intervention that it planned initially to file its motion to limit discovery by December 20, or at the latest by December 23. Finally, DOJ has likely already confronted many of the same issues in seeking to stay discovery in civil litigation relating to DRAM manufacturers. *See* DOJ Motion 3. In contrast, the schedule proposed in the DOJ Motion is unreasonably leisurely. DOJ has requested that it be permitted to file its motion to limit discovery on January 10, 2003. After Rambus is provided with an opportunity to respond, this could result in a final ruling well past the middle of January.

Prompt resolution of this matter is necessary, we believe, in order to ensure that the parties are able to complete their pre-hearing discovery in accordance with the Revised Scheduling Order. As Rambus has noted, several dozen depositions are scheduled for January, which would potentially be impacted by a delayed decision. *See* Rambus Response, at 2 n.1. In contrast, there are very few (if any) depositions scheduled during the holiday period between December 21, 2002, and January 5, 2003. Resolution of the concerns raised by the DOJ by January 3 will permit the numerous January depositions to go forward as scheduled without any uncertainty as to the permissible scope of inquiry.[1]

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[1] Even prior to the filing of these motions by Rambus and the DOJ, Complaint Counsel was concerned about the current status of discovery. Although the parties have a total of 110 witnesses on their respective preliminary witness lists, only a small number of them have been deposed. Regretably, most planned depositions have been scheduled in or postponed until January. Completion of fact discovery by February 3, 2003, will require concentrated effort by all parties. Nevertheless, Complaint Counsel remains committed to the Revised Scheduling Order entered by Your Honor in this matter. Complaint Counsel recognizes that, given the length of the Part III Hearing that this matter is likely to require, the revised schedule gives Your Honor very little time to complete your Initial Decision within the one-year deadline established

An expedited resolution of this matter also minimizes any possible prejudice to Rambus and third parties from the interim relief sought by DOJ. An extended timetable for resolution could interfere with Rambus's discovery or create unreasonable hardships for third parties – *e.g.*, in the event Your Honor orders no relief or relief different from DOJ's proposed interim relief, this might necessitate the need to redepose some witnesses on issues not previously covered. Because of the small number of depositions scheduled for the interim period proposed by Complaint Counsel, the holiday season, any prejudice is minimized.

For these reasons, Complaint Counsel urges Your Honor to grant DOJ's Motion in substantial part. Your Honor should grant DOJ's motion to intervene, its motion for leave to file a motion to limit discovery, and its motion to limit discovery in the interim, but should modify DOJ's proposed order to direct expedited filing of DOJ's motion by December 23, 2002, and Rambus's response by December 30, 2002. If Your Honor grants DOJ's motion for leave to file a motion to limit discovery, Complaint Counsel requests that it be provided the opportunity to present its views regarding DOJ's requested limitation on discovery by December 30, 2002.

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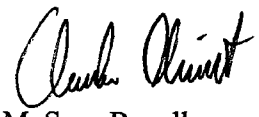
by Rule 3.51(a) of the Commission's Rules of Practice. Any delay in the scheduling and taking of depositions would merely exacerbate these difficulties and likely render it impossible to meet the one year deadline.

Complaint Counsel respectfully requests that Your Honor decide upon that motion as expeditiously as possible once all permitted filings have been made.

Respectfully submitted,



M. Sean Royall
Geoffrey D. Oliver
Andrew J. Heimert

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION
Washington, D.C. 20580
(202) 326-3663
(202) 326-3496 (facsimile)

COUNSEL SUPPORTING THE COMPLAINT

Dated: December 18, 2002

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

M. Sean Royall
Deputy Director

(202) 326-3663

November 15, 2002

Mr. Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560

Dear Steve,

This letter responds to your letter of November 5, addressed to me and Geoff Oliver, concerning Rambus's efforts to obtain third-party discovery from major DRAM manufacturers relating to DRAM module and chip pricing. It is not our intention, as you know, to intervene or interfere in any way with Rambus's discovery-related dealings with third parties pertaining to this litigation. Our understanding, however, is that your reason for writing us was simply to verify that your assumptions with respect to Complaint Counsel's positions in this litigation are correct – namely, your assumption that Complaint Counsel is likely at the hearing in this case to raise issues relating to DRAM module and chip pricing. Our response is that yes, this assumption is correct, although we believe that this response may require some clarification.

As your letter notes, we have contended in this case that Rambus's challenged conduct has resulted in, or otherwise threatens, various forms of injury to competition. In this regard, we contend that Rambus's conduct not only has increased the technology-related prices (or royalties) paid by synchronous DRAM manufacturers, but also that such conduct threatens to cause increases in the prices of synchronous DRAM devices themselves, as well as downstream products that use or incorporate synchronous DRAM devices, in part due to the potential for DRAM manufacturers to pass through to their customers some or all of the increased costs associated with Rambus's conduct. To the extent that Rambus documents or third-party documents comment on the potential for such pass through to occur, we believe that such documents may be highly relevant to our contentions.

On the other hand, in our view, documents that simply embody or record pricing-related data for DRAM modules or chips are far less likely to be relevant, for the following basic reason: Given the highly competitive nature of the DRAM marketplace, it is our understanding that market prices are dictated primarily by supply and demand, and that manufacturing costs, in the short term, are not likely to influence market prices, except to the extent that the lowest-cost

producers may bid prices down in response to competition from others. As a consequence, even though Rambus's conduct has, among other things, raised the technology-related costs of synchronous DRAM manufacturers – in particular, those manufacturers from which Rambus has been successful in securing license agreements – it is not likely that these DRAM manufacturers would be able to unilaterally increase the prices at which their products are sold, or that any such increases would be detectable from an analysis of pricing data over the past 1-2 years (that is, since Rambus began collecting royalties on synchronous DRAM devices). This is not to say that, over the longer term, such downstream price increases are unlikely. We expect they would be. Moroever, in the event that Rambus suceeded in enforcing its patent rights against all or substantially all synchronous DRAM manufacturers, this would likely precipitate swifter effects in terms of downstream price increases. Nevertheless, for the reasons explained above, we do not believe that potentially costly, and time consuming, analyses of detailed pricing data are likely to yield anything useful in this case, nor do we presently plan to conduct – or have our experts conduct – such analyses for purposes of the administrative hearing.

We hope that this letter adequately responds to your question. If you would like to discuss the matter further, please let us know.

Sincerely,

M. Sean Royall By MLC

M. Sean Royall
Deputy Director

cc: Rich Rosen, Esq.

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BEFORE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER

Upon consideration of the Motion of the United States Department of Justice, Antitrust Division ("DOJ") to Intervene and Stay Discovery Pending a Ruling on a Motion to Limit Discovery Relating to the DRAM Grand Jury, dated December 17, 2002,

IT IS HEREBY ORDERED that the DOJ's Motion to intervene is GRANTED.

IT IS FURTHER ORDERED that the DOJ has leave to file a Motion to Limit Discovery Relating to the DRAM Grand Jury no later than December 23, 2002. Rambus's and Complaint Counsel's Responses thereto, if any, shall be filed by December 30, 2002.

IT IS FURTHER ORDERED that the DOJ's request for a limited stay of discovery relating to the DRAM investigation is granted and that, pending the Court's ruling on the DOJ's Motion to Limit Discovery Relating to the DRAM Grand Jury: (1) no party may question any deposition witness regarding any contacts or communications between DRAM manufacturers regarding pricing to DRAM customers; and (2) no party may conduct any discovery relating to

any contacts or communications with the DOJ or the grand jury relating to the ongoing DRAM grand jury investigation.

_____
James P. Timony
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on December 18, 2002, I caused a copy of the attached, *Complaint Counsel's Statement in Partial Support of Department of Justice's Motion to Intervene and Stay Discovery,* to be served upon the following persons:

by hand delivery to:

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by facsimile transmission and overnight courier to:

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Counsel for Rambus Incorporated

Beverly A. Dodson