

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**PRELIMINARY FURTHER RESPONSE BY RESPONDENT RAMBUS INC. TO
MOTION BY U.S. DEPARTMENT OF JUSTICE TO INTERVENE AND STAY
DISCOVERY PENDING A RULING ON A MOTION (THAT DOJ PROPOSES
TO FILE ON JANUARY 10, 2003) TO LIMIT DISCOVERY RELATING TO THE
DRAM GRAND JURY**

Respondent Rambus Inc. (“Rambus”) respectfully submits this response to the Motion to Intervene and Stay Discovery Pending a Ruling on a Motion to Limit Discovery Relating to the DRAM Grand Jury, which was filed late yesterday, December 17, 2002, by the U.S. Department of Justice (“DOJ”). In short, the DOJ seeks “an immediate limited stay of discovery relating to the DRAM grand jury investigation pending the Court’s [*sic*] ruling” on a further motion to limit discovery that the DOJ seeks leave to file by January 10, 2003.

The requested stay would seriously impair Rambus’s ability to prepare its defense within the time allowed under the Scheduling Order for discovery and trial preparation. Because the DOJ proposes not to file its motion until January 10, 2003, after which

Rambus and Complaint Counsel would need some period of time to respond,¹ this matter likely would not be decided before the end of January, when discovery is scheduled to close.

Your Honor already has determined that the DRAM pricing issues in question are relevant to Rambus's defenses (*see* Order, dated December 4, 2002, granting Rambus's Motion to Compel Micron Technology Corporation to Produce DRAM Price-Related Documents), and Rambus will not reargue that point. It suffices to say that the evidence Rambus would be barred from discovering if the DOJ's motion for a stay were to be granted bears on many issues in this matter, including the following: (1) whether any alleged anticompetitive conduct by Rambus had or will have any impact on the pricing of DRAM products if, in fact, the price of those products was set as the result of unlawful agreements among certain DRAM manufacturers; and (2) whether certain DRAM manufacturers, on whose testimony it appears Complaint Counsel currently intends to rely, conspired to remove Rambus and RDRAM products as a competitive force because Rambus and RDRAM were an impediment to the ability of those manufacturers to raise prices.²

The DOJ has not met its burden in connection with its request for a stay, and asserts only vague conclusions of "interference." The case law plainly demonstrates that such an unsubstantiated claim of interference "falls far short" of the showing required to

¹ It is to be expected that the DOJ's motion will be quite extensive and factually intensive given the length of time the DOJ indicates it needs in order to prepare it.

² Such evidence, if developed in discovery, would bear not only on substantive issues in this case, but also would bear directly on possible bias on the part of these witnesses

delay civil discovery. *See Horn v. District of Columbia*, 210 F.R.D. 13, 16 (D.D.C. 2002) (a copy of this case is appended hereto as Exhibit A). *See also United States v. Gieger Transfer Service*, 174 F.R.D. 382, 385 (S.D. Miss. 1997) (“the mere relationship between criminal and civil proceedings, and the resulting prospect that discovery in the civil case could prejudice the criminal proceedings, does not establish the requisite good cause for a stay.”) Therefore, no stay is justified and depositions should proceed.

If, however, Your Honor is considering issuing a limited stay, you should instead stay all deposition discovery (and move out other dates in the Scheduling Order to accommodate this stay) for the following reasons:

- (1) It is pointless, inefficient and wasteful of the resources of all interested parties (Rambus, the Government and third parties) to depose witnesses on the current schedule³ and then to re-depose a large number of those same witnesses after the DOJ’s motion is decided, as would be required under the DOJ’s proposal;
- (2) Rambus has faced substantial discovery delay and obstruction from third parties, making a stay of discovery and a commensurate

³ The current schedule already has been disrupted by the DOJ’s motion, as Micron’s counsel late yesterday unilaterally advised that Micron “will not make ... Steven Appleton available for deposition on Thursday, December 19, 2002,” as previously agreed, but that he will, instead, “be available for deposition in Boise on January 13 or January 16, 2003.” *See* letter from Richard L. Rosen, dated December 17, 2002, appended as Exhibit B.

extension of the deadlines in the Scheduling Order appropriate in any event;⁴

- (3) The Court of Appeals for the Federal Circuit has not yet issued its expected ruling in the Infineon appeal, which raises many of the same issues (such as the scope and clarity of the JEDEC patent policy) that lie at the core of Complaint Counsel's allegations;
- (4) Rambus's own document production to Complaint Counsel was delayed by a lengthy meet-and-confer process, and Rambus is in the process of producing 250,000 or more pages of documents to Complaint Counsel;⁵ and
- (5) Complaint Counsel recently have clarified their prior position on possible harm flowing from a stay, and now have confirmed that any ongoing impact on prices from Rambus's alleged wrongdoing is not likely to be discernable (*see* Mr. Royall's November 19, 2002 letter to Mr. Perry, a copy of which is appended as Exhibit B to Mr. Lynch's declaration filed yesterday in support of the DOJ's motion).

For all of these reasons, Rambus respectfully requests that Your Honor deny the DOJ's motion for an immediate stay. Alternatively, if Your Honor is inclined to grant a

⁴ For example, Mitsubishi has so far refused – despite two Orders from Your Honor – to produce relevant documents from its Japanese parent, or even to produce the files of its own JEDEC representative, and Micron now refuses to produce Mr. Appleton.

⁵ A stay of all depositions, which Rambus suggests would be more appropriate than a partial stay of depositions, would not be intended to delay the continued production of documents by Rambus, or by others. Such other discovery matters should proceed apace.

partial stay of deposition discovery, then Rambus requests that all deposition discovery be stayed until after Your Honor rules on the DOJ's further motion.

Given the urgent nature of these issues and the press of time, such as arise from the unilateral cancellations of depositions by third parties (*see* Exhibit B), Rambus's counsel respectfully request that it might be particularly helpful and appropriate to hold a brief telephonic Status Conference later today.

DATED: December 18, 2002 Respectfully submitted,

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