

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**RAMBUS INC.’S CORRECTED REPLY TO COMPLAINT COUNSEL’S
RESPONSE REGARDING MOTION BY THE DEPARTMENT
OF JUSTICE TO LIMIT DISCOVERY**

Complaint Counsel evidently want very badly to limit discovery by Respondent Rambus Inc., (“Rambus”) into possible collusion by DRAM manufacturers, so much so that they have taken the extraordinary step of filing an unauthorized Response to Rambus’s Memorandum (“Response”) on the issue and in that Response have retracted their earlier assertion that Rambus’s conduct has caused consumer harm.¹ Complaint Counsel’s concern is to some extent obvious: If the evidence shows that the DRAM manufacturers conspired in violation of the antitrust laws about the very DRAM products that are the subject of this litigation, it would cast further doubt on the credibility of those firms and their representatives, whose complaints to the Commission instigated this case and on whose self-serving testimony it largely rests.

¹ Compare Complaint Counsel’s Opposition to Rambus’s Motion to Stay, or In the Alternative, for an Extension of Time at 12 (July 15, 2002) (“every day of delay before judgment in this action allows an irreversible transfer of wealth from manufacturers and consumers into the pockets of Rambus”) with Complaint Counsel’s Response at 8 (“Complaint Counsel has never” alleged that Rambus’s conduct has affected prices charged to consumers) (emphasis in original).

The credibility issue raised by the possibility of DRAM manufacturer collusion is itself sufficient to require ongoing discovery by Rambus in this area. But that is not the only reason to deny the Justice Department motion or, at the very least, to grant the Justice Department's alternative requested relief of a stay of this case until the grand jury investigation is completed. There are other, independent reasons as well that go directly to the substance of the FTC's complaint in this case and Rambus's defenses.

Rambus submits this brief reply to Complaint Counsel's Response for the limited purpose of explaining how evidence of DRAM manufacturer collusion, which Complaint Counsel no longer dismiss as mere "speculation,"² is likely to be relevant to this case for these additional, substantive reasons. On this issue, Complaint Counsel's Response is largely an effort at misdirection because it does not address the most important respect in which the evidence sought to be discovered by Rambus bears on the central issues of this case.

In order to prevail in this case, Complaint Counsel must prove both (1) that Rambus engaged in anticompetitive conduct within the meaning of the antitrust law and (2) that that conduct caused Rambus and Rambus's patents to have more market power than they otherwise would have had. The second requirement, the causation requirement, requires Complaint Counsel to prove that, if Rambus had made the disclosures to JEDEC that they allege "commonly understood" JEDEC rules required Rambus to make, then technologies that did not infringe Rambus patents would have become dominant in DRAM manufacture instead of Rambus's technologies. Complaint Counsel is unlikely to prove such causation for several

² See Complaint Counsel's Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury at 4 n.1 (January 3, 2003).

independent reasons, including the fact that there were and are no viable, noninfringing alternatives.

The evidence of collusion among DRAM manufacturers that Rambus seeks to discover bears directly on the causation issue. As Rambus explained in its January 3 memorandum (“Memorandum”), that evidence is likely to show (i) that whether DRAM technologies succeed or fail commercially is determined by the market, not by JEDEC; (ii) that in the mid-‘90s Rambus’s RDRAM technology appeared likely to become the de facto industry standard, largely because it was preferred by Intel and even though it has never been standardized by JEDEC; (iii) that the DRAM manufacturers feared that result because RDRAM would have diminished their role in the development of the DRAM industry for technological reasons and because it would have diminished their ability to control DRAM prices; (iv) that SDRAM and DDR SDRAM were preferred by the manufacturers for these reasons, even though they understood that there was a risk that Rambus would be entitled to royalties on those technologies; and (v) that the DRAM manufacturers colluded (possibly in violation of the antitrust laws) both on DRAM prices and to force Intel to stop supporting RDRAM and to support SDRAM and DDR SDRAM instead. See Memorandum at 12-20.

The evidence of collusion that is the subject of the Justice Department motion bears on all of this, and most directly on points (iii) and (v) above. In other words, the evidence could be important to showing that Rambus’s conduct at JEDEC did not cause Rambus or its patents to have any additional market power and that the success of SDRAM and DDR SDRAM was the result, instead, of deliberate choices made by the DRAM manufacturers that had nothing to do with any belief that those technologies were not owned by Rambus. The manufacturers were

willing to support those technologies, even at the risk that they were owned by Rambus, because the manufacturers had bigger fish to fry – stopping RDRAM.

Complaint Counsel's Response purports to address the reasons set forth in Rambus's Memorandum as to why the evidence is relevant to this case, but their response on the central causation issue misses the point. Complaint Counsel argue that, even if the DRAM manufacturers knowingly took the risk that SDRAM and DDR SDRAM might infringe Rambus's patents, discovery into "a possible downstream DRAM pricing conspiracy" is irrelevant. Response at 8. To the contrary, evidence of such a conspiracy would show both (1) that the DRAM manufacturers had a powerful incentive to choose SDRAM and DDR SDRAM and thus did not do so in reliance on anything Rambus did at JEDEC and (2) that it is the conduct of Intel and other firms in the marketplace, not the standards decisions of JEDEC, that determine which technologies will succeed in the DRAM industry. Both of these points go directly to the critical causation element in Complaint Counsel's case.

The evidence that Rambus seeks from these key DRAM manufacturers is central to the causation issue and, of course, to DRAM manufacturer credibility. Rambus should not be required to defend itself without access to that evidence. The Justice Department's motion should be denied, subject to the limitations on Rambus's discovery to which Rambus has already agreed;³ alternatively, if it is determined that the Justice Department's motion should be granted in its entirety in order to protect the grand jury investigation, then proceedings in this case should

³ See Memorandum by Rambus Inc. in Response to Motion by Department of Justice to Limit Discovery Relating to DRAM Grand Jury at 3 (January 3, 2003) (Rambus would agree "not to ask any deposition witness about any communications with the DOJ or the grand jury" and "not to seek the production of correspondence between DRAM manufacturers and the DOJ or the grand jury").

be stayed until Rambus can be permitted to pursue this important discovery. A proposed order is attached.⁴

Respectfully submitted,

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Counsel for Respondent Rambus Inc.

January 8, 2003

⁴ The proposed order also provides for an extension of the schedule by approximately three weeks because of the delays already caused by this matter.

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ORDER GRANTING IN PART AND DENYING IN PART DEPARTMENT OF JUSTICE’S MOTION TO LIMIT DISCOVERY RELATING TO DRAM GRAND JURY

Upon consideration of the Motion of the Department of Justice, Antitrust Division (“DOJ”) to Limit Discovery Relating to the DRAM Grand Jury (the “DOJ Motion”), dated December 27, 2002,

IT IS HEREBY ORDERED that the DOJ Motion is GRANTED in part to the extent that Rambus Inc. (“Rambus”) is hereby prohibited from asking any deposition witness about any communications with the DOJ or the grand jury and from seeking seek the production of correspondence between DRAM manufacturers and the DOJ or the grand jury;

IT IS HEREBY FURTHER ORDERED that, in all other respects, the DOJ Motion is DENIED; and

IT IS HEREBY FURTHER ORDERED that, in light of the interruption related to the temporary stay previously entered, Complaint Counsel and Rambus shall agree upon and submit a revised scheduling order that adds approximately 3 weeks to the schedule in this matter.

James P. Timony
Chief Administrative Law Judge

Date: _____

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on January 8, 2003, I caused a true and correct copy of *Rambus Inc.'s Corrected Reply to Complaint Counsel's Response Regarding Motion by the Department of Justice to Limit Discovery* to be served by facsimile at 415-436-6687 and overnight delivery to Niall E. Lynch at the United States Department of Justice, Antitrust Division, 450 Golden Gate Avenue, Room 10-0101, San Francisco, California 94102-3478, and on the following persons by hand delivery:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

M. Sean Royall
Deputy Director, Bureau of Competition
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Jacqueline M. Haberer