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June 17, 2003

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580

Re: In the Matter of Rambus, Inc. – Docket No. 9302

Dear Judge McGuire:

As the Court is aware, Micron Technology, Inc. ("Micron") is a non-party to the above captioned matter. Several Micron employees, including Micron's Chairman, CEO, and President, Steve Appleton, have been or soon will be called to testify. Mr. Appleton has been subpoenaed to testify on Friday, July 20th. As counsel for Micron, I write to call the Court's attention to an important issue that Micron expects will arise with respect to the testimony of Mr. Appleton and possibly other Micron witnesses.

At various points during discovery and the ongoing hearing on this matter, Rambus has sought to gather and present evidence regarding alleged collusion among DRAM manufacturers, such as Micron, regarding DRAM prices. Micron believes that Rambus may seek to question Mr. Appleton and others regarding such alleged collusion. Questioning on this subject 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's defense. Should Rambus attempt to question any Micron witness on this subject, counsel for Micron intends to object and strongly urge the Court to preclude such examination.

Since June 2002, a federal grand jury has been investigating the DRAM industry. After Rambus propounded discovery requests to Micron that were aimed at the grand jury investigation and its subject matter, the United States Department of Justice ("DOJ") took the extraordinary step of intervening to seek a limitation of discovery as to matters occurring before the grand jury. In support of its motion, filed on December 27, 2002, the DOJ advised the Court that, *inter alia*, Rambus's proposed discovery would, "if left unchecked, cause significant disruption to the grand jury investigation and potential harm

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to the Antitrust Division's criminal enforcement program."¹ The DOJ was particularly concerned that discovery of communications between DRAM manufacturers and the DOJ would reveal the scope and direction of the grand jury investigation and identify potential grand jury witnesses. In addition, the DOJ argued, "depositions of witnesses on possible price fixing among DRAM manufacturers, during the pendency of the grand jury, will interfere with the grand jury's ability to gather truthful and complete testimony."²

In support of its motion, the DOJ invoked the law enforcement investigatory privilege, which precludes the disclosure of all communications with the DOJ regarding its investigation. See, e.g., *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988); *In re Dep't of Investigation*, 856 F.2d 481 (2d Cir. 1988); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984). Rambus's asserted need for discovery on this subject was clearly outweighed by the interest in "prevent[ing] disclosure of law enforcement techniques and procedures, ... preserv[ing] the confidentiality of sources, ... protect[ing] witness and law enforcement personnel, ... safeguard[ing] the privacy of individuals involved in an investigation, and otherwise ... prevent[ing] interference with an investigation." *In re Dep't of Investigation*, 856 F.2d at 484.

The DOJ also pointed out that witness depositions on contacts between DRAM competitors regarding pricing could undermine the grand jury's work. DOJ Motion at 16-18. The DOJ explained that "[p]ermitt[ing] deposition discovery to proceed, prior to the conclusion of all grand jury proceedings, could lead to disclosure of grand jury material, expos[ure] cooperating witnesses to threats and intimidation from their employer, competitors or customers, and encourage non-cooperating witnesses to manipulate their grand jury testimony to conform to the publicly available testimony of deposed witnesses." *Id.* at 16-17 (emphasis added). If Rambus were allowed to take deposition testimony on possible price-fixing activity, the DOJ said it would be "inevitable that information gathered by the government and the grand jury will be disclosed." *Id.* at 18.

The DOJ's motion was supported by an in camera submission which, of course, has not been made available to Micron but which presumably describes in greater detail the reasons why such questioning would prejudice the grand jury investigation.

¹ United States Department of Justice's Motion to Limit Discovery Relating to the DRAM Grand Jury at 2 (December 27, 2002).

² *Id.*

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Rambus opposed the DOJ's motion. Judge Timony considered the submissions and granted the DOJ's motion. Judge Timony's order prohibited the parties from conducting:

(1) any discovery relating to any communications with the DOJ concerning the ongoing DRAM grand jury investigation; (2) discovery requests of materials produced to the grand jury; (3) any witness depositions on communications among DRAM manufacturers regarding pricing to DRAM customers.³

While this order tracked the specific relief sought by the DOJ, Judge Timony made clear that the general subject of collusion was irrelevant to the issues in the case. In his opinion accompanying the order, Judge Timony considered Rambus's arguments that DRAM manufacturers took actions to derail the acceptance of RDRAM, or engaged in collusive price-fixing conduct, or that, as a result of collusive actions by DRAM manufacturers, Intel rejected the RDRAM. He found that "Rambus has not shown that any of these issues are directly relevant and material in this proceeding."⁴ Indeed, he found that evidence of price fixing "is immaterial to the issues in this case, including whether Rambus' conduct alleged in the Complaint could tend to injure competition."⁵

As the trial of this matter approached, Complaint Counsel sought an order that would preclude the presentation of evidence of alleged collusion on the ground that such evidence, as Judge Timony previously had found, is irrelevant, and also because it would needlessly complicate and confuse the proceeding. Your Honor denied Complaint Counsel's motion *in limine* to bar all such evidence in advance of trial. The Court noted, however, that it "has doubts about the relevance of evidence regarding purported collusion among DRAM manufacturers," and admonished respondent that "the Court

³ Order Granting Motion of the United States Department of Justice to Limit Discovery Relating to the DRAM Grand Jury (January 13, 2003).

⁴ Opinion Supporting Order Granting Motion of the United States Department of Justice to Limit Discovery Relating to the DRAM Grand Jury at 6-7 (January 13, 2003).

⁵ *Id.* at 7.

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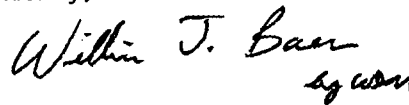
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does not intend to entertain extensive examination on this question since the focus of this matter is on the conduct and actions of Respondent, not non-parties."⁶

Rambus has made it clear that intends to present evidence "that DRAM manufacturers have colluded on the price of SDRAM and DDR SDRAM..."⁷ Since the grand jury investigation is continuing, allowing questioning of witnesses at a hearing on these subjects would cause the same harm the DOJ described and Judge Timony sought to avert in connection with pretrial discovery. Given this Court's recent determination that such testimony is of dubious relevance, it is both necessary and appropriate for this court to extend Judge Timony's order and preclude questioning of witnesses at trial concerning the matters occurring before the grand jury.

Micron respectfully submits that the Court should prevent Rambus from questioning any 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. Should Rambus attempt to ask such questions, counsel for Micron will be in the courtroom and we respectfully urge the Court to entertain objections from Micron on this ground and to consider any such objections in light of the record, including the previous submissions by the DOJ.

Sincerely,



William J. Baer
Counsel for Micron Technology, Inc.

⁶ Order on Motions In Limine at 9, 10 (April 21, 2003).

⁷ 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).

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