UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

OPINION SUPPORTING ORDER GRANTING MOTION OF THE UNITED STATES DEPARTMENT OF JUSTICE TO LIMIT DISCOVERY RELATING TO THE DRAM GRAND JURY

On December 27, 2002, the United States Department of Justice ("DOJ") filed its Motion to Limit Discovery Relating to the DRAM Grand Jury. The DOJ, which is not a party to this case, is currently conducting a criminal antitrust investigation of possible price fixing in the DRAM industry. DOJ's Motion seeks to quash certain discovery requests that Rambus has directed to several DRAM manufacturers to the extent that those requests demand either information regarding communications with the DOJ concerning the ongoing DRAM grand jury investigation or materials produced to the grand jury. DOJ also seeks to preclude Rambus from obtaining, prior to the conclusion of all grand jury proceedings, any witness depositions concerning communications among DRAM manufacturers regarding pricing to DRAM customers.

Rambus opposes a portion of DOJ's motion. It agrees not to "ask any deposition witness about any communications with the DOJ or the grand jury," and it also agrees "not to seek production of correspondence between DRAM manufacturers and the DOJ or the grand jury." However, Rambus contends that there is no justification for DOJ's attempt to prevent it from obtaining discovery concerning communications among DRAM manufacturers regarding pricing

to DRAM customers. Complaint Counsel supports DOJ's Motion.

By Order dated January 15, 2003, DOJ's Motion is GRANTED. This opinion sets forth the reasoning supporting that Order.

BACKGROUND

The Complaint in this case alleges that Rambus has obtained monopoly power, attempted monopolization, and restrained trade in certain markets for technology related to a common form of digital computer memory, known as "dynamic random access memory," or "DRAM." Specifically, the Complaint alleges that, from 1991 until mid-1996, Rambus participated in an industry standard setting body known as JEDEC in connection with JEDEC's adoption of standards relating to the design and architecture of the DRAM; that Rambus violated certain JEDEC rules by failing to disclose to the other members of JEDEC that it had filed patent applications that would cover certain technologies considered, and ultimately adopted, by JEDEC for the DRAM standard; that if the other JEDEC members had been aware of the possibility that Rambus might obtain these patents, they would have incorporated alternative technologies into the standards; and that, as a result of these standards, DRAM manufacturers are now locked into producing DRAMs that require payment of royalties to Rambus. The Complaint seeks an order forbidding Rambus from enforcing its patents.

In its Answer to the Complaint, Rambus argues that it had, at all times while it was a member of JEDEC, acted in accordance with JEDEC's written requirements regarding disclosure of patents. Rambus further contends that, not until long after it left JEDEC, did it have any patent or patent application that applied to any DRAM product manufactured in compliance with the

JEDEC standard. Finally, Rambus argues that the JEDEC standard and its conduct in connection with the adoption of that standard are irrelevant because DRAM manufacturers employ Rambus innovations in their products not because of the JEDEC standard, but because of cost/performance advantages to which there are no alternatives.

Unconnected with this litigation, DOJ is conducting a criminal antitrust investigation of possible price fixing in the DRAM industry. As a part of its investigation, a grand jury has been convened. It has issued subpoenas for documents to many DRAM manufacturers. DOJ has also identified certain employees of manufacturers who have information regarding possible law violations. Subpoenas for testimony have been served on several of those individuals.

During discovery in this proceeding, Rambus has made requests directed to DRAM manufacturers that overlap with certain aspects of the grand jury investigation. In particular, Rambus has sought discovery of communications between DRAM manufacturers and DOJ concerning the grand jury investigation, and has requested materials that DRAM manufacturers have provided to, or received from, the DOJ, any grand jury, or any other person in connection with DOJ's investigation. Rambus also seeks deposition testimony concerning communications among DRAM manufacturers about DRAM pricing.

On December 27, 2002, DOJ moved to quash this discovery. It argues that the law enforcement investigatory privilege precludes discovery relating to communications with the grand jury, and that Fed. R. Crim. P. 6(e)(2) precludes discovery of grand jury documents. It also argues that, pursuant to Rule 3.31(d) of the Commissions Rules of Practice, 16 C.F.R. § 3.31(d), the Administrative Law Judge should exercise his discretion and limit, pending conclusion of the grand jury proceedings, witness depositions regarding communications among DRAM

manufacturers regarding pricing to DRAM customers.

I. Discovery of Communications Related to the Grand Jury's Investigation and Documents Disclosed to the Grand Jury

The law enforcement investigatory privilege is well recognized and provides qualified protection from disclosure of law enforcement techniques and procedures, preserves the confidentiality of sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals involved in an investigation, and prevents interference with investigations. *In re Department of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988). Rule 6(e) of the Federal Rules of Criminal Procedure seeks to protect the secrecy of grand jury proceedings and of matters occurring before a grand jury. *Alexander v. FBI*, 186 F.R.D. 102, 107-08 (D.D.C. 1998). Absent a showing of compelling necessity or of a particularized need, no disclosure of such matters should be required. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *see Tuite v. Henry*, 98 F.3d 1411, 1417-19 (D.C. Cir. 1996). Plainly, the law enforcement investigatory privilege and the policy of Fed. R. Crim. P. 6(e) apply to Rambus' attempt to discover communications related to the grand jury's investigation and subpoena compliance, and to its attempt to discover documents disclosed to the grand jury. Rambus, in its Response to DOJ's Motion, has agreed not to ask any deposition witness about any communications with the DOJ or the grand jury, and has also agreed not to seek the production of correspondence between DRAM manufacturers and the DOJ or the grand jury. Rambus has not demonstrated compelling necessity or a particularized need for any discovery relating to any communication with the DOJ regarding the ongoing DRAM grand jury investigation or for materials produced to the grand jury. Accordingly, the parties to this proceeding are prohibited

from conducting any discovery relating to any communications with the DOJ concerning the ongoing DRAM grand jury investigation and any discovery requests of materials produced to the grand jury.

II. Discovery of Communications Among DRAM Competitors Regarding Pricing

DOJ seeks to prevent Rambus from taking any depositions regarding communications among DRAM manufacturers concerning pricing to DRAM customers. It argues that such discovery may be quashed, pursuant to Commission Rule 3.31(d), which provides that "[t]he Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, [or] oppression . . . ." 16 C.F.R. § 3.31(d)(1). In its Motion, DOJ asks that this discovery be prohibited until the conclusion of the grand jury's proceedings. For the reasons set forth below, the discovery is quashed without any time limit.

Cases interpreting Fed. R. Civ. P. 26(c), which parallels Rule 3.31(d), show that, when deciding whether to grant protective orders, courts conduct a balancing test. Where the relevance of, or need for, the information sought is great, there must be an accordingly great showing of annoyance, embarrassment, or oppression before a court will grant a protective order. *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985); *Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431-32 (D. Mich. 1979). But if the discovery cannot benefit the party seeking it, even a very slight inconvenience will be sufficient to justify an order quashing it. *Isaac v. Shell Oil Co.*, 83 F.R.D. at 432.

DOJ argues that permitting deposition discovery of communications among DRAM

manufacturers regarding DRAM pricing "to proceed prior to the conclusion of all grand jury proceedings could lead to disclosure of grand jury material, expose 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." DOJ asserts that Rambus' discovery may interfere with DOJ's investigation and violate grand jury secrecy. Discovery may be limited to protect the interests of a grand jury proceeding. *Founding Church of Scientology of Washington, D.C., Inc. v. Kelley*, 77 F.R.D. 378, 380-81 (D.D.C. 1977); *Capital Engineering & Manufacturing Co., Inc. v. Weinberger*, 695 F. Supp. 36, 41 (D.D.C. 1988) ("[T]he court must determine the extent to which the civil discovery could prove meddlesome, whether to stay discovery entirely or to narrow the range of discovery so as not to impinge upon the criminal proceedings.")

Rambus responds that information regarding possible DRAM manufacturer collusion is relevant to issues in this case. In particular, it states that, at the time of the development of the JEDEC standard, there was an alternate DRAM technology controlled by Rambus (the "RDRAM"), and that DRAM manufacturers feared that, if RDRAM had become the market standard, the manufacturers' market position would have been diminished. Thus, Rambus argues that DRAM manufacturers colluded to prevent RDRAM from becoming the industry standard. Rambus also argues that, in furtherance of their goal, the manufacturers colluded to prevent Intel from adopting RDRAM.

The issue in this case, as alleged in the Complaint, is whether Rambus' failure to disclose information to other members of JEDEC resulted in the enhancement of the significance and value of Rambus' patents. It may be, as Rambus alleges, that DRAM manufacturers took actions to

derail the acceptance of the RDRAM, a DRAM technology over which Rambus had even greater control. It may also be that DRAM manufacturers engaged in collusive price fixing conduct that had greater impact on the market for DRAMs than any action taken by Rambus. And it may be that, as a result of collusive actions by DRAM manufacturers, Intel rejected the RDRAM. But Rambus has not shown that any of these issues are directly relevant and material in this proceeding. While proof of price fixing by DRAM manufacturers could show that higher prices downstream would not be entirely due to Rambus' conduct, it is immaterial to the issues in this case, including whether Rambus' conduct alleged in the Complaint could tend to injure competition. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

DOJ has demonstrated that discovery should be limited to protect the interests of the grand jury proceeding. Rambus has not demonstrated that the discovery it seeks concerning possible collusion among those DRAM manufacturers is 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. Accordingly, the parties to this proceeding are prohibited from conducting witness depositions on communications among DRAM manufacturers regarding pricing to DRAM customers.

III. Rambus' Request for a Stay

In the event that the DOJ's motion is granted, Rambus requests a stay of all deposition discovery and a continuance of the hearing date. This open ended request is denied. However, because fact discovery is currently scheduled to close on February 3, 2003, and because the

December 18, 2002 order issuing a temporary stay of discovery has delayed some discovery, the deadline for the close of discovery and all deadlines subsequent to that deadline will be extended by three weeks. A revised scheduling order will be issued.

CONCLUSION

In accordance with the Order Granting Motion of the United States Department of Justice to Limit Discovery Relating to the DRAM Grand Jury, issued on January 15, 2003, that motion is GRANTED.

ORDERED:

James P. Timony
Administrative Law Judge

Dated: January 15, 2003