UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Before The Honorable James P. Timony
Administrative Law Judge

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

RESPONSE OF MICRON TECHNOLOGY, INC. TO MOTION OF RAMBUS INC. TO COMPEL

Rambus has moved to compel non-party Micron Technology, Inc. ("Micron") to produce the following categories of documents in partial response to a subpoena *duces tecum*:

1. "All documents analyzing or describing the factors that influenced your DRAM pricing decisions between January 1, 1998 and June 18, 2002;"

2. "All documents that reflect or refer to communications with any other DRAM manufacturer about DRAM pricing;" and

3. "All documents that the company has provided to or received from the Department of Justice ("DOJ"), any grand jury, or any other person in connection with DOJ's investigation of alleged price fixing by certain DRAM chip manufacturers."

Micron estimates that these requests would call for production of hundreds of thousands of pages. They are massively overbroad and, as discussed below, minimally if at all relevant to any issue in this case. Indeed, they are extremely unlikely to yield information relevant to the Complaint or any legally cognizable defense. Rather, on their face they appear clearly intended to harass Micron. But even taking at face value the

assertions of Rambus in its motion, granting Rambus's motion would allow Rambus to conduct discovery for, and ultimately to conduct, a second "trial within a trial" on massively complex issues of no apparent relevance to the charge in the complaint that Rambus has monopolized and attempted to monopolize markets for synchronous DRAM technology through its fraudulent misconduct in an industry standard-setting body.

Micron does not contend that it is exempt from discovery in this case. To begin with, Micron has produced approximately 180,000 pages of documents to Rambus in private litigation between Micron and Rambus concerning Rambus's fraud on JEDEC, including Micron's claim that Rambus attempted to monopolize the markets for Synchronous DRAM Technology and Synchronous DRAMs. Micron has agreed that documents it produced to Rambus in that case can be used by Rambus in this proceeding. Rambus has also been provided with documents Micron has provided to Complaint Counsel in their investigation. In addition, Micron has been and is producing documents to Rambus in response to three subpoenas *duces tecum*, including the subpoena at issue in this motion, concerning topics related to JEDEC, Rambus's intellectual property claims, the technologies at issue in the case and possible alternatives to those technologies, and forecasts of the DRAM industry among other areas. Finally, Micron has agreed to produce five witnesses for deposition by Rambus, including its Chairman, President and Chief Executive Officer, its Vice President of Networking and Communications, its Executive Director – Advanced Technology and Strategic Marketing and two other technical employees.[1] The issue on this motion is whether Rambus needs yet additional

[1] Four of these witnesses have been listed on Complaint Counsel's preliminary witness list. Micron has moved to quash six additional deposition subpoenas served by Rambus.

discovery from Micron on the remote and extremely broad topic of DRAM pricing, and whether its need outweighs the burden and prejudice to Micron.

Micron is aware that Your Honor has ruled that discovery relating to DRAM pricing is relevant in denying the motion of Mitsubishi Electric & Electronics USA, Inc. ("Mitsubishi") to quash or narrow a subpoena from Rambus. We respectfully maintain that that ruling should not control the result here for the following reasons:

- Complaint Counsel have recently made clear that their case revolves around the markets alleged in the complaint, *i.e.*, the markets for DRAM *technology*, not DRAM chips.

- Rambus has had extensive discovery from Micron in the antitrust and patent litigation between Micron and Rambus covering the issues relevant to the Complaint in this case and Rambus's potential defenses, and is obtaining more discovery from Micron in this case.

- The discovery already taken by Rambus contains extensive information about Micron's costs, pricing and royalties, and Rambus is receiving additional material relating to the DRAM industry.

- Apparently unlike Mitsubishi, Micron is the subject of a pending grand jury investigation and Rambus is seeking documents that constitute proceedings before the grand jury.

FACTUAL BACKGROUND

A. Discovery Taken By Rambus in the Delaware Action

Rambus has already had extensive discovery from Micron on many of the factual issues raised in this case. On August 28, 2000, Micron filed an action against Rambus in the United States District Court for the District of Delaware, *Micron Technology, Inc. v. Rambus Inc.*, C.A. No. 00-792 (the "Delaware Action"). Rambus refers to this case in its motion as "patent litigation." Motion to Compel at 2 n.1. In fact, Micron has sued Rambus for violations of the Sherman Act, fraud, breach of contract, equitable estoppel

and other claims arising from the fact that, among other things, Rambus fraudulently failed to disclose patents and patent applications to JEDEC in violation of JEDEC's patent policy. Micron also seeks a declaration that certain Rambus patents are invalid, unenforceable and not infringed. Declaration of Richard L. Rosen, ¶ 3.

Rambus took extensive and far-ranging discovery from Micron in the Delaware Action. Over the course of more than a year and a half of intense discovery, Rambus issued several sets of document requests to Micron, containing over 200 numbered specifications (not counting subparts). In response to those requests, Micron produced approximately 180,000 pages of documents to Rambus. Rosen Decl. ¶ 4. In addition, Rambus served Micron with four sets of interrogatories containing 50 separate questions (not counting subparts), and took the depositions of some 49 witnesses, including 29 current or former Micron employees. Some of those depositions extended over two or three days, totaling over 250 hours of deposition testimony. *Id.*, ¶¶ 5-6. Rambus took the depositions of Micron's CEO, members of its Board of Directors, its chief counsel for patent litigation and licensing, its current and former JEDEC representatives, the executives who supervised those JEDEC participants, the Micron technical staff with expertise concerning the relevant technologies, and Micron's key marketing personnel. *Id.*, ¶ 6.

With the exception of a few outstanding issues, fact discovery has closed in the Delaware Action, and the case is essentially ready for trial.[2] *Id.*, ¶ 7. Rambus is represented by the same lead counsel in both the Delaware Action and this proceeding,

[2] The court has deferred the trial pending the Federal Circuit's ruling on the appeal in the related action between Rambus and Infineon Technologies AG, as many of the issues presented in the Delaware Action may be resolved adversely to Rambus under principles of collateral estoppel.

and Micron has agreed to allow Rambus to use documents produced in the Delaware Action in this proceeding. *Id.*, ¶ 8.

B. Rambus' October 4, 2002 Subpoena

Rambus served Micron with the Subpoena (which is dated August 20, 2002) on October 4, 2002. The Subpoena contains 67 specifications, some of which contain numerous subparts. Through a lengthy series of telephone conferences, the parties were able to reach agreement on Micron's compliance with the subpoena on issues other than those presented in this motion.[3] As a result, Micron has already produced over 20,000 pages of additional documents to Rambus and expects to produce tens of thousands more. Micron is also responding to two other subpoenas *duces tecum* served by Rambus. Rosen Decl., ¶ 9.

As originally drafted, Rambus's subpoena sought documents concerning virtually every aspect of Micron's pricing. When Micron questioned the relevance of those requests, Rambus responded that the complaint alleges – among other things – that Rambus' conduct has affected DRAM pricing and, therefore, Rambus is entitled to discovery relating to the effect of its conduct on DRAM prices. But, unlike its position in its motion, Rambus suggested that its purpose was quite narrow. Thus, its counsel wrote that she was willing "to significantly narrow our requests on this topic to capture the narrow issue regarding the effect of Rambus and Rambus's royalties on DRAM chip pricing." *See Id.* ¶ 10 and Ex. 1.

Based on this representation, Micron offered to respond to the one specification in the subpoena that actually is directed to the issue Rambus has identified as relevant –

[3] The parties were unable to reach agreement on one issue which was held in abeyance.

Specification 58, which seeks "[a]ll documents that support or relate to the proposition that royalties paid by the company to Rambus during the relevant pricing period had an impact on the sale price of the company's DRAM chips during the relevant pricing period." *Id.*, ¶ 12. But three days after suggesting that the issue was a "narrow" one, Rambus reversed course and demanded that Micron produce three broad categories of documents that potentially subsume many or all of the original 15 requests at issue:

1. "All documents analyzing, reflecting or describing the factors that influenced your DRAM pricing decisions between January 1, 1998 and June 18, 2002;"[4]

2. "All documents that reflect or refer to communications with any other DRAM manufacturer about DRAM pricing;" and

3. "All documents that the company has provided to or received from the Department of Justice ("DOJ"), any grand jury, or any other person in connection with DOJ's investigation of alleged price fixing by certain DRAM chip manufacturers."

See Exhibit 2 to Nguyen Declaration attached to Motion to Compel.

In a further effort to address Rambus' stated needs, Micron then proposed to produce documents sufficient to show, on a quarterly basis, Micron's DRAM prices, costs and royalties paid. *See* Nguyen Decl., Ex. 3. This would be in addition to internal and third-party forecasts, analyses and projections of the DRAM industry which will be produced pursuant to another of Rambus's subpoenas. Rambus rejected this proposal on November 12, 2002 (*see* Nguyen Decl., Ex. 4) and filed its motion to compel the following day.

[4] After Micron objected strongly to these demands, Rambus' only concession was to offer to remove the word "reflecting" from this category.

C. The Grand Jury Investigation

In June 2002, Micron and several other DRAM manufacturers announced that they had received subpoenas from a grand jury investigating possible anticompetitive conduct in the DRAM industry. *See* Rosen Decl., ¶ 15. That nonpublic investigation is currently ongoing. In addition, over 20 purported class actions have been filed against Micron and other DRAM manufacturers. To date, there has been no discovery in any of those cases. *Id.*, ¶ 16.

ARGUMENT

A. The Discovery Sought By Rambus Is Massively Overbroad, Not Directed At Any Relevant Issue In This Case, And Designed To Harass Micron

This case concerns the fraudulent misconduct by Rambus relating to its participation in the semiconductor industry standard-setting body known as JEDEC, and Rambus's attempt to extract royalties from DRAM manufacturers who produce products conforming to industry standards. Rambus claims that these products infringe its patents and has sought substantial royalties from DRAM manufacturers.[5] Some manufacturers have acceded to Rambus's demands and entered into license arguments with Rambus. Micron has not.

That Rambus's scheme, if successful, will increase the costs of Micron and other DRAM manufacturers is self-evident. Rambus is thus trying to redirect the focus of this case from its own conduct to the competitive behavior of the DRAM manufacturers who

[5] According to the Complaint, Rambus has obtained license agreements providing for royalties amounting to 3.5% of revenues for DDR SDRAM and 0.75% of revenues for SDR SDRAM. Complaint, ¶ 93. Rambus has also publicly asserted that it would demand even higher royalties from any manufacturer that chooses to litigate with Rambus, and may simply refuse to license any manufacturer that is unsuccessful in such litigation. *Id.*, ¶ 94.

are the immediate targets, and intended victims, of its scheme. It apparently wants to put the DRAM industry on trial for alleged price fixing. It should not be permitted to misuse discovery in this case in an attempt to contrive a speculative, remote and ultimately irrelevant defense, for several reasons:

- It would make what Rambus has already described as a "complex" case much more complicated.[6]

- It would impose a huge burden on Micron and other DRAM manufacturers to produce mountains of ultimately irrelevant evidence.

- Even if Rambus were able to establish that the conduct of DRAM manufacturers affected DRAM prices, that would not in any way refute the allegations of the Complaint that Rambus's conduct threatens to and has damaged competition in DRAM technology markets in a way that will raise the cost of such technology and the products that require it – and ultimately raise DRAM prices to intermediate and end users.

- Finally, in light of the total lack of relevance of the discovery, it is fundamentally unfair and improper to require Micron (and other DRAM manufacturers) to produce voluminous material regarding their pricing and competitive behavior while they are subjects of a grand jury investigation.

It is worth noting that Rambus's current position represents a substantial expansion of the theory that Rambus's counsel expounded to Your Honor at the prehearing conference. There, Rambus's counsel speculated – without any foundation – about whether DRAM manufacturers may have colluded *at JEDEC*. Transcript at 39-40 (copy attached as Exhibit D). Rambus was not arguing that that would constitute a defense to any of the charges in the Complaint, but as an illustration of the fact that JEDEC is "an entity that permits concerted activity by competitors." *Id.* at 40. Of

[6] Rambus Inc.'s Motion for Entry of Scheduling Order at 2 (filed Aug. 2, 2002). Interestingly, while Rambus listed many areas of potential discovery from non-parties in that motion, it did not identify the pricing behavior of DRAM manufacturers as an area on which it anticipated taking discovery.

course, if all Rambus is seeking is evidence concerning whether collusion has gone on at JEDEC, it already has all the discovery it needs. Micron has already produced a decade's worth of JEDEC-related material and is producing more in this case. Rambus has also had abundant discovery from Infineon, Hynix, other JEDEC members and JEDEC itself. It has taken depositions of dozens of JEDEC participants. To date, Rambus had not produced a shred of evidence to support its hypothesis of consipiratorial activity at JEDEC.

B. The Mitsubishi Ruling Is Not Controlling Here

Your Honor has ruled in connection with Mitsubishi's motion to quash that requests for documents relating to the factors driving DRAM pricing are relevant because the Complaint alleges "that Rambus's conduct has led to increased DRAM prices."[7] Complaint Counsel and counsel for Rambus have, however, had a recent exchange of correspondence that was not available to Your Honor in connection with the Mitsubishi motion. That exchange clarifies the theory of the Complaint and demonstrates that the pricing-related discovery sought by Rambus has little, if any, relevance to the issues in the case.

Complaint Counsel's November 19, 2002 letter to Rambus's counsel, a copy of which is attached as Exhibit A, calls attention to the fact that the relevant markets alleged in the Complaint are markets for DRAM *technology*, not DRAM *chips*:

> It appears to me that Rambus, by directing so much attention on the issue of downstream DRAM pricing, *is focusing on the wrong issue*, or at least an issue of subsidiary importance to the overall litigation. The primary anticompetitive effect alleged in the Commission's complaint is an increase in the prices, or royalties, paid for

[7] Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow Subpoena, at 5 (November 18, 2002).

> *synchronous DRAM technology*, in the relevant technology markets alleged in the complaint.

Letter from M. Sean Royall to Steven M. Perry, November 19, 2002, at 2 (copy attached as Ex. A) (emphasis added).[8] An increase in DRAM manufacturers' costs, as threatened by Rambus's conduct, likely would cause DRAM prices to increase, but that is not the principal focus of the Complaint. While the Complaint does allege, among other *threatened* effects, that Rambus's anticompetitive conduct could lead to price increases for synchronous DRAM chips sold in downstream markets:

> [S]uch downstream effects *fall outside of the relevant technology markets* pertinent to the Section 5 violations that the Commission's complaint has asserted against Rambus. Stated differently, the adverse competitive impacts on which the Commission's complaint against Rambus is directly predicated involve technology markets, not downstream product markets, *and consequently the presence or absence of proof of actual downstream effects is, in itself, in no way determinative of liability.*

Id. (emphasis added).

In other words, Rambus's purported defense that factors other than its conduct may have affected DRAM prices does not address the allegations of the Complaint and is a red herring. Thus, to the extent that Rambus is seeking "to understand the [DRAM] industry's pricing mechanisms",[9] that is not relevant to any triable issue in this case. Rambus is not entitled to conduct a fishing expedition through the files of customers or competitors simply to gain a better understanding of the markets when those markets are not at issue in the case. *See, e.g., Flowers Industries, Inc.*, Dkt. No. 9148, 1981 FTC

[8] Also attached as Exhibits B and C are copies of Mr. Royall's November 15, 2002 letter to Mr. Perry and Mr. Perry's reply dated November 18, 2002.
[9] Motion to Compel at 5.

LEXIS 117 at *12-13 (Sept. 11, 1981) (Timony, J.) (quashing respondent's subpoena in part where the requested discovery was aimed at an issue of "doubtful relevancy"). [10]

C. Each Of The Specific Categories Of Pricing-Related Documents Sought By Rambus Is Overbroad, Irrelevant And Impermissible

Furthermore, an examination of the specific categories of documents demanded by Rambus demonstrates that they are not being sought for the purpose of adducing relevant and admissible evidence in this case, but primarily to vex and harass Micron.

1. Documents Concerning the Department of Justice Investigation

Department of Justice investigations are confidential and nonpublic, and grand jury proceedings are secret. Thus, Rambus could not plausibly know how documents provided in the DOJ investigation of the DRAM industry could be relevant to any issue in this case. For this reason, and because such requests necessarily reveal proceedings before the grand jury, courts have rejected discovery requests aimed at documents provided in such investigations. *See, e.g., Alexander v. FBI*, 186 F.R.D. 102, 109 (D.D.C. 1998) (quashing a blanket request for production of all material produced to a grand jury); *Midwest Gas Servs. v. Indiana Gas Co.*, 2000 WL 760700 (S.D. Ind. 2000) (holding that "cloned discovery" is "irrelevant and immaterial unless the fact that particular documents were produced or received by a party is relevant to the subject matter of the instant case"); *Falstaff Brewing Corp. v. Kessler*, 489 F. Supp. 191 (E.D.

[10] Thus, Rambus's citation to cases allowing discovery from other market participants in FTC and other antitrust cases is irrelevant to the discovery sought here. For example, *Kaiser Aluminum & Chemical Co.*, Dkt. No. 9080, 1976 FTC LEXIS 68 (Nov. 12, 1976), was a merger case in which the respondent had an obvious need to collect data from competitors to refute the allegations of the complaint concerning potential effects of the merger on the market in which it competed with those third parties and on competitive conditions generally in the refractories business. Likewise, in *FTC v. U.S. Pipe & Foundry Co.*, 304 F. Supp. 1254 (D.D.C. 1969), the hearing examiner, the Commission and the district court all concluded that a respondent in a monopolization case had a right to discovery from a potential competitor to establish that its monopoly was honestly acquired and maintained. Here, Micron is providing Rambus with the discovery it would need to establish any legally cognizable defense to the Complaint.

Wis. 1980). As the Seventh Circuit stated in *United States v. Stanford*, 589 F.2d 285, 291 n. 6 (7th Cir. 1978), "A general request for 'all documents collected or received in connection with the investigation of antitrust violations …,' for example, would be in effect a disclosure of the grand jury proceedings; the documents are significant because they were before the grand jury." Thus, Micron should not be compelled to produce documents that may have been provided to the Department of Justice or the grand jury.[11]

2. Documents Relating to Micron's Pricing Decisions and Communications With Competitors

Rambus also seeks all documents "analyzing or describing" Micron's DRAM pricing decisions since January 1, 1998. Virtually all of Micron's business involves making and selling DRAMs. It has hundreds of customers, and prices are negotiated individually with most of them, in many cases more often than once a month. Rosen Decl., ¶ 19. Each of those separate negotiations generates documents discussing and describing the factors that went into determining the price to be quoted and the price eventually agreed to with the customer. *Id.*, ¶ 21. In addition, Micron establishes pricing guidelines for each of its products that do not determine actual sales prices but are used as part of the individualized negotiations. These guidelines change from time to time based on market conditions. *Id.*, ¶ 21. Thus, Rambus' demand would require Micron to conduct an extensive search of Micron's entire sales and marketing organization, both at headquarters and in numerous other locations, for documents describing literally thousands of pricing decisions. At least several dozen Micron sales and marketing employees, as well as others, could have such documents. *Id.*, ¶ 22. The number of

[11] Micron does not contend that the existence of the grand jury investigation means that its business documents are otherwise beyond the reach of discovery. But the attempt to force Micron to give Rambus what it has given the grand jury is impermissible.

pages of documents potentially responsive to these "narrow" requests would easily be in the hundreds of thousands and would far exceed the extensive discovery Rambus has already had in the Delaware Action.

As noted above, this has minimal, if any, relevance to this case. Indeed, Micron pays no royalties to Rambus, so it is difficult to see how Micron's internal communications concerning its pricing could produce any relevant evidence. The same applies to Rambus's request for documents relating to "communications with any other DRAM manufacturer about DRAM pricing". When the massive burden these requests would impose is weighed against the likely usefulness of the discovery, the balance tips decisively against Rambus.[12]

Rambus's pricing-related requests should be denied on grounds of burden and remoteness to relevance alone. But Rambus' steadfast refusal to drop or even modify these demands is telling. It strongly suggests that these requests are not being propounded for the purpose of trial preparation, but to harass Micron and others. As one court stated in denying discovery of third parties:

> "It is axiomatic that a party cannot take [discovery] for purposes unrelated to the lawsuit at hand." [quoting *Jennings v. Peters*, 162 F.R.D. 120, 122 (N.D. Ill. 1995)]…. In conjunction with my fears that Echostar is actually investigating the parties for possible anti-trust litigation, rather than merely preparing for trial in this lawsuit, I am of the opinion that Echostar's efforts at discovery from non-parties should be closely regulated.

[12] Rambus's assertion that there is no additional burden associated with this request because the documents it seeks have already been produced to the Department of Justice and will be produced again in class action litigation must be recognized for what it is – rank speculation.

Echostar Communications Corp. v. News Corp Ltd., 180 F.R.D. 391, 396 (D. Colo. 1998). Thus, despite the existence of a protective order, a motion to compel was denied in pertinent part. The same should occur here.

Rambus has had abundant discovery from Micron in prior litigation, all of which is available for use in this case, as well as yet more document and deposition discovery in this case. But there is a point at which the burdens on a non-party exceed the expected usefulness of discovery in allowing a respondent to present a defense to the charges in the case. Rambus's current requests go far beyond that point.

CONCLUSION

For the foregoing reasons, Rambus's motion to compel production of pricing-related documents should be denied.

Respectfully submitted,

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Dated: November 25, 2002