

TRADE COMM.

711326
SECRETARY

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

COMPLAINT COUNSEL'S STATEMENT IN PARTIAL SUPPORT OF DEPARTMENT OF JUSTICE'S MOTION TO INTERVENE AND STAY DISCOVERY

The Antitrust Division of the U.S. Department of Justice ("DOJ") has moved to intervene in this proceeding and sought leave to file a motion to limit discovery to avoid potential interference with an ongoing federal grand jury investigation focusing on the pricing and output of dynamic random access memory ("DRAM") devices. See United States Department of Justice's Motion to Intervene and Stay Discovery (Dec. 17, 2002) ("DOJ Motion"). The DOJ Motion also seeks interim relief limiting discovery in this proceeding until such time as its proposed motion seeking permanent relief of a comparable nature has been resolved. See *id.* DOJ's Motion focuses specifically on depositions of persons employed by certain DRAM manufacturers, pursuant to subpoenas issued by Respondent Rambus Incorporated. For the reasons explained herein, Complaint Counsel supports the DOJ Motion in substantial part but seeks to expedite the schedule proposed by the DOJ.

First, as concerns DOJ's request to intervene, Complaint Counsel believes that this request should be granted. The need to preserve the secrecy and integrity of a federal grand jury

proceeding is obviously a matter of considerable importance. Complaint Counsel has no desire to see this action, or discovery related to this action, lead to such interference. Moreover,

is not done, however, because DOJ's interest in this case is not to prevent DOJ
request for intervention can this be achieved.

Second, as concerns DOJ's request for interim relief effectively barring any party from probing issues of relevance to the grand jury's work until such time as Your Honor reaches a final resolution of this matter, again, Complaint Counsel believes that DOJ's request should be granted. Complaint Counsel does not believe that interim limitations on discovery of this sort will impede appropriate discovery efforts in this case. Nor should such interim limitations require the postponement or rescheduling of any depositions. In the latter connection, we appear to be in agreement with Rambus. As Your Honor knows, even prior to the filing of DOJ's

Response"). Complaint Counsel agrees with Rambus that the deposition of Mr. Appleton should proceed notwithstanding the pendency of any DOJ motion to limit discovery, and believes that

any other depositions that have been scheduled, or may in the future be scheduled, should also

proceed subject to the interim limitations requested by DOJ, until such time as Your Honor has had an opportunity to enter a final ruling.

reserve the bulk of our comments until after the DOJ has filed its proposed motion to limit discovery, assuming Your Honor grants the motion for leave. For present purposes, we would simply note that the discovery that is at issue here – that is, discovery conducted by Rambus

marginal, if any, relevance to this case. See Letter from Mr. Sean Royall to Steven M. Perry (November 15, 2002) (attached hereto as Exhibit A).

Finally, as concerns DOJ's request to be given until January 10, 2003, to prepare and file its proposed motion to limit discovery, this aspect of DOJ's Motion Complaint Counsel does not support. Our hope, as noted above, is that this issue can be promptly and efficiently resolved, not only so as to ensure that this action causes no improper interference with the work of the grand jury, but also to ensure that DOJ's intervention causes no significant interference with discovery in this case. For these reasons, Complaint Counsel would like to see this matter resolved on a more expedited schedule than that proposed by the DOJ, and we are confident that this can be done.

Complaint Counsel thus proposes that DOJ be directed to file its motion to limit discovery by December 23, with a response by Rambus (if any) by December 30, 2002. We would hope that this schedule would permit Your Honor to make an expedited decision on

schedule is reasonable, we believe, as both Rambus and DOJ are well situated to file their papers

December. Furthermore, counsel for DOJ indicated to Complaint Counsel in conferring about its anticipated intervention that it planned initially to file its motion to limit discovery by December 20, or at the latest by December 23. Finally, DOJ has likely already confronted many of the same issues in seeking to stay discovery in civil litigation relating to DRAM manufacturers. *See* DOJ Motion 3. In contrast, the schedule proposed in the DOJ Motion is unreasonably leisurely. DOJ

uncertainty as to the permissible scope of inquiry.¹

¹ Even prior to the filing of these motions by Rambus and the DOJ, Complaint Counsel was concerned about the current status of discovery. Although the parties have a total of

all parties. Nevertheless, Complaint Counsel remains committed to the Revised Scheduling Order entered by Your Honor in this matter. Complaint Counsel recognizes that, given the length of the Part III Hearing that this matter is likely to require, the revised schedule gives Your Honor very little time to complete your Initial Decision within the one year deadline established

An expedited resolution of this matter also minimizes any possible prejudice to Rambus and third parties from the interim relief sought by DOJ. An extended timetable for resolution could interfere with Rambus's discovery or create unreasonable hardships for third parties – e.g., in the event Your Honor orders no relief or relief different from DOJ's proposed interim relief

this might necessitate the need to redene some witnesses on issues not previously covered

For these reasons, Complaint Counsel urges Your Honor to grant DOJ's motion in substantial part. Your Honor should grant DOJ's motion to intervene, its motion for leave to file

a motion to limit discovery, and its motion to limit discovery in the interim, but should deny its

Rambus's response by December 30, 2002. If Your Honor grants DOJ's motion for leave to file a motion to limit discovery, Complaint Counsel requests that it be provided the opportunity to present its views regarding DOJ's requested limitation on discovery by December 30, 2002.

by Rule 3.51(a) of the Commission's Rules of Practice. Any delay in the scheduling and taking

Complaint Counsel respectfully requests that Your Honor decide upon that motion as expeditiously as possible once all permitted filings have been made.

Respectfully submitted,



M. Sean Royall
Geoffrey D. Oliver
Andrew J. Heimert

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION

(202) 326-3496 (facsimile)

COUNSEL SUPPORTING THE COMPLAINT

Dated: December 18, 2002



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

Bureau of Competition

M. Scott Powell

(202) 326-3663

November 15, 2002

Mr. Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560

Dear Steve,

This letter responds to your letter of November 5, addressed to me and Geoff Oliver, concerning Rambus's efforts to obtain third-party discovery from major DRAM manufacturers relating to DRAM module and chip pricing. It is not our intention, as you know, to intervene or interfere in any way with Rambus's discovery-related dealings with third parties participating in

raise issues relating to DRAM module and chip pricing. Our response is that yes, this assumption is correct, although we believe that this response may require some clarification.

As your letter notes, we have contended in this case that Rambus's challenged conduct has resulted in, or otherwise threatens, various forms of injury to competition. In this regard, we contend that Rambus's conduct not only has increased the technology-related prices (or royalties) paid by synchronous DRAM manufacturers, but also that such conduct threatens to cause increases in the prices of synchronous DRAM devices themselves as well as downstream

documents comment on the potential for such pass through to occur, we believe that such documents may be highly relevant to our contentions.

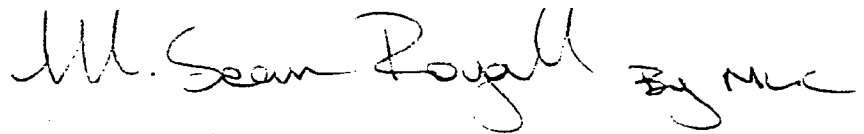
On the other hand, in our view, documents that simply embody or record pricing-related data for DRAM modules or chips are far less likely to be relevant. for the following basic reason:

producers may bid prices down in response to competition from others. As a consequence, even though Rambus's conduct has, among other things, raised the technology-related costs of synchronous DRAM manufacturers – in particular, those manufacturers from which Rambus has been successful in securing license agreements – it is not likely that these DRAM manufacturers would be able to unilaterally increase the prices at which their products are sold, or that any such increases would be detectable from an analysis of pricing data over the past 1-2 years (that is, since Rambus began collecting royalties on synchronous DRAM devices). This is not to say that

Moreover, in the event that Rambus succeeded in enforcing its patent rights against all or substantially all synchronous DRAM manufacturers, this would likely precipitate swifter effects in terms of downstream price increases. Nevertheless, for the reasons explained above, we do

likely to yield anything useful in this case, nor do we presently plan to conduct – or have our

dispose the matter further, please let us know.

Handwritten signature of M. Sean Royall in cursive, followed by the initials "By MLC".

M. Sean Royall
Deputy Director

cc: Rich Rosen, Esq.

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

[PROPOSED] ORDER

Upon consideration of the Motion of the United States Department of Justice, Antitrust Division ("DOJ") to Intervene and Stay Discovery Pending a Ruling on a Motion to Limit Discovery Relating to the DRAM Grand Jury, dated December 17, 2002.

IT IS HEREBY ORDERED that the DOJ's Motion to intervene is GRANTED.

IT IS FURTHER ORDERED that the DOJ has leave to file a Motion to Limit Discovery Relating to the DRAM Grand Jury, later than December 23, 2002. Defendant's and Plaintiff's Counsel's Responses thereto, if any, shall be filed by December 30, 2002.

IT IS FURTHER ORDERED that the DOJ's request for a limited stay of discovery relating to the DRAM investigation is granted and that, pending the Court's ruling on the DOJ's Motion to Limit Discovery Relating to the DRAM Grand Jury: (1) no party may question any deposition witness regarding any contacts or communications between DRAM manufacturers regarding pricing to DRAM customers; and (2) no party may conduct any discovery relating to

any contacts or communications with the DOJ or the grand jury relating to the ongoing DRAM grand jury investigation.

James P. Timony

Date: _____

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on December 18, 2002, I caused a copy of the attached, *Complaint Counsel's Statement in Partial Support of Department of Justice's Motion to Intervene and Stay Discovery*, to be served upon the following persons:

by hand delivery to:

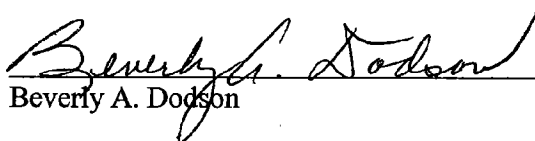
Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by facsimile transmission and overnight courier to:

A. Douglas Melamed, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1402

Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated


Beverly A. Dodson