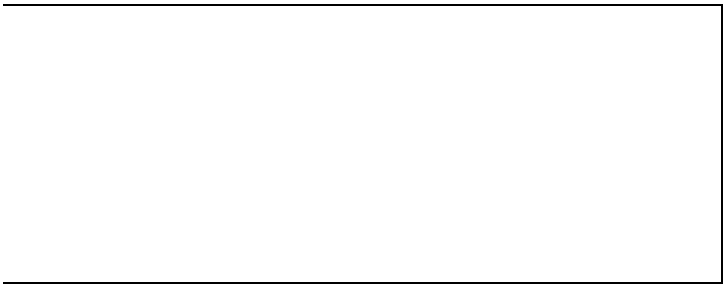
UNITED STATES OF AMERICA



adding unneeded complication to this proceeding and precipitating unnecessary delays. As explained further below, Complaint Counsel therefore respectfully urges Your Honor to grant DOJ's request for limitations on discovery in this action, and to do so without agreeing to Rambus's invitations for delay.

A. The Discovery That Rambus Seeks Is Irrelevant to This Action and Any Limitation on Such Discovery Will Not Prejudice Rambus's Defense in This Case

In the August 2, 2002, Scheduling Hearing, Complaint Counsel cautioned that Rambus and its lawyers would likely seek to defend against the Commission's claims by "pointing fingers at others," just as it has attempted to defend against allegations of fraud and other misconduct in related patent litigation. *See* Aug, 2, 2002, Tr. at 29. As Your Honor can see, that strategy now is being employed in this case. Indeed, Rambus has made it clear that – if allowed – one of its principal lines of defense in this action will be to point fingers at downstream DRAM makers, alleging that such companies may have engaged in inappropriate or even illegal conduct, as if that somehow provided a justification for Rambus's own wrongdoing.

With this in mind, Rambus has subpoenaed virtually all of the companies that make DRAM products worldwide, seeking among other things to capitalize on the fact that some of these companies may currently be the subjects of an unrelated DOJ antitrust investigation probing the possibility that such companies may have anticompetitively coordinated on the output or pricing of DRAM chips. Initially, Rambus sought to defend its discovery into DRAM output and pricing on the theory that it needed such information in order to respond to the Commission's claims of downstream price effects resulting from Rambus's anticompetitive conduct. *See* Letter from Steven M. Perry to M. Sean Royall and Geoffrey D. Oliver, at 1 (Nov. 5, 2002) (attached hereto as Exhibit A). Yet, in response to inquiries from Rambus's lawyers, Complaint Counsel has explained that this is not a valid justification for such

allegations in this case. Yet Rambus now contends that there is another reason to justify such discovery. Rambus's argument now is not that this discovery is directly relevant to the Commission's case. Rather, Rambus now argues that it is indirectly relevant inasmuch as it may have some (as yet unexplained) connection to a defense that Rambus hopes to make, focusing on what appear to be highly speculative allegations that DRAM makers may have somehow acted in a coordinated way to block Rambus's technology from being widely adopted within the memory industry.[1] How should Your Honor respond to this theory to support Rambus's requested discovery concerning DRAM pricing, which is doubly removed from any possible relevance to this proceeding? Complaint Counsel submits that this matter can be resolved quite easily, based on well established legal doctrines concerning the relevance and admissibility in an antitrust suit of evidence relating to the alleged wrongdoing of third parties.

The Supreme Court long ago established that "unclean hands" is not a permissible defense to liability in an antitrust suit. As the Court explained in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, the "alleged illegal conduct of [plaintiff], however, could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured." 340 U.S. 211,

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[1] This is not the first time that Rambus has alluded to the notion that DRAM makers may have coordinated in an effort to somehow disadvantage Rambus's technology. In his deposition in the *Infineon* case, Rambus's Chairman, William Davidow, repeatedly asserted that some form of coordination had occurred. Yet, at the same time, he was forced to admit repeatedly that his views in this regard were based on nothing more than rank speculation. *See* January 31, 2001, Deposition of William Davidow, *Rambus Inc. v. Infineon Technologies AG*, No. 3:00CV52 (E.D. Va.) (attached hereto as Exhibit C), at 85 ("It's my speculation that a group of manufacturers . . . have conspired . . . that they have . . . colluded to undermined the success of RDRAMs."); *id.* at 40 ("I have more just hearsay evidence of this – that the industry began to collude against Rambus."); *id.* (acknowledging that this assertions were "purely a speculation on my part"); *id.* at 41 ("I don't have factual data, but I'm reflecting a lot of gossip."); *id.* at 86 ("This is all speculation on my part.").

214 (1951), *overruled on other grounds, Copperweld C*

U.S. 752 (1984) (reversing earlier cases holding wholly owned subsidiaries capable of conspiring with parent companies).[2] Accordingly, an antitrust defendant may not point to the anticompetitive or otherwise unlawful actions of a plaintiff to excuse its own anticompetitive conduct. *See, e.g.*, *Burlington Industries, Inc. v. Milliken & Co.*, 690 F.2d 380, 388 (4th Cir. 1982) (“*Kiefer-Stewart*

[2] The rejected defense in *Kiefer-Stewart* bears a remarkable resemblance to the one Rambus seeks to assert here. The defendants, liquor producers accused of price fixing, sought to defend their conduct by pointing to the plaintiff’s alleged participation in a conspiracy among liquor distributors to fix resale prices. The Supreme Court held that the trial court correctly ruled that any conspiracy in which the plaintiff was a part does not provide a defense. 340 U.S. at 214.

Of course, this obviously is not a private action instituted by a DRAM maker. It is a

to escape the consequences of its own wrongdoing, or even to attempt to do so through the type of discovery at issue here, by pointing to the alleged misdeeds of others.

The Supreme Court and other lower courts not only have consistently applied the principles discussed above to exclude or strike "unclean hands" defenses. *See, e.g.*, *Southern Motor Carriers*, 439 F. Supp. at 52 (striking "unclean hands" defense directed at government). But in addition, courts have intervened early on to block discovery aimed at developing such defenses, in order to eliminate the wasteful and unnecessary expenditure of time and resources. *See, e.g., Chrysler Corp.*, 596 F. Supp. at 420 ("Permitting discovery and the development of the case under the unclean hands defense 'would serve only to divert and protract [the] litigation, with concomitant expense.'") (alteration in original) (emphasis added). In short, it is entirely appropriate to preclude Rambus from engaging in discovery into matters that would support the type of unclean-hands argument that it seeks to develop, because such an argument is entirely misplaced – and, consistent with substantial precedent, should not

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C. Conclusion

Because the discovery Rambus seeks is not relevant to this matter, either as to a defense or as to witness bias, and because DOJ's requested discovery limitations will not in any way prejudice Rambus's ability to develop its defenses in this proceeding, Complaint Counsel respectfully requests that Your Honor grant DOJ's Motion, and that Your Honor do so without agreeing to Rambus's invitations to delay.

Respectfully submitted,

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