

PUBLIC

UNITED STATES OF AMERICA

The credibility issue raised by the possibility of DRAM manufacturer collusion is itself sufficient to require ongoing discovery by Rambus in this area. But that is not the only reason to deny the Justice Department motion or, at the very least, to grant the Justice Department's alternative requested relief of a stay of this case until the grand jury investigation is completed. There are other, independent reasons as well that go directly to the substance of the FTC's complaint in this case and Rambus's defenses.

Rambus submits this brief reply to Complaint Counsel's Response for the limited purpose of explaining how evidence of DRAM manufacturer collusion, which Complaint Counsel no longer dismiss as mere "speculation,"² is likely to be relevant to this case for these additional, substantive reasons. On this issue, Complaint Counsel's Response is largely an effort at misdirection because it does not address the most important respect in which the evidence sought to be discovered by Rambus bears on the central issues of this case.

In order to prevail in this case, Complaint Counsel must prove both (1) that Rambus engaged in anticompetitive conduct within the meaning of the antitrust law and (2) that that conduct caused Rambus and Rambus's patents to have more market power than they otherwise would have had. The second requirement, the causation requirement, requires Complaint Counsel to prove that, if Rambus had made the disclosures to JEDEC that they allege "commonly understood" JEDEC rules required Rambus to make, then technologies that did not infringe Rambus patents would have become dominant in DRAM manufacture instead of Rambus's technologies. Complaint Counsel is unlikely to prove such causation for several

² See Complaint Counsel's Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury at 4 n.1 (January 3, 2003).

independent reasons, including the fact that there were and are no viable, noninfringing alternatives.

The evidence of collusion among DRAM manufacturers that Rambus seeks to discover bears directly on the causation issue. As Rambus explained in its January 3 memorandum (“Memorandum”), that evidence is likely to show (i) that whether DRAM technologies succeed or fail commercially is determined by the market, not by JEDEC; (ii) that in the mid-‘90s Rambus’s RDRAM technology appeared likely to become the de facto industry standard, largely because it was preferred by Intel and even though it has never been standardized by JEDEC; (iii) that the DRAM manufacturers feared that result because RDRAM would have diminished their role in the development of the DRAM industry for technological reasons and because it would have diminished their ability to control DRAM prices; (iv) that SDRAM and DDR SDRAM were preferred by the manufacturers for these reasons, even though they understood that there was a risk that Rambus would be entitled to royalties on those technologies; and (v) that the DRAM manufacturers colluded (possibly in violation of the antitrust laws) both on DRAM prices and to force Intel to stop supporting RDRAM and to support SDRAM and DDR SDRAM instead. See Memorandum at 12-20.

The evidence of collusion that is the subject of the Justice Department motion bears on all of this, and most directly on points (iii) and (v) above. In other words, the evidence could be important to showing that Rambus’s conduct at JEDEC did not cause Rambus or its patents to have any additional market power and that the success of SDRAM and DDR SDRAM was the result, instead, of deliberate choices made by th

willing to support those technologies, even at the risk that they were owned by Rambus, because the manufacturers had bigger fish to fry – stopping RDRAM.

Complaint Counsel's Response purports to address the reasons set forth in Rambus's

be stayed until Rambus can be permitted to pursue this important discovery. A proposed order is attached.⁴

Respectfully submitted,

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January 8, 2003

⁴ The proposed order also provides for an extension of the schedule by approximately three weeks because of the delays already caused by this matter.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on January 8, 2003, I caused a true and correct copy of *Rambus Inc.'s Corrected Reply to Complaint Counsel's Response Regarding Motion by the Department of Justice to Limit Discovery* to be served by facsimile at 415-436-6687 and overnight delivery to Niall E. Lynch at the United States Department of Justice, Antitrust Division, 450 Golden Gate Avenue, Room 10-0101, San Francisco, California 94102-3478, and on the following persons by hand delivery:

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