PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

RESPONSE BY RAMBUS INC. TO MICRON TECHNOLOGY INC.'S REQUEST THAT THE COURT RECONSIDER ITS APRIL 21, 2003 ORDER REGARDING COLLUSION AMONG DRAM MANUFACTURERS

I. INTRODUCTION

On the evening of June 17, 2003, counsel for Rambus Inc. ("Rambus") received a copy of a letter from counsel for Micron Technology, Inc. ("Micron") addressed to Your Honor. In that letter, Micron's counsel requested that Your Honor reconsider your April 21, 2003 Order on the parties' various motions *in limine*. In particular, Micron asks Your Honor to rule, in advance of the expected testimony this Friday by Micron CEO Steve Appleton, that Rambus be foreclosed "from questioning any Micron witnesses at trial concerning . . . communications among DRAM manufacturers relating to pricing to DRAM customers."[1]

Micron's request has no merit and should be rejected, for at least three reasons:

- The Department of Justice, although well aware of this trial and of Your Honor's April 2003 ruling, has *not* intervened to argue that the trial might in any way interfere with any grand jury's investigation. Micron has neither the standing nor the credibility necessary to argue that Rambus's questioning of Micron witnesses might "undermine the grand jury's work."
- Micron is also in no position to argue what is or is not "relevant to Rambus's defense." As demonstrated below, Complaint Counsel has made it very clear that they hope to obtain findings of fact on the issue of why RDRAM failed to become the predominant memory device in the late

[1] *See* Arnold & Porter June 17, 2003 letter, p. 4 (attached). Micron also asks the Court to bar Rambus from inquiring about communications between Micron and the DOJ regarding the pending grand jury investigation of the DRAM industry. Rambus has no intention of asking Micron's witnesses about that subject.

1990's. The findings sought by Complaint Counsel relate to the purportedly high cost of RDRAM. The prejudice to Rambus were Your Honor to foreclose its ability to respond to Complaint Counsel's case is thus even more apparent than it was when Your Honor denied Complaint Counsel's motion to bar evidence of collusion.[2]

- Micron's request is also untimely. Micron has known of Your Honor's April 2003 order, and of the subpoenas directed to its witnesses, for months. Sending a letter to Your Honor on the eve of Mr. Appleton's testimony is improper both procedurally and as a matter of due process.

In short, Your Honor should reject Micron's untimely and meritless request to bar Rambus's questioning on collusion issues.

II. ARGUMENT

Rambus submitted a twenty-page brief on April 11, 2003 in response to Complaint Counsel's Motion in Limine to Bar Presentation of Testimony and Arguments Regarding Purported Collusion Among DRAM Manufacturers. Rambus will not repeat the arguments made in that brief. Rambus will instead focus on the trial testimony in this case and on the reasons why Micron's request would be prejudicial to Rambus's ability to obtain a fair trial.

[2] Rambus also notes that as Your Honor pointed out in your April 2003 Order, a decision about relevance would be better made "with the benefit of the greater context available from trial." Your Honor referenced, in particular, the need to hear the testimony of Complaint Counsel's economist, Mr. McAfee. Mr. McAfee has not yet testified.

As Your Honor is aware, Complaint Counsel have attempted to present evidence in their case-in-chief that the Rambus memory device, RDRAM, failed to become the predominant memory device because it failed *on its merits* because of the allegedly high costs inherently associated with it. In his opening statement, for example, Mr. Royall argued that RDRAM had failed to compete successfully with JEDEC standard devices because the latter "were cheaper" and because they had "provided the DRAM marketplace with exactly what it desired, low-cost incremental additions to the earlier generation of conventional DRAMs." Trial Transcript, vol. 1 at 53:1-2 and 72:20-23. Mr. Royall then asserted that it was RDRAM's purported inability to compete in the marketplace that "triggered Rambus's decision to play its JEDEC IP card.. . ." *Id*. at 73:6-7.

Complaint Counsel have also solicited testimony during their direct examination of numerous witnesses about the industry's desire for "low cost" memory devices. *See, e.g.*, Trial Transcript, vol. 4 at 823:18 (testimony by Micron employee E3g(r TD 0 b empiam320.25 -1

927274.1

device. *See, e.g.*, Trial Transcript, vol. 24 at 4416:23-25 (testimony by Infineon employee Martin Peisl that the RDRAM had "a higher price which was based on the higher cost structure because the chip was bigger than the standard DRAM and there were increased test costs. . ."); vol. 13 at 2364:24-2365:3 (testimony by Hewlett-Packard employee Jackie Gross that "[i]t was our impression that the cost[s] to manufacture RDRAM were higher than the costs to manufacture the alternative technologies"); vol. 19 at 3697:15-17 (testimony by AMD employee Richard Heye that "every memory vendor that I spoke to would tell me that Rambus had a higher cost structure on a per part basis than DDR.").

In short, the price of RDRAM, and the purported reasons for the relative difference between the RDRAM price and the price of competitive memory devices, are issues that Complaint Counsel have repeatedly raised in their case-in-chief. In addition, if the expert report supplied by Complaint Counsel's economist is any guide, counsel intend to solicit opinion testimony from him that is based upon this fact testimony. Complaint Counsel also apparently intend to ask Your Honor for findings on these issues, and they apparently intend to argue to Your Honor that Rambus's efforts since 1999 to enforce its valid patents were motivated by, and were an anti-competitive response to, Rambus's purported inability to compete in an open and competitive marketplace.

It would thus be fundamentally unfair to prevent Rambus from developing evidence that the industry failed to adopt RDRAM not as a result of any higher cost structure inherent to the RDRAM device, but rather as the result of collusion among DRAM manufacturers to restrict the supply and raise the price of RDRAM. Such

evidence would largely, if not entirely, refute the conclusion by Complaint Counsel's economist that Rambus' conduct resulted in competitive harm, and it would refute Complaint Counsel's argument that Rambus's motives in attempting to license its valid patents were anti-competitive.

III. CONCLUSION

For the reasons stated above and in Rambus's previous brief on these issues, Micron's request that Your Honor reconsider your April 21, 2003 order on the parties' motions *in limine* should be rejected.

DATED: June 19, 2003 ____

Gregory P. Stone
Steven M. Perry
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100
(213) 687-3702 (facsimile)
(202) 663-6158
(202) 457-4943 (facsimile)

A. Douglas Melamed
Kenneth A. Bamberger
WILMER, CUTLER & PICKERING

(202) 663-9100

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

CERTIFICATE OF SERVICE

I, James M. Berry, hereby certify that on June 19, 2003, I caused a true and correct copy of *Response by Rambus Inc. To Micron Technology Inc.'s Request That The Court Reconsider Its April 21, 2003 Order Regarding Collusion Among DRAM Manufacturers* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire Chief Administrative Law Judge Federal Trade Commission, Room H-112 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	M. Sean Royall, Esq. Deputy Director, Bureau of Competition Federal Trade Commission, Room H-372 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580
Donald S. Clark, Secretary Federal Trade Commission, Room H-159 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	Malcolm L. Catt, Esq. Attorney Federal Trade Commission 601 New Jersey Avenue, N.W. Washington, D.C. 20001
Richard B. Dagen, Esq. Assistant Director, Bureau of Competition Federal Trade Commission 601 New Jersey Avenue, N.W. Washington, D.C. 20001	William J. Baer, Esq. Arnold & Porter 555 Twelfth Street, N.W. Washington, D.C. 20004-1206

____

James. M. Berry