

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman  
Pamela Jones Harbour  
Jon Leibowitz  
William E. Kovacic  
J. Thomas Rosch



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In the Matter of  
**RAMBUS INC.,**  
a corporation.

Docket No. 9302

**MOTION OF RESPONDENT RAMBUS INC. FOR LEAVE TO FILE RESPONSE TO  
BRIEF OF AMICI CURIAE MICRON TECHNOLOGY, INC., SAMSUNG  
ELECTRONICS CORPORATION, LTD., AND HYNIX SEMICONDUCTOR, INC.**

As explained in Rambus's Opposition to the Motion by Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. for Leave to File Brief as Amici Curiae, the Commission should reject the proposed brief of amici curiae ("Amicus Brief") as untimely and needlessly repetitive of Complaint Counsel's filings. In the alternative, Rambus hereby moves for leave to file the attached Response to the Amicus Brief.

The Amicus Brief misconstrues the effect of the Commission's Order, misconceives the scope of the Commission's remedial authority, and misstates both the state of the DRAM industry and the potential impact of the Order on Rambus and that industry. Rambus therefore believes a responsive submission would materially aid the Commission in understanding the issues before it.

Accordingly, if the Commission grants the Amici's motion for leave to file their Amicus Brief, Rambus submits that the Commission should also accept the attached Response to the Amicus Brief.

Respectfully submitted,



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Gregory P. Stone  
Steven M. Perry  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071-1560  
(213) 683-9100

A. Douglas Melamed  
Paul R.Q. Wolfson  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 663-6000

Attorneys for Respondent Rambus Inc.

March 9, 2007

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**[PROPOSED] ORDER GRANTING LEAVE TO RESPONDENT  
RAMBUS INC. TO FILE RESPONSE TO BRIEF OF *AMICI CURIAE*  
MICRON TECHNOLOGY, INC., SAMSUNG ELECTRONICS  
CORPORATION, LTD., AND HYNIX SEMICONDUCTOR, INC.**

Upon consideration of Respondent Rambus Inc.'s Motion for Leave to File a Response to the Brief of Amici Curiae Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. in Opposition to Rambus's Motion to Reconsider the Commission's Remedy Order in the Matter of Rambus Inc.,

**IT IS ORDERED** that Respondent's motion is **GRANTED**. The Response attached to Respondent's motion shall be deemed timely filed as of the date of this Order.

By the Commission.

Donald S. Clark  
Secretary

SEAL

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BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of

**RAMBUS INC.,**

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**RESPONSE OF RAMBUS INC.  
TO BRIEF OF *AMICI CURIAE* MICRON TECHNOLOGY, INC.,  
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SEMICONDUCTOR, INC.**

MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071  
(213) 683-9100

WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, D.C. 20006  
(202) 663-6000

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## INTRODUCTION

Respondent Rambus Inc. (“Rambus”) respectfully submits this Response to the Brief of Amici Curiae Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. in Opposition to Rambus’s Motion to Reconsider the Commission’s Remedy Order in the Matter of Rambus Inc. (“Amicus Brief”). The Amicus Brief is devoted almost entirely to one argument: that the Commission should prohibit Rambus from seeking royalties or damages above Maximum Allowable Royalty (MAR) rates even with respect to use of Rambus’s technology (whether licensed or not) occurring *before* the effective date of the Commission’s Order. Such a result would contradict the plain language of the Commission’s Order, exceed the Commission’s remedial authority, and finds no support in sound policy or the record. *See* Reply of Respondent Rambus Inc. in support of its Petition for Reconsideration of the Commission’s Final Order (“Rambus PFR Reply”) 2-5.<sup>1</sup>

### **I. AMICI FAIL TO RESPOND TO RAMBUS’S PLAIN READING OF THE COMMISSION’S ORDER OR TO ACKNOWLEDGE ITS PROSPECTIVE OPERATION.**

The Commission has made clear that the remedy in this case is intended to provide relief that is “prospective only.” Opinion of the Commission on Remedy (“Remedy Op.”) 7; *see also*

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<sup>1</sup> Amici appear to agree with Rambus (and Complaint Counsel) that Rambus should not be required to refund any royalties that Rambus has already collected under existing licenses. *See* Amicus Brief 12; *see also* Complaint Counsel’s Response to Rambus’s Petition for Reconsideration (“CC Response”) 1 n.1 (agreeing “in principle” that no refunds are required); Rambus’s Petition for Reconsideration (“Rambus PFR”) 2-5. However, one of the amici has recently taken the opposite position before a federal district court. *See Hynix v. Rambus*, Case No. CV 00-20905-RMW, Hearing Tr. 22-23 (N.D. Cal. Feb. 16, 2007) (attached as Ex. 2 to Amicus Brief) (The Court: “Do you think . . . that someone who has been paying pursuant to a license can now . . . get money back?” Hynix: “Yes, we think that’s what the Commission meant when it talks about rescission.”). The amici’s contradictory position highlights the need for the Commission to make clear that its Order does not require such refunds by deleting the word “rescind” from Paragraph IV.A of the Order. *See* Rambus PFR 2-5.

Complaint Counsel’s Opposition to Rambus’s Motion to Stay 18 (filed July 15, 2002) (acknowledging that the “Commission seeks only prospective relief” in this matter). For that reason, the Commission’s Order limits Rambus’s ability to obtain royalties above MAR rates only with respect to “manufacture, sale, or use” of infringing products “after the date this Order becomes final.” Final Order Paragraph IV.A.; *see also id.* Paragraph VI (ordering Rambus to cease efforts in which the company, “*for periods after this Order becomes final*, is seeking relief that would result in payments” in excess of MAR rates). Further, Paragraph I.J of the Order sets forth the “Maximum Allowable Royalty Rates” for SDRAM and DDR SDRAM, starting with the “First Royalty Period”; Paragraph I.D in turn defines “First Royalty Period” as “the period that begins on the date this Order is issued.” This language indicates that the Commission did not intend the Maximum Allowable Royalty Rates in the Order to apply to pre-Order use of Rambus’s technologies.<sup>2</sup> Even Complaint Counsel acknowledge that, under the Commission’s Order, the bar against Rambus’s collection of above-MAR royalties is tied to “the timing of third-party conduct,” *i.e.*, whether the use of Rambus’s technologies occurs before or after the effective date of the Order. CC Response 4 n.3.

By contrast, amici fail to acknowledge the language of the Commission’s Order. For example, amici point to no language in either Paragraphs IV.A or VI of the Order that would support their reading of these provisions. Amici rely instead on Paragraph V of the Order, which requires Rambus to offer licenses that they claim are “unlimited in time,” and argue by extension that the MAR cap therefore applies to past infringement as well. Amici Br. 10. But nothing in

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<sup>2</sup> Paragraph I.D. is unique in referencing the issuance date—rather than effective date—of the Order. The Commission’s Order does not become effective until “the sixtieth day after service.” 16 C.F.R. § 3.56(a). Accordingly, Rambus understands the First Royalty Period to begin on that date. There is certainly no basis to think that it begins prior to the date on which the Order was issued.

Paragraph V suggests that Rambus is required to offer licenses that extend into the past as well as the future, and such a reading would place Paragraph V in conflict with Paragraphs IV.A and VI. Any reading that would render provisions of the Commission's Order in conflict with each other should be rejected. *See, e.g., Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988). Such a reading would also be inconsistent with the Commission's clearly expressed intent to provide a "prospective" remedy.

## **II. AMICI REQUEST A RETROACTIVE REMEDY THAT THE COMMISSION HAS NO AUTHORITY TO IMPOSE.**

Contrary to amici's contention, barring Rambus from collecting royalties or damages at above-MAR rates for past use of its technologies or past infringement of its patents would constitute an impermissible retrospective remedy. A law that creates or impairs obligations or duties "in respect to transactions or considerations already past, must be deemed retrospective." *Society for the Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H 1814) (No. 13,156) (Story, J.) (citing cases); *see also* Rambus PFR Reply 3-4. An Order that dramatically curtailed Rambus's ability to collect debts and enforce obligations with respect to *past* use of its technologies (whether licensed or not) is by definition a retrospective remedy, for it would be an Order "in respect to transactions ... already past." And, in its remedy opinion, the Commission took pains to make clear that its Order would *not* operate retrospectively. *See* Remedy Op. 4, 7; *see also In re Dell Computer Corp.*, 121 F.T.C. 616, 626 (1996) ("Moreover, unlike other antitrust statutes, Section 5 provides only for prospective relief.").

The cases cited by amici lend no support to their contention that the Commission may, by Order, effectively alter the consequences of *past* transactions—as opposed to "prospectively"

terminating the effects of unlawful conduct” (Remedy Op. 4).<sup>3</sup> Nor do the Commission’s consent orders in *In re Union Oil Co.*, No. 9305, 2005 WL 2003365 (F.T.C. Aug. 2, 2005), and *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996), bolster amici’s claims. See Amicus Br. 13-14. Those orders do not on their face bar the respondents from seeking royalties or damages with respect to past use of the patented technologies; but even if they are so read, consent orders can provide no precedent for the approach that amici urge upon the Commission today. Rambus PFR Reply 4 (citing *Kelley v. FERC*, 96 F.3d 1482, 1490 (D.C. Cir. 1996)).

### **III. AMICI’S ASSERTIONS ABOUT THE IMPACT OF THE COMMISSION’S ORDER AND THE STATE OF THE DRAM MARKET ARE WITHOUT MERIT.**

Amici’s suggestion that allowing Rambus to recover royalties at above-MAR rates for past use of its technologies would deprive the Order of significant effect is both legally and factually flawed. Among other things, the Commission’s Order will substantially curtail Rambus’s revenues from the use of its technologies *in the future*. As Complaint Counsel have asserted, SDRAM and DDR SDRAM revenues from 2007 through 2010 are expected to total about \$14 billion, and that figure does not even include the controllers that will be manufactured in the future and subject to the Order. See CC Response, Appendix C. The Order thus implies a reduction of at least several hundred million dollars in royalties and damages to be collected by Rambus for use of its technologies in the future. The Order creates a clear and immediate threat to Rambus’s licensing revenue stream—its “lifeblood”—which the company uses to fund core

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<sup>3</sup> In *FTC v. Ruberoid*, the Supreme Court specifically stated that the Commission’s “cease and desist” authority is meant to allow it to “prevent illegal practices *in the future*.” 343 U.S. 470, 472 (1952) (emphasis added). *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946), and *FTC v. National Lead Co.*, 352 U.S. 419 (1957), are inapposite as well; although both cases stated that the Commission’s choice of remedy will be upheld if it bears a “reasonable relation” to the unlawful conduct at issue, they did so against the background principle that “the Commission may exercise only the powers granted it by the Act.” *National Lead*, 352 U.S. at 428.

research and development efforts. Reply of Respondent Rambus Inc. in Support of Motion for Stay (“Rambus Stay Reply”) 6.

Notwithstanding the substantial financial impact that the Order will have on Rambus, amici, like Complaint Counsel, erroneously suggest that the Order will have “virtually no market impact” because the market has already transitioned to the DDR2 SDRAM standard. Amicus Brief 16. But the Commission found no violation with respect to DDR2 SDRAM, so there is no basis to complain that the remedy does not address it. In any event, seventy percent or more of DDR2 production is currently unlicensed and therefore provides no revenue to Rambus whatsoever. Rambus Stay Reply 4. Four of the six largest manufacturers of DDR2 DRAMs—including all of the amici—are engaged in litigation to avoid paying any royalties at all.

Moreover, amici ignore the many other provisions of the Order designed to ensure an immediate halt to any remaining effects of Rambus’s conduct at JEDEC that the Commission found to be exclusionary and to prevent any resumption of exclusionary conduct by Rambus. *E.g.* Final Order Paragraph II (barring Rambus from engaging in any misrepresentation or omission to an SSO concerning its patents or patent applications and requiring disclosures as required by SSO rules); *id.* Paragraph III (requiring a Compliance Officer to carry out the obligations). Amici’s assertion that the Order would be “ineffectual” is plainly baseless.<sup>4</sup>

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<sup>4</sup> Amici also charge that, unless the Commission adopts their construction of the Order, Rambus will be rewarded for “bad faith litigation conduct.” Amici Br. 17 n.10. Amici disregard the fact that the Commission explicitly *declined* to decide whether Rambus had engaged in spoliation and *denied* Complaint Counsel’s motion for sanctions arising out of allegations of misconduct. Liability Op. 118 & n.646. Amici have even less support for their novel contention that Rambus somehow engaged in “dilatory” tactics by exercising its rights to an adjudicatory proceeding. Rambus is not aware that such a contention has ever been made previously in this case, and knows of no basis for it. In any event, allegations of bad faith litigation conduct and dilatory tactics have nothing to do with the remedy issues discussed in Rambus’ Petition for Reconsideration.

#### **IV. AMICI SEEK A WINDFALL FOR COMPANIES THAT PREVIOUSLY INFRINGED RAMBUS'S PATENTS.**

The retrospective remedy *amici* advocate would confer upon them an enormous private benefit. And it would send the problematic message to manufacturers in the future that they should refuse to take licenses from patentees and should instead infringe and litigate. Under amici's proposal, manufacturers who previously paid license fees at above-MAR rates would not be entitled to a refund of such fees, *see supra* p. 1 n.1, whereas manufacturers who infringed Rambus's patents and litigated against Rambus would be freed from any obligation to pay damages in excess of MAR rates for unlawful use of Rambus's patented technologies during the same time period. Amici clearly seek a government-conferred edge over their law-abiding competitors.<sup>5</sup>

#### **V. AMICI'S OPPOSITION TO RAMBUS' MOTION FOR STAY IS UNTIMELY AND UNFOUNDED.**

Finally, amici briefly register their opposition to Rambus's motion for a full stay of the Commission's Order. Amici Br. 10. This opposition is both untimely and unresponsive. Even if Rule 3.56 somehow entitled Amici to respond to Rambus's stay motion, their response was due by February 26—three days prior to the date they filed it. Moreover, even though Rambus has explained that each of the four factors listed in Rule 3.56 militates in favor of a full stay of the

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<sup>5</sup> In addition to disputing the proper construction of Paragraphs IV.A, V, and VII of the Order, amici also take issue with three other points raised in Rambus's Petition for Reconsideration. Amici assert that (1) Rambus should not be entitled to seek statutorily-authorized patent law remedies such as treble damages and attorneys' fees for *future* infringement against manufacturers that refuse to pay even MAR rates; (2) Rambus should not be able to seek relief in excess of MAR rates against companies that defend against infringement occurring *after* the effective date of the Order by raising defenses based on alleged deception at JEDEC; and (3) the Commission should not clarify the term "JEDEC compliant." Amici Br. 18-19. Amici, however, offer little analysis to support their disagreement, and, in any event, Rambus has already provided unrebutted reasons refuting these same assertions. Rambus PFR 9-13 & 14 n.10-11.

Commission's Order, amici do not even address any of these factors. As a result, their opposition to Rambus's request for a stay should be disregarded.

### CONCLUSION

For the foregoing reasons, Rambus requests that the Commission grant its Petition for Reconsideration and issue an amended order clarifying the remedy as proposed in the Petition.

Respectfully submitted,



Gregory P. Stone  
Steven M. Perry  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071-1560  
(213) 683-9100

A. Douglas Melamed  
Paul R.Q. Wolfson  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 663-6000

Attorneys for Respondent Rambus Inc.

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