

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

In the Matter of)
)
RAMBUS INC.,)
a corporation,)
_____)

Docket No. 9302



**CORRECTED MEMORANDUM IN SUPPORT OF RAMBUS INC.'S MOTION TO
STAY OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME**

On June 3, 2002, the Federal Circuit heard argument in *Rambus Inc. v. Infineon Technologies AG.*, Case Nos. 01-1449, 01-1583, 01-1604, 01-1641, 02-1174, 02-1192 (*"Infineon"*). As detailed below, many of the factual and legal issues central to that appeal are almost identical to those central to the Complaint here, including the proper interpretation of JEDEC's disclosure rules and whether Rambus's alleged non-disclosure of its patent interests allowed it to gain and exercise market power. This overlap virtually ensures that the Federal Circuit's decision will shape, and perhaps resolve on grounds of precedent or collateral estoppel, many of the issues in this case.

This case is, therefore, a prime candidate for a brief stay until the Federal Circuit's decision, which is expected in the next few months.¹ Granting a stay pending the Federal Circuit's decision will enable many of the novel and complex legal and factual issues raised in this case to be better focused, facilitate consistency with the Federal Circuit's decision, and allow the significant discovery necessary in this case to be conducted as efficiently and expeditiously

¹ The briefing and argument were conducted on an expedited basis, indicating that the Federal Circuit is likely to issue its opinion soon.

as possible, thereby conserving both the Commission's and Respondent's resources. Two federal district courts have already issued stays in actions that — like this one — will be directly and materially affected by the Federal Circuit's decision. This Court should follow their lead.

Alternatively, if the Motion to Stay is denied, the Court should grant Respondent a short extension of time within which to file its Answer. Complaint Counsel have authorized us to state that they consent to a 14-day extension of time.

BACKGROUND

The Complaint's basic allegations can be summarized as follows: (1) from December 1991 through mid-1996, Rambus was a member of JEDEC (Compl. ¶¶ 21, 40), a voluntary association of technology companies dedicated to setting industry standards (*id.* ¶¶14-15); (2) in 1993, JEDEC established standards for certain aspects of dynamic random access memory, or "DRAM," memory chips (*id.* ¶ 27); (3) these standards incorporated technology that Rambus either had patented or patented at some point in the future (*id.* ¶ 91); (4) according to the Complaint, JEDEC's rules required its members to disclose their patents, patent applications, and even possible future patent applications, under certain circumstances, including any time that JEDEC was considering a standard that "might involve" technology "related to" a member's existing *or future* intellectual property (*id.* ¶¶ 24, 79); (5) Rambus violated those rules by not disclosing its patent applications and intention to obtain patents that would relate to standards that JEDEC was considering adopting (*id.* ¶¶ 2, 70, 80); (6) JEDEC might not have adopted standards that related to Rambus's inchoate intellectual property but for Rambus's non-disclosure (*id.* ¶¶ 20-22, 71, 80); (7) the incorporation of Rambus's later-patented intellectual property into JEDEC's standards provided market power to Rambus (*id.* ¶¶ 122); (8) by enforcing or seeking to enforce its later acquired patents, Rambus exercised market power that it

had acquired wrongfully through violation of JEDEC's disclosure rules (*id.* ¶ 2); and (9) DRAM manufacturers became so "locked-in" to Rambus's technology that they were powerless to alter or work around JEDEC's standards (*id.* ¶¶ 105-109).

The Commission is the *fourth* adjudicative body that is currently considering these factually erroneous and legally flawed allegations.

Rambus initiated the *Infineon* case in August 2000, alleging patent infringement. Infineon asserted various affirmative defenses and counterclaims, including allegations that Rambus's non-disclosure of its intention to obtain patents relating to the JEDEC standards violated JEDEC's disclosure rules and constituted fraud. The court in that case construed Rambus's patents extremely narrowly and erroneously held that they were not infringed by Infineon's products. The jury returned a fraud verdict against Rambus.² Rambus appealed to the Federal Circuit on grounds including the trial Court's erroneous interpretation of both the scope of Rambus's patents and JEDEC's disclosure rules. That appeal was argued on June 3. In light of the expedited briefing and argument set by the Federal Circuit, it is anticipated that a decision will be handed down within the next few months.

Soon after Rambus initiated its suit against Infineon, Rambus was sued in two federal district courts by other DRAM manufacturers. Micron Technology, Inc. ("Micron") sued Rambus in federal district court in Delaware seeking a declaratory judgment that its manufacture and sale of SDRAM products compliant with the JEDEC standards does not infringe Rambus's patents and accusing Rambus of monopolization, attempted monopolization, fraud, and inequitable conduct. Hynix Semiconductor, Inc. ("Hynix") sued Rambus in federal district court

² The *Infineon* court overturned by JMOL important aspects of the jury's verdict, including the jury's erroneous findings of actual and constructive fraud on Infineon's DDR SDRAM counterclaim and constructive fraud on Infineon's SDRAM counterclaim. Attachment A at 12, 50.

in California, also seeking a declaratory judgment that its manufacture and sale of SDRAM products compliant with the JEDEC standards do not infringe Rambus's patents and also accusing Rambus of antitrust violations, unfair competition, and breach of contract.

Because of the similarity of issues in *Micron* and *Hynix* to those on appeal in *Infineon*, the *Micron* and *Hynix* courts each stayed at least part of those proceedings.³ In its order tentatively granting Rambus's motion to stay the *Hynix* action, the *Hynix* Court stated that a stay was appropriate in part because Hynix's antitrust, breach of contract, fraud and unfair competition claims appeared to be "premised in large part on facts that have been, or are being litigated in the earlier Infineon and Micron actions." Attachment B at 7-20. Similarly, the *Micron* court explained that its reason for postponing non-discovery-related proceedings was because "the subject of Rambus's disclosure duty to JEDEC" was to be considered by the Federal Circuit in the *Infineon* appeal. Attachment D at 21. The *Hynix* and *Micron* Courts, in justifying their orders, reasoned that delaying their proceedings would ensure consistency with the Federal Circuit's decision and conserve the courts' and parties' resources by postponing discovery and other activities that could prove irrelevant in light of the Federal Circuit's decision. See Attachment B at 7-26; Attachment D at 25.

On June 18, 2002, the Commission issued the Complaint in this matter. Just as the DRAM manufacturers alleged in the *Infineon*, *Micron*, and *Hynix* cases, the Complaint alleges that Rambus has wrongfully acquired market power by waiting for JEDEC to set certain

³ The *Hynix* court stayed that matter completely; the *Micron* court did not "stay the matter as a whole," but postponed claim construction and trial until a decision was issued by the Federal Circuit in the *Infineon* appeal. A copy of the court order in the *Hynix* "tentatively" granting the motion for stay requested by Rambus in *Hynix* is provided at Attachment B. A copy of the final order granting stay in the action is provided at Attachment C. A copy of the order and memorandum opinion in *Micron* is provided at Attachment D.

standards before disclosing that those standards related to one patent that Rambus had and others that it *later* obtained. (See Compl. ¶¶ 80, 122.) Just as the DRAM manufacturers alleged in the *Infineon*, *Micron*, and *Hynix* cases, the Complaint alleges that, through its allegedly wrongful non-disclosure of its then non-existent patents, Rambus allowed JEDEC to adopt standards that incorporated its technology. Just as the DRAM manufacturers alleged in the *Infineon*, *Micron*, and *Hynix* cases, the Complaint alleges that the incorporation of Rambus's technology into JEDEC's standards effectively locked manufacturers into using Rambus's technology and provided Rambus with market power that it otherwise would not have obtained. (See Compl. ¶¶ 80, 91, 122.) Likewise, the DRAM manufacturers and Staff all assert that, by enforcing its patents, Rambus has wrongfully exercised market power. (*Id.* ¶¶ 100, 103, 122). At the heart of all four matters are issues relating to the validity and scope of Rambus's patents, the proper interpretation and application of JEDEC's disclosure rules, the reliance of DRAM manufacturers on Rambus's non-disclosure, and the exercise of the market power that supposedly resulted from Rambus's allegedly wrongful conduct — all issues that are likely to be addressed by the Federal Circuit.

ARGUMENT

1. This Matter Should Be Stayed Until the Federal Circuit Rules in the Pending *Infineon* Case

Stays are regularly granted in circumstances where, as here, separate but related proceedings may impact the conduct of the case before the court. *See, e.g., Amdur v. Lizars*, 372 F.2d 103 (4th Cir. 1967) (affirming stay of proceedings “so long as a similar action . . . remains ‘outstanding and undecided’”); *International Nickel Co. v. Martin J. Barry, Inc.*, 204 F.2d 583, 584-86 (4th Cir. 1953) (affirming stay pending the outcome of a similar suit that had been filed earlier in another federal court); *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983)

(staying action pending resolution of a separate, parallel action on appeal to the Ninth Circuit when “[t]he outcome of the appeal could have a profound effect on the within litigation.”); see also *Ontario, Inc. v. World Imports U.S.A., Inc.*, 145 F. Supp. 2d 288, 291 (W.D.N.Y. 2001) (holding that parties and issues need not be identical to warrant a stay, so long as a stay “will more than likely narrow the issues before this Court and ultimately save the parties and this Court from a needless or duplicative expenditure of resources”).

In light of the actions of the *Micron* and *Hynix* courts, principles of comity also weigh in favor of a stay. See *A. Stone & Co. v. Korak Corp.*, 76 Civ. 5280-CSH, 1977 U.S. Dist. LEXIS 12597, at * 9 (S.D.N.Y. Feb. 1, 1977) (finding comity to be a principal consideration in deciding a motion to stay).

In fact, at least two federal Circuit Courts of Appeal have suggested that it may be error *not* to issue a stay in such circumstances. See *Bailey v. Ness*, 733 F.2d 279, 283 (3d Cir. 1984) (holding that district court should have stayed action until state court appeals had run their course or time for bringing appeal had lapsed); *Seltzer v. Ashcroft*, 675 F.2d 184, 185 (8th Cir. 1982) (stating that the “proper course” is to stay the second action in which collateral estoppel is sought pending exhaustion of appellate procedures in the first action).

The FTC’s rules expressly recognize the propriety of a stay in precisely this situation: FTC Rule 3.51(a) provides that an ALJ “may stay the administrative proceeding until resolution of the collateral federal court proceeding.” 16 C.F.R. § 3.51(a) (2001). Moreover, in order to accommodate the issuance of any such stay, Rule 3.51(a) tolls the “one year rule” during the “pendency of any collateral federal court proceeding that relates to the administrative adjudication.” *Id.*

There can be no question that the *Infinion* matter is “collateral” to the case at bar and that the decision in the *Infinion* appeal will squarely affect these proceedings. The similarity of the core issues in both cases is revealed by a comparison of the Complaint with the transcript of the *Infinion* oral argument.⁴ For example, the antitrust violations alleged in the Complaint rest on the assertion that Rambus violated JEDEC’s disclosure obligations. (Compl. ¶¶ 2, 70-78, 80.) The Complaint alleges that JEDEC’s rules imposed a very broad duty to “disclose the existence of any patents or pending patent applications that it [Rambus] knew or believed ‘might be involved in’ the standard-setting work that JEDEC was undertaking and to identify the aspect of JEDEC’s work to which they related.” (Compl. ¶¶ 70, 79 (citing ¶¶ 21, 24).) This allegation tracks issues front-and-center in the *Infinion* appeal, including: (1) whether JEDEC rules required disclosure of patent applications or only issued patents (Tr. at 10-14, 38-39); (2) whether JEDEC rules required disclosure of an intent to file “related” applications in the future (Tr. at 9-10); and (3) whether JEDEC rules required disclosure of intellectual property that in some broad sense “related to” a JEDEC standard. (Tr. at 6-10, 18-24, 34-36, 39.)

The Complaint also alleges that part of Rambus’s “anticompetitive scheme” was its effort to “perfect” its patents rights over technologies that it believed might relate to technologies involved in the proposed and ultimately adopted JEDEC standards. (Compl. ¶ 2.) Essentially the identical issue was raised before the Federal Circuit, which extensively questioned the parties at the oral argument regarding the propriety of Rambus’s filing patent applications in order to cover the standards as they developed at JEDEC. (Tr. at 20-21, 28-29, 36.)

⁴ A copy of a certified but unofficial transcript of the oral argument (“Transcript”) is provided at Attachment E.

Also central to both the Complaint and the *Infinion* appeal is the issue of causation: whether JEDEC would have adopted a different standard had Rambus disclosed its patents, patent applications, and plans for future patents; and whether incorporation of Rambus's technology into the JEDEC standard had any actual effect on the DRAM manufacturers. (Compl. ¶ 3, 119; Tr. at 26.)

Other issues that are likely to be addressed in the *Infinion* decision and bear on this case include whether Rambus had any patent applications pending while it was a JEDEC member that would be infringed by products built to a JEDEC standard (Tr. at 3-6, 23, 33); whether Rambus obtained any material information by being a JEDEC member that was not public and that it thus could not have learned had it not joined JEDEC (Tr. at 21-22, 36-38); and whether, even if Rambus failed to comply with its obligations with respect to SDRAM, it did anything wrong with respect to DDR SDRAM. (Tr. at 14-15, 24-26.)

As the foregoing analysis indicates, any decision by the Federal Circuit is likely to resolve, or at least impact substantially, several of the central issues raised in the Complaint. The interests of the Commission and the parties therefore are served by suspending activity now, before significant time and resources are wasted pursuing issues and theories that may change or become irrelevant. Ultimately a stay will benefit everyone involved by focusing the issues and ensuring that both discovery and trial will be as productive, efficient, and expeditious as possible.

2. In the alternative, Respondent's time to Answer the Complaint should be Enlarged

This case is *extremely* complex. The Staff has spent months drafting a detailed, 35-page 124-paragraph Complaint that raises hundreds of factual issues, including a number of highly technical issues about Rambus's technology. *See, e.g.*, ¶¶59-69. In order to admit, deny, or

explain *each* fact alleged in the Complaint, *see* 16 C.F.R. §3.12(b)(ii)((2), so as to frame and narrow the issues in dispute instead of simply stating that respondent does not have sufficient knowledge to admit or deny, respondent requires more time than the 20 days allowed under the Rules. Accordingly, if the requested Stay is not granted, respondent respectfully requests an additional 14 days in which to file its Answer, that is, until July 29, 2002.

An extension of time is also warranted here because respondent has not yet selected its lead trial counsel for this matter. Respondent's market capitalization fell by nearly 50 percent following the Commission's announcement of its decision to file a complaint. Understandably, Respondent has been preoccupied with dealing with the press and communicating with its shareholders, business partners, and the 120 highly trained, mobile engineers it employs. Moreover, the selection of lead trial counsel is complicated by the pendency of the private cases described above and the need to litigate all of the pending cases in the most efficient manner. Respondent expects to choose its lead counsel within the next week or so. Whoever is chosen will need time to finalize the Answer. Under these circumstances, a 14-day extension of time is both reasonable and fair.

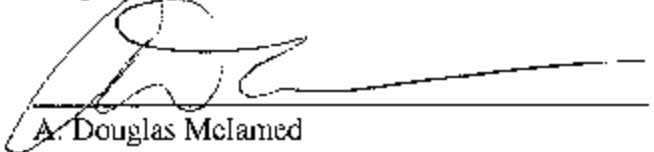
Complaint Counsel has authorized us to represent that it consents to the grant of the Motion for Extension of Time.

CONCLUSION

For the foregoing reasons, Rambus's Motion for Stay pending the decision by the Federal Circuit in *Rambus Inc. v. Infineon Technologies AG* should be granted. If it is denied, the Court should grant Rambus's Motion for Extension of Time.

July 10, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kyle DeYoung, hereby certify that on July 10, 2002, I caused a true and correct copy of *Rambus Inc.'s Corrected Memorandum in Support of its Motion to Stay, or in the Alternative, for an Extension of Time* be served on the following persons by hand delivery:

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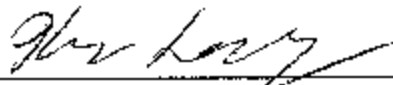
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