UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR STAY OF FINAL ORDER PENDING APPEAL

The Commission issued its Opinion and Final Order in this matter on February 2, 2007. The Opinion and Final Order were served on Rambus and its counsel on February 9, 2007, and the Final Order will therefore become effective on April 12, 2007. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g)(1),(2). Pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondent Rambus Inc. moved for a stay of the Final Order pending judicial review on February 16, 2007. The Commission has determined to grant Respondent's motion in part and to deny it in part.

Accordingly:

IT IS ORDERED THAT enforcement of, and Respondent's obligation to comply with, Paragraphs IV, V.A., VI, and VII of the Final Order in this matter be, and they hereby are, stayed in part, upon the filing of a timely petition for review of the Final Order in an appropriate court of appeals and until the court of appeals issues its mandate, in accordance with the following conditions:

1. Respondent will be permitted to acquire, and to seek to acquire, rights to (but not possession of) fees, royalties, payments, judgments, and other consideration in excess of that permitted by Paragraphs IV, V.A., VI, and VII of the Final Order ("Excess Consideration"), **PROVIDED THAT:**

   a. all Excess Consideration is (1) collected and held pursuant to an escrow agreement by an escrow agent that has received the approval of the Commission, which approval shall not be unduly delayed, and only in a manner that has received the approval of the Commission, or (2) payable pursuant to a contingent contractual obligation by the party paying such Excess Consideration ("Payer");

PROVIDED, HOWEVER, THAT if Respondent proposes an escrow agent and manner of collecting Excess Consideration to the Commission before April 12, 2007, an escrow agent may, for a period of up to six months, collect Excess Consideration accruing prior to the grant of such approval, and may hold it in escrow;

b. the Excess Consideration (and accrued interest) in escrow will be held pursuant to the terms of the escrow agreement, which will provide for such Excess Consideration (and accrued interest) to be held until redistributed, pursuant to an order of the Commission, either to Respondent or to the parties that paid such consideration; and the Commission will, promptly after receiving a mandate from a court of appeals, order redistribution of the Excess Consideration (and accrued interest) in escrow in accordance with the decision of the court of appeals;

c. there is only one contingency under which the Excess Consideration (and any accrued interest) payable pursuant to any contingent contractual obligation shall be payable to Respondent: the issuance by the Commission of an order authorizing Respondent to receive such Excess Consideration (and any such accrued interest); and the Commission will, promptly after receiving a mandate from a court of appeals, issue an order, consistent with the decision of the court of appeals, clarifying whether Respondent may receive Excess Consideration (and accrued interest) payable pursuant to any contingent contractual obligation;

d. all costs of collecting the Excess Consideration, of holding and administering it in escrow, and of redistributing it ("Escrow Costs"), shall be paid out of the escrowed funds; and

e. the escrow agent, pursuant to its contract with Respondent and with each party paying Excess Consideration into escrow, will have specific obligations, including to pay Escrow Costs from the escrowed funds; and, in the event that escrowed funds are not sufficient to pay Escrowed Costs, to collect sufficient additional funds from Respondent to pay Escrow Costs.

2. The purpose of requiring that Excess Consideration be held in escrow is to insure, to the extent possible, that in the event that the relevant provisions of the Final Order are upheld on appeal, the Payers will promptly be made whole. Consequently, the Commission will approve a manner of collecting Excess Consideration, and of holding it in escrow, only if there will be no commingling of Excess Consideration with non-escrowed funds, and only if there will be a reliable accounting, with quarterly reports to each Payer, of the amount of Excess Consideration of such Payer in escrow. In determining whether to approve a manner of collecting Excess Consideration, and of holding it in escrow, the Commission will consider, *inter alia*, whether the escrow agent has adequate reserves in light of the anticipated amount of

the Excess Consideration (including interest); and whether the interest to be earned by the Excess Consideration in escrow is consistent with interest from other investments with similar levels of liquidity and risk. Escrow amounts will be invested in money market accounts or in a list of investments set forth as an exhibit to the escrow agreement.

IT IS FURTHER ORDERED THAT Repondent's Motion for Stay be, and it hereby is, **DENIED** in all other respects.

By the Commission, Commissioner Rosch not participating.

Donald S. Clark
Secretary

SEAL
ISSUED: March 16, 2007

Attachment: Opinion of the Commission

OPINION OF THE COMMISSION ON RESPONDENT'S MOTION FOR STAY OF FINAL ORDER PENDING APPEAL

On February 16, 2007, respondent Rambus Inc. applied for a stay pending appeal of the Commission's Final Order of February 2, 2007. Although Rambus seeks a stay of the Commission's Order in its entirety (Stay Motion at 1), it acknowledges that the harms it alleges in support of its motion could be ameliorated by a partial stay of the Order's provisions regarding Rambus's efforts to enforce its patents and collect royalties, while leaving the provisions that concern Rambus's participation in standard setting organizations immediately effective. Rambus Stay Motion at 15-16; Rambus Reply at 6 n.2. Complaint Counsel do not object to a partial stay, provided that any royalties in excess of the maximum allowable royalty rates ("MARR") are placed in escrow during the pendency of Rambus's appeal. Complaint Counsel Opposition at 5. Rambus, having initially proposed such an arrangement (Stay Motion at 15-16), nonetheless contends that any provision that limits its access to royalty payments in excess of the MARR during the pendency of an appeal could hinder the company's research and development efforts. Rambus further objects to the specific form of escrow that Complaint Counsel propose (Rambus Reply at 5-6), and proposes an alternative form of order to establish an escrow for any royalties that are in excess of the MARR. Rambus Reply at 7, Exhs. A & B.

For the reasons stated below, the Commission conditionally stays Paragraphs IV, V.A., VI, and VII of its Final Order, effective upon the filing of a timely petition for review in an appropriate court of appeals and until the court of appeals issues its mandate. The Commission denies Rambus's application in all other respects.[1]

Applicable Standard

Section 5(g) of the Federal Trade Commission Act ("FTC Act") provides that FTC adjudicative orders, other than divestiture orders, shall take effect automatically "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by * * * the Commission" or "an appropriate court of appeals." 15 U.S.C. § 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. Respondent has satisfied this requirement in its February 2 motion.

Pursuant to Rule 3.56(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of

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[1] Rambus does not articulate any reasons for staying provisions of the Order that prohibit Rambus, while participating in a standard-setting organization, from, *inter alia*, making any misrepresentations concerning its patents and patent applications and from failing to make any required disclosures regarding its patents and patent applications. Final Order ¶ II. Similarly, Rambus does not contend that a stay is warranted as to provisions of the Order that are designed to facilitate compliance. For these reasons alone, Rambus's request for a broader stay must be denied. *See* 16 C.F.R. § 3.56(c) (requiring stay applicant to "state the reasons a stay is warranted and the facts relied upon" and supply "supporting affidavits or other sworn statements").

the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. We consider each of these factors below. Rule 3.56(c) further provides that an application for a stay must state the reasons a stay is warranted and include "supporting affidavits or other sworn statements, and a copy of the relevant portions of the record." *See, e.g.*, *North Texas Specialty Physicians*, 2006 FTC LEXIS 10 at *2 (Jan. 20, 2006).

Analysis

Rambus's argument regarding its likely success on the merits relies chiefly on a principle that the Commission has adopted in prior cases – *i.e.*, that the first stay factor can be substantially satisfied by a showing that the Commission's decision was based on a complex factual record. Rambus Stay Motion at 4 (*quoting Novartis Corp.*, 128 F.T.C. 233, 235 (1999) ("it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits"); *Toys "R" Us, Inc.*, 126 F.T.C. 695, 697 (1998) ("difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits")). Rambus contends that the complexity of the factual record, its volume, and the presence of difficult factual and legal issues support issuance of a stay.[2] Stay Motion at 4-7.

Although Complaint Counsel contend that Rambus has overstated its case for a stay (Complaint Counsel Opposition at 2-4), they do not deny the complexity and difficulty of the matter. Indeed, they do not object to a partial and limited stay that would require that any royalties in excess of the MARR be placed in escrow during the pendency of an appeal. *Id.* at 1, 5. According to Complaint Counsel, such a limited order "will address virtually all of the concerns identified by Rambus in its Motion, while preserving in large part the beneficial effects to be achieved by the Commission's Final Order during the time that the appeal is pending." *Id.* at 1.

We conclude that Rambus has made an adequate showing with respect to the first prong of the Commission's analysis.[3] As we recognized in *Toys "R" Us, Inc.*, 126 F.T.C. at 697, the

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[2] Rambus also contends that the Commission is not authorized to compel Rambus to license its patents. This line of argument merely restates a position that the Commission considered and rejected in crafting its remedial order and therefore offers no support for Rambus's motion for a stay pending appeal. *See, e.g.*, *Toys "R" Us, Inc.*, 126 F.T.C. at 697; *Detroit Auto Dealers, Inc.*, 1995 FTC LEXIS 256 at *4 (Aug. 23, 1995).

[3] We do not agree, however, with Rambus's suggestion (Stay Motion at 5 n.2) that this matter is made more difficult or complex, and therefore a stronger candidate for a stay, as a result of the decision of the Federal Circuit in *Rambus Inc. v. Infineon Techs. AG*, 318 F. 3d 1081 (Fed. Cir. 2003). As we explained in our opinion on liability (Liability Op. at 51 n.277), the

Commission has acknowledged that "[t]he difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits." *See also Novartis Corp.*, 128 F.T.C. at 235; *North Texas Specialty Physicians*, 2006 FTC LEXIS 10 at *5 (Jan. 20, 2006).

We turn, then, to the second prong – *i.e.*, whether Rambus is likely to suffer serious irreparable harm if the Order is not stayed. Rambus alleges four distinct forms of irreparable injury. First, Rambus contends that it will be permanently deprived of any royalties or damage awards that would otherwise accrue during the pendency of the appeal. Second, Rambus asserts, it will be deprived of its statutory right to exclude others from using its patented technologies – an opportunity Rambus would not be able to recover even if the Order were overturned on appeal. Third, Rambus argues, the Order would diminish Rambus's "goodwill" by effectively requiring termination and renegotiation of existing licenses. Fourth, Rambus argues that it would suffer "extraordinary financial harm." See Stay Motion at 7-8.

As for Rambus's assertions of unrecoverable financial loss, Complaint Counsel contend that the industry has largely moved on to later iterations of JEDEC standards that leave Rambus free to pursue royalties unimpeded by the Commission's Order.[4] Complaint Counsel Opposition at 3. The proposed escrow arrangement would largely address these concerns. Rambus will have immediate access to royalty income up to the MARR, and will be deprived of access to income in excess of that level only during the pendency of its appeal. It will have ready access to the remaining funds in the event the Commission's Order is overturned. Moreover, the proposed escrow would address Rambus's concerns about the confusion and loss of good will that Rambus contends would result from termination and renegotiation of its existing licenses.

Apart from its assertions of financial loss, Rambus contends that provisions of the Order that require it to grant a worldwide license to the covered technologies at the MARR abridge its statutory "right to exclude." Rambus's reliance on the Federal Circuit's decisions in *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985) and *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456-57 (Fed. Cir. 1988) to support this proposition is unavailing. Those

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decision of the Federal Circuit was not based on the same evidentiary record as the Commission's decision. *See* Liability Op. at 51 n.277. Furthermore, the issue before the court in *Infineon* was whether there was "clear and convincing" proof that Rambus had engaged in fraudulent conduct in violation of state law. A Section 5 claim, however, does not require such a showing. *See,, e.g., FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1203 n.7 (10th Cir. 2005).

[4] Rambus attempts to rebut this assertion, contending that firms are not signing licenses for DDR2 and DDR3. Rambus Reply at 1, 4. But Rambus fails to show that any such unwillingness of potential licensees to enter into license agreements for these technologies is either the result of the Commission's Order or would be cured by a stay. On the contrary, the Order expressly imposes no relief with respect to those technologies.

decisions merely hold that the nature of the patent grant weighs against holding that monetary damages will *always* suffice to make the patentee whole. As the Federal Circuit explained subsequently in *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990), a concept that every patentee is *always* irreparably harmed by an alleged infringer's pre-trial sales disserves the patent system as much as the proposition that no patentee can ever be irreparably harmed when an alleged infringer can respond in damages. *Id*. at 683. The court said that, like all generalities, neither concept was universally applicable. *Id*. *See also Calmar, Inc. v. Emson Research, Inc*., 838 F. Supp. 453, 456 (C.D. Cal. 1993). In the present case, Rambus's purported right to exclude is abridged pending appeal only as to uses that are compliant with two JEDEC standards, leaving Rambus's patents unaffected for all other purposes.[5] Given these limitations, we are unable to conclude that Rambus's alleged non-economic injuries are substantial enough to warrant staying the Order in its entirety, or an unconditional stay of the MARR provisions.

Finally, Rambus contends that it will suffer irreparable injury because Paragraph IV.B. of the Commission's Order might be judicially construed to require it to refund any royalties in excess of the MARR that it has already collected. According to Rambus, the provision also could be read to prevent it from collecting royalties in excess of the MARR for past periods that it has not yet collected. Stay Motion at 13; Reply at 5. In our view, these contentions are at odds with the clear terms of the Order,[6] as well as with the Commission's obvious intent, which was to enter a "forward-looking remedy." *See* Remedy Op. at 2; *see id.* at 7 (referring to relief granted as "prospective only"). The possibility that the Commission's Order would be construed to require refunds, or to prevent collection of past due royalties, seems unlikely and therefore is not a proper basis for a stay. *See, e.g., Toys "R" Us*, 126 F.T.C. at 694-95.

We turn, then, to the public interest and the possibility that a stay of the Commission's Order would harm others. Because Complaint Counsel represent the public interest in effective law enforcement, we consider these factors together. *See, e.g., California Dental Ass'n*, 1996 FTC LEXIS 277 at *7 (May 22, 1996). In this regard, we note that a blanket stay of the provisions prohibiting Rambus from collecting excess royalties would frustrate the Commission's efforts to restore competition to the relevant markets. Any damage to the public interest would be irreparable. An escrow arrangement – as proposed by the parties – will impose some burden on licensees during the pendency of an appeal. Nonetheless, that burden will be tempered by the assurance that these funds will be repaid promptly if the Commission's Order is sustained.

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[5] Furthermore, the right to exclude requires that a patent be valid and enforceable and a showing of infringement. Even then, exclusion does not necessarily follow. *See eBay Inc. v. MercExchange LLP*, 126 S. Ct. 1837 (2006).

[6] Both Paragraphs IV.A. and IV.B. are directed to the collection of royalties with respect to "the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product after the date this Order becomes final."

Conclusion

The decision to grant a limited stay of our Final Order is a difficult one. Undoubtedly, it will entail some harm to the public interest by allowing Rambus to continue to collect monopoly rents during the pendency of its appeal. However, given the complexity of the factual and legal issues underlying our decision to prohibit Rambus from collecting royalty payments in excess of the MARR, we conclude that these interests must be balanced against its competing private interests during the brief pendency of an appeal. Apart from the stayed provisions (Paragraphs IV, V.A., VI, and VII), all other provisions of our Final Order will become effective on April 12, 2007.[7] *See* 15 U.S.C. § 45(g); 16 C.F.R. §§ 3.56(a), 4.3(a).

ISSUED: March 16, 2007

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[7] By the terms of the Commission's Order, Paragraphs V.B. through V.E. impose no requirements on Rambus until the effective date of Paragraph V.A.