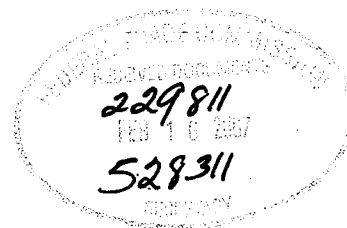


PUBLIC

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



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

PETITION OF RESPONDENT RAMBUS INC.  
FOR RECONSIDERATION OF THE COMMISSION'S FINAL ORDER

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## I. INTRODUCTION

Pursuant to Commission Rule 3.55, 16 C.F.R. § 3.55, respondent Rambus Inc. (“Rambus”) moves for reconsideration, modification, or clarification of certain aspects of the Commission’s Final Order (“Order”).<sup>1</sup> As the Commission’s Remedy Opinion makes clear, the Order is intended to “restor[e], to the extent possible, the competitive conditions that would have been present absent Rambus’s unlawful conduct.” Remedy Op. 6. That Order, however, contains several provisions that—depending on how they might be construed—could place Rambus in a worse position than it would have been in the Commission’s version of the “but for” world. Some aspects of the Order also raise important questions about how Rambus may conduct its business in the future. And certain provisions of the Order—depending again on how they are construed in the future—might cause Rambus extraordinary harm.

Accordingly, Rambus respectfully requests that the Commission reconsider or modify its Order to make clear that the Commission did not intend to visit these consequences upon Rambus.<sup>2</sup> The modifications and clarifications that Rambus requests will not undermine in any way the Commission’s expressed objective of ensuring that Rambus charges no more than the specified maximum royalties, as set by the

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<sup>1</sup> The Order implements a remedy based on factual findings and legal conclusions in the Commission’s July 31, 2006, Opinion (“Liability Op.”) and its February 2, 2007, Opinion on Remedy (“Remedy Op.”). Rambus maintains that many of the factual findings in those two opinions are not supported by the record and that many of the legal conclusions therein are also incorrect, positions discussed at length in Rambus’s previous briefs in this case. For present purposes, Rambus addresses only issues raised by the Commission’s Order itself that Rambus could not have previously addressed, as required by 16 C.F.R. § 3.55.

<sup>2</sup> Rambus is also concurrently filing a motion to stay the Commission’s Order pending appeal, pursuant to 16 C.F.R. § 3.56. As that motion makes clear, the Commission’s Order should be stayed whether or not the instant Petition for Reconsideration is granted.

Commission, for the period in which the Order is in effect. With this Petition, Rambus is submitting a proposed Amended Final Order ("Proposed Order") that it believes addresses these ambiguities.<sup>3</sup>

Each of the issues addressed in this Petition for Reconsideration is properly raised under Rule 3.55. These issues arise in principal part from the specific language that the Commission has used in its Order. Before the Commission's Order was issued, Rambus could not have anticipated these issues and thus had no opportunity to present them to the Commission. In prior cases, the Commission has been willing to clarify and amend its orders to address similar concerns. *See, e.g., In re Borg-Warner Corp.*, 102 F.T.C. 1164 (1983) (FTC order rev'd on appeal, 746 F.2d 108 (2d Cir. 1984)) (modifying remedial order to clarify certain ambiguities and other issues raised by movant); *In re Koscot Interplanetary, Inc.*, 87 F.T.C. 419 (1976) (issuing order clarifying movant's obligations as requested despite denying movant's petition for reconsideration). The Commission should follow the same course here.

**II. THE COMMISSION'S ORDER SHOULD BE RECONSIDERED, MODIFIED, OR CLARIFIED TO AVOID POTENTIALLY DISASTROUS CONSEQUENCES TO RAMBUS AND TO MAKE CLEAR THAT RAMBUS SHOULD NOT BE IN A WORSE POSITION THAN IT WOULD HAVE BEEN IN THE "BUT FOR" WORLD**

**A. The Commission Should Confirm That The Order Does Not Require Rambus To Refund Royalties Already Collected Or To Forego Royalties Already Due Under Existing Licenses**

Paragraph IV.B of the Commission's Order states that Rambus shall allow any party that previously agreed to pay royalties in excess of the Maximum Allowable

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<sup>3</sup> Rambus is also submitting a blackline document that compares the Commission's Order with the Proposed Order ("Blackline Proposed Order").

Royalties (MARs) specified in the Order to “terminate *or rescind* [its] license agreement—at the option of the licensee—without penalty.” Order 7 (emphasis added). This provision has the potential to visit drastic consequences on Rambus, should the word “rescind” be construed in a manner Rambus believes the Commission did not intend.

An existing licensee’s “terminat[ion]” of its license would not require Rambus to refund royalties that it had already collected or to forego royalties already due under the license, because “termination” of a license has only prospective effect.<sup>4</sup> The significance of “rescind” in the context of the Order is less clear, however. Like termination, rescission discharges contractual parties’ “remaining duties of performance,” but in some circumstances, rescission also may require “restitution with respect to performance that *has been rendered.*” *Restatement (Second) of Contracts* § 283 (1981) (emphasis added); *see also Black’s Law Dictionary* 1332 (8th ed. 2004) (“[R]escission is ... accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions.”). In other words, a provision requiring “rescission” of Rambus’s patent licenses might be said to require Rambus to return some or all the licensing royalties it has ever collected for use of its invented technologies in SDRAM and DDR SDRAM, as well as to forego collecting all royalties that are currently due under existing licenses for pre-Order use of Rambus’s technologies that have not yet been paid to Rambus.

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<sup>4</sup> Although some might claim that terminating a license excuses the licensee from paying royalties already due as of the termination date, but not yet collected, Rambus understands the Order as excusing only those obligations the licensee would have incurred had it not terminated the license. A revision clarifying this point appears in ¶ IV.B of the Blackline Proposed Order.

This expansive reading of “resci[ssion]” would imply that Rambus must refund royalties collected on *all* technologies subject to the rescinded license.<sup>5</sup> If Rambus were required to refund to existing licensees all royalties previously collected, Rambus could have to produce more than [ ] million in cash. *See* DeLey Decl. ¶3 (non-public) (attached as Exhibit A). If Rambus were required to forego royalties due but not yet paid under existing licenses, it would have to forego substantial additional revenue.

Nothing in the Remedy Opinion suggests that the Commission intended the Order to sweep so broadly or to have such drastic effects on Rambus. To the contrary, the Commission emphasized that the Order was designed to “to prohibit Rambus from engaging in [unlawful] practices ... as well as to prevent *future* related conduct.” Remedy Op. 27 (emphasis added). Paragraph IV in particular was crafted “to preclude Rambus from *continuing* to collect monopoly rents.” *Id.* at 29 (emphasis added). These expressions of purpose indicate that the Commission intended only to prevent Rambus from asserting claims to above-MAR rates for use after the effective date of the Order of Rambus’s patented technologies, not to require it to refund royalties paid in the past or to forego royalties owed for use of its technologies in the past.

Indeed, as the Commission itself recognized, the Order could not properly require Rambus to return royalties for use of Rambus’s technologies in the past because its orders “are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future.” *FTC v. Ruberoid Co.*, 343 U.S. 470,

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<sup>5</sup> Some of Rambus’s licenses include rights to use Rambus technologies not only for SDRAM and DDR SDRAM, but also other uses of the licensed technologies, such as DDR2 SDRAM. *See* Smith Decl. ¶ 6 (attached as Exhibit B). Parties to these licenses could on an expansive reading of the term “rescind” demand refunds of royalties paid for use of Rambus’s technologies in SDRAM DDR SDRAM, *and* DDR2 SDRAM, even though the Commission did not find a causal link between Rambus’s conduct and JEDEC’s adoption of DDR2 SDRAM. Remedy Op. 30 (citing Liability Op. 110-14).



473 (1952) (cited in Remedy Op. 6-7). For that reason, the Commission ordered relief that was “prospective only” and that “would simply stop Rambus from *continuing* to exploit its ... monopoly power.” Remedy Op. 7 (emphasis added). The Commission also acknowledged the limitations on its authority by describing its order as one “prospectively terminating the ill effects of unlawful conduct” in order to distinguish that remedy from the “disgorgement order” rejected in *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005). Remedy Op. 4.

Though it appears that the Commission did not intend to require Rambus to refund royalties previously collected from licensees or to forego royalties owed for use of its technologies in the past, the use of the word “rescind” in Paragraph IV.B could inspire licensees to demand that Rambus provide such refunds or forego such royalties. This would understandably lead to further confusion and likely disputes—a situation the Commission has said it was trying to avoid. Remedy Op. 16 n.101. The Commission should foreclose that possibility by making explicit what its Opinion already implies: the Order does not require Rambus to refund any portion of the royalties it has already collected, or to forego royalties owed for use of its technologies prior to the effective date of the Order. The Commission should also issue an amended order deleting the word “rescind” because “terminate” adequately accomplishes the Commission’s apparent purpose. (This revision appears in ¶ IV.B of the Blackline Proposed Order.)

**B. The Commission Should Modify The Order To Preserve Rambus’s Ability To Recoup Foregone Royalties And Damages For The Period Pending Appeal Should The Commission’s Order Be Reversed**

Even if the Order is overturned on appeal, Rambus may never be able to recover the difference between (a) rates charged by Rambus in accordance with the Order and (b) the rates under its existing license agreements or other agreements that it might have

entered into absent the Order, for licensed use of its technologies while the Order was in effect. Nor could Rambus likely recover the difference between (a) damages awarded for patent infringement as capped by the Order and (b) the damages that Rambus otherwise could have obtained under the Patent Act, for unlicensed use of its technologies while the Order was in effect. Such results would improperly penalize Rambus because it would permanently deprive Rambus of monies to which it would have been lawfully entitled during this period. Thus, the Order should be modified in three ways as described below.

**1. Meaning Of "Release"**

Paragraph IV.B directs Rambus to "release" its current licensees "from any further payments pursuant to [their] license agreement[s] that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order." Order 7. This language appears intended to require Rambus to release licensees from the obligation to pay royalties in excess of MAR rates for future sales pursuant to *existing* "license agreements," and not to release those licensees from all future obligations to pay such royalties if and when the Order is overturned.<sup>6</sup> For example, if a licensee agrees in a new or amended license to a contingency clause requiring the licensee to pay the difference between existing contract rates and MAR rates for the period pending appeal if the Order is overturned (as discussed in the next sub-section), then that separate, contingent obligation should not be affected by the "release." Licensees may argue, however, that the term "release," as used in the Order, obligates Rambus to permanently abandon any claim to above-MAR royalties, even if the Order is reversed on appeal. *See*

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<sup>6</sup> Nor does the provision appear designed to require Rambus to release licensees with respect to pre-Order royalties already incurred under existing licenses for past sales but that the licensee has not yet paid.

*Black's Law Dictionary* 1315 (8th ed. 2004) (defining "release" to mean "giving up a right or claim to the person against whom it could have been enforced").

To avoid this result, the Commission should at a minimum modify Paragraph IV.B to make clear that Rambus need release licensees only from the obligation to comply with their *existing* contractual obligations during the period in which the Order is in effect. (Rambus's proposed revision appears in ¶ IV.B of the Blackline Proposed Order.)

## **2. Escrow Or Contingency Clause Provisions In Licenses**

Modifications of the Commission's Order are warranted to avoid the potential for irretrievably lost royalties from licensees for the period in which the Order is in effect. The Order does not state that compliant licenses or amendments that Rambus negotiates under compulsion of the Commission's Order will be void *ab initio* if the Order is overturned. Thus, even if Rambus proves to an appellate court that it was entitled to charge royalties above those specified by the Commission, it will have no mechanism by which it will be able retrospectively to collect licensing revenues that it was forced to forego during the pendency of its appeal. If Rambus were to seek to recover the foregone royalties from manufacturers, the manufacturers could argue that they were licensed during the relevant time period.

That problem could be avoided if, as Rambus has suggested in its concurrently filed stay motion, the Commission stays its Order pending the disposition of Rambus's appeal in the federal courts. The problem might be mitigated in part if the Commission were (a) to establish a procedure pursuant to which licensees may place amounts called for by their license agreements, to the extent they are in excess of MAR, in escrow pending the outcome of the appeal, or (b) expressly to allow Rambus and its licensees to

negotiate provisions for contingent royalty payments (either in new license agreements or as amendments to existing license agreements), under which licensees would agree to pay Rambus the royalties it will have foregone while the Order is in effect, should that Order be reversed.<sup>7</sup> Nothing in the Order appears to prohibit escrow and/or contingency clauses like these, but their explicit approval would clarify the Commission's intent and allow Rambus to seek to protect itself from the risk that lost royalties might never be recovered. Under such clauses, Rambus would not receive royalties greater than MAR while the Order is in effect, but could (for example) require payment of amounts higher than MAR for the period while the Order was in effect if the Order is set aside. (Rambus's proposed revision regarding contingent royalty payments appears at ¶ V.D of the Blackline Proposed Order. The Proposed Order does not include language implementing the escrow procedure.)

### 3. Contingent Damages Awards

Modifications of the Commission's Order are also warranted to avoid the potential for irretrievably lost damages from patent infringement suits against non-licensees for the period in which the Order is in effect. The Order limits Rambus's recovery for post-Order infringement damages to MAR rates.<sup>8</sup> If the Order is overturned on appeal, Rambus may be precluded from seeking subsequently to recover the full measure of infringement damages from infringing DRAM manufacturers. If Rambus had already obtained a judgment limited by the Commission's maximum allowable rates, the

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<sup>7</sup> This alternative would not entirely eliminate the problem of irretrievably lost revenues because the Order could not compel licensees to enter in to such agreements if they prefer not to do so.

<sup>8</sup> Rambus does not understand the Commission's Order to limit the judicial remedies that Rambus may seek for *pre-Order* infringement of its patented technologies, regardless of the date the action is commenced.

infringing manufacturers would likely argue that a second attempt to recover the full measure of infringement damages should be barred by *res judicata*.

Accordingly, the Commission should modify its Order to permit – pending resolution of the appeal – a trial court to calculate the full measure of damages in suits for post-Order infringement. If the order has been set aside by the time of the damages award, Rambus would collect the full award. If Rambus’s appeal has been denied by that time, Rambus would collect only the capped MAR amount and the rest would in effect be “remitted.” If Rambus’s appeal is still pending, Rambus would collect the capped MAR amount and the balance of the award would be stayed pending final resolution of the appeal. (Rambus’s proposed revision appears in ¶ VI.B of the Blackline Proposed Order.)

**C. The Commission Should Modify Its Order To Avoid Giving Potential Licensees An Incentive To Infringe, Rather Than License, Rambus’s Patents, By Making Clear That Rambus May Seek The Full Range of Judicial Remedies Traditionally Available In Infringement Actions**

Paragraph VII of the Order bars Rambus from seeking “relief that would result in payments to [Rambus] in excess of Maximum Allowable Royalty Rates” for post-Order infringement. Though it appears that the Commission intended only to limit the *compensatory* damages Rambus could seek for post-Order infringement, licensees may argue that Paragraph VII forbids Rambus from pursuing other remedies in infringement cases authorized by Congress, such as treble damages for willful infringement, attorney’s fees in appropriate cases, interest, and injunctions.

If Paragraph VII were read to deprive Rambus of these remedies to the extent they result in payments in excess of MAR rates, it would create a new and decided incentive for manufacturers to refuse to take a license from Rambus and instead to infringe

Rambus's patents. Knowing that Rambus's damages in an infringement action would be capped at MAR rates and that its litigation costs likely would exceed such a sharply limited potential recovery, it is likely that some infringers would predict that Rambus would not seek damages and thus would refuse to take even a license specifying MAR rates, unless Rambus could also obtain additional remedies for their infringement. To guard against such opportunism, the Commission should make clear that its Order permits Rambus to seek the full range of remedies for infringement that would have been available from a district court in the but-for world (with the proviso that compensatory damages shall be limited at MAR rates, subject to the qualification described above in Part II.B.3).

Remedies such as treble damages for willful infringement and attorney's fees in appropriate cases and interest would have been available to Rambus in the but-for world, subject to the discretion of the district courts, even if the "reasonable royalty" to which Rambus would have been entitled in the but-for world would have been limited at MAR rates. *See* 35 U.S.C. § 284. If the Order were construed to prevent Rambus from seeking treble damages, attorney's fees, and interest, it would encourage infringement rather than licensing of Rambus's patents and would make Rambus worse off, and infringers better off, than they would have been in the but-for world. Such a result would be inconsistent with the Commission's oft-stated intention to emulate, on a prospective basis, conditions in the but-for world. *See* Remedy Op. 7 (describing permissible, prospective order as one that "attempts to replicate the 'but for' world—*i.e.*, the circumstances that would exist had Rambus not engaged in its deceptive course of conduct").

Equally important, the Commission should make clear that it does not intend to prevent Rambus from seeking injunctive relief, including a preliminary injunction, against ongoing and future infringement by an entity that has declined to obtain a license from Rambus. Nothing in the Order appears to prohibit such an injunction, nor could any such prohibition be reconciled with Rambus's statutory right to seek injunctive relief for infringement under the Patent Act, 35 U.S.C. § 283. Injunctive relief is likely as a practical matter to be necessary in order for Rambus to protect against infringement. The potential recovery of MAR rates might in many instances not justify litigation by Rambus, and certain prospective licensees might therefore choose simply to infringe in the expectation that Rambus would not seek damages.

To avoid such unintended and punitive results, the Commission should confirm that Paragraph VII does not foreclose Rambus from seeking, in an infringement action, all remedies (other than compensatory damages that would exceed royalties at above-MAR rates) that would traditionally be available to a patentee, including treble damages for willful infringement, attorney's fees, interest, and injunctions against ongoing and future infringement. (Rambus's proposed revision appears in ¶ VI.D of the Blackline Proposed Order.)

**D. The Commission Should Modify Its Order To Ensure That Rambus Is Not Made Worse Off Than It Would Have Been In The But-For World by Making Clear That Rambus Is Not Limited To MAR Rates When Litigants Allege Deception At JEDEC**

As noted above, the Commission has consistently emphasized in this case that its remedial order is intended to emulate, on a forward-looking basis, conditions in the but-for world in which Rambus never deceived JEDEC members about its patent interests. Thus, the Commission has determined what it believes to be the royalty rates that

Rambus would have charged in the but-for world. Remedy Op. 19-25. At the same time, the Commission has expressly disclaimed any authority or intent to make Rambus worse off (or licensees better off) than they would have been in the but-for world, stressing that the Commission's remedial authority is forward-looking and is not to be used for compensatory or punitive purposes. Remedy Op. 7.

Unless the Commission's Order is modified in an additional respect, however, Rambus will indeed be in a materially worse position than it would have been in the but-for world (even assuming that the Commission's maximum allowable royalty rates accurately reflect what Rambus would have charged in the but-for world). The Commission's Order effectively allows prospective licensees *both* to take advantage of "but-for world" rates, which are based on the assumption that Rambus never engaged in any deception, *and also* to seek an even better result in litigation against Rambus, based on the allegation that Rambus actually did engage in deception. The Order thus enables prospective licensees to be better off than they would have been in either the but-for world or the real world. Accordingly, the Commission should amend its Order to make clear that prospective licensees may not take advantage of MAR rates, either under a license (Order, Paragraph V) or as a cap on damages (Order, Paragraphs VI-VII), when doing so would be inconsistent with the but-for world.

Specifically, the Commission should modify its Order to make clear that a prospective licensee cannot *both* avail itself of the MAR rate, either by accepting a license pursuant to Paragraph V of the Order or by asserting rights in litigation under Paragraphs VI-VII of the Order, *and* contest – with respect to the post-Order period during which MAR rates are in effect – Rambus's right to enforce its patents on account



of alleged deception at JEDEC.<sup>9</sup> In the but-for world, neither licensees nor infringers would have been able to raise arguments based on alleged deception at JEDEC because, by definition, Rambus did not engage in the alleged deception in the but-for world. If licensees or infringers were permitted *both* to claim the benefits of the Order as a ceiling on their obligation for use of Rambus's technologies (*i.e.*, benefit from what the Commission determined to be rates in a but-for world) *and* to sue Rambus for JEDEC-related conduct in the hope of an even better litigation result in the real world, they would be materially better off (and Rambus worse off) than they would have been in either the but-for world or the real world (and presumably thus better off than the Commission intended). *See* Remedy Op. 12-16 (rejecting Complaint Counsel's request for zero royalty rates on ground that the "but-for" world standard does not support such a punitive result). (Rambus's proposed revisions appear in ¶¶ V.C, VI.C, and VII.C of the Blackline Proposed Order.)

**E. The Commission Should Clarify That Rambus May Collect Multiple Royalties On Systems That Incorporate Multiple JEDEC-Compliant Products**

The Commission's Opinion and Order recognize the existence of two categories of JEDEC-Compliant Products, namely (a) memory chips that comply with JEDEC

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<sup>9</sup> The Supreme Court's recent decision in *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), does not preclude such a modification. In *MedImmune*, the Court held that, for Article III purposes, a licensee that has entered into a license with a patent holder has standing to file a declaratory judgment action challenging the validity of the patent without repudiating the license. *Id.* at 777. Rambus's proposed amendment would not interfere with a licensee's rights under *MedImmune*. A licensee that accepted the MAR license would not be limited from raising legal arguments that would have been available to it in the but-for world, including challenges to the validity and infringement of Rambus's patents, without repudiating that license. Those arguments would also be available to an infringer that rejected a MAR license. But neither would be able both to take advantage of MAR rates based on the but-for world and to pursue legal arguments that would not have been available to it in the but-for world.

SDRAM Standards or DDR SDRAM Standards (JEDEC-Compliant SDRAM and JEDEC-Compliant DDR SDRAM<sup>10</sup>) and (b) other components (such as memory controllers) that interface with JEDEC-Compliant DRAM Products.<sup>11</sup> The Opinions and

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<sup>10</sup> Rambus understands “JEDEC-Compliant SDRAM” as used in the Order to refer to a single-data-rate synchronous DRAM that contains all the features specified in the relevant portion of JEDEC standard 21-C, Release 4, as published in November 1993 (JX-56 at 103-124) or the relevant portion of JEDEC standard 21-C, Release 9, as published in August 1999 (CX-234 at 143-162), with the possible exception of features expressly designated as optional. Additionally, Rambus understands “JEDEC-Compliant DDR SDRAM” as used in the Order to refer to a double-data-rate synchronous DRAM that contains all the features specified in JESD79 Release 1 (as published in June 2000), Release 2 (as published in May 2002), Release C (as published in March 2003), Release D (as published in January 2004), or Release E (as published in May 2005), with the possible exception of features expressly designated as optional. Although the Order also makes references to the “revised” versions of these standards, Paragraph I.H, I.I, it seems that the Commission could not have intended for its definitions to include *future* revisions of the standards (*i.e.*, those made after July 31, 2006) to the extent they differ materially from the current versions of the standards. Any other interpretation would allow JEDEC members to confiscate additional Rambus technologies simply by amending the standards to include them. The Commission should clarify that it did not intend to authorize such gamesmanship by revising its Order to include the language from ¶ I.G and ¶ I.H of the Blackline Proposed Order.

In addition to clarifying which versions of the standards are relevant, the Commission should clarify what it means to “comply” with a standard. While some licensees may contend that a product must include *all* features (even optional ones) described in a standard to “comply” with it, record evidence demonstrates that, because standards are promulgated to ensure interoperability, a product will comply with a standard as long as it includes those features *required* to make the product interoperable. The product need not also include optional features, or other technologies not mentioned in the standard, to be considered “compliant” with the standard. *See* Rhoden, Tr. 554:2-555:2.

<sup>11</sup> The Order defines “JEDEC-Compliant Non-DRAM Products” as “memory controllers or other non-memory-chip components that *comply* with” the SDRAM Standards, the DDR SDRAM Standards, or both of those standards. Paragraph I.G (emphasis added). This definition is ambiguous because the DRAM standards describe only memory chips. Because those standards are not directed at “memory controllers or other non-memory-chip components,” it is unclear how any such products could “comply” with the standards. Thus, it appears that the Commission must have intended to define “JEDEC-Compliant Non-DRAM Products” as components designed to *interface* with JEDEC-Compliant DRAM Products, as suggested in the revisions in ¶ I.F in the Blackline Proposed Order. Presumably, the Commission intended its Order to apply to “Relevant” patents covering technologies used in such components only to the extent that those technologies are necessary in order for the components to interface with the specified DRAM products. Otherwise, the Order would permit manufacturers to use Rambus’s technologies without paying for them for reasons that have nothing to do with the SDRAM or DDR SDRAM standards.

Order appear to overlook a third category, however: systems incorporating multiple memory chips and/or other components. Indeed, the Commission never discusses what royalty Rambus may charge for a system incorporating multiple chips and other components. Nevertheless, the Order suggests that the Commission intended that Rambus would be able to collect one royalty for each infringing memory chip and one royalty for each infringing component that interfaces with those memory chips that is included in the system, because the Order would clearly allow Rambus to collect such multiple royalties if each chip and each other interfacing component were sold separately. The Commission should revise its Order to make this clear. (Suggested language appears in ¶ I.I of the Blackline Proposed Order.)

**F. The Commission Should Clarify That Licensees Have The Option Of Entering Into Fixed-Fee Licenses If They So Prefer And The Parties Agree**

Some of Rambus's existing licenses provide for fixed payments rather than running royalties charged on a per-unit basis. Such licenses are negotiated, typically at the behest of the licensee, because the licensee cannot (at least without incurring significant administrative expenses and burdens) collect the information necessary to calculate a per-unit royalty. *See* Smith Decl. ¶ 7. Rambus generally prefers running royalty payments. *See id.* Nevertheless, Rambus assumes that the Commission did not intend to restrict flexibility desired by the licensees in this or other ways, and Rambus assumes that at least some existing or prospective licensees might prefer such fixed-payment arrangements to a standard running-royalty license. Rambus therefore requests that the Commission clarify that the Order does not preclude, in addition to a per-unit MAR-rate license, the option of a flat-fee license (or an amendment to existing flat-fee licenses) negotiated in good-faith, if the licensee so chooses. Licensees, of course, would

remain free to terminate existing flat-fee licenses under Paragraph IV.B and accept the running-royalty license if they prefer. In short, Rambus believes the Commission should make it clear that, should a licensee prefer an alternative to the license the Commission has required Rambus to offer, Rambus may accept the licensee's proposed alternative. (Rambus's proposed revision appears in ¶ V.D of the Blackline Proposed Order.)

**G. The Commission Misconstrued The Samsung RDRAM License In Dropping Royalty Rates To Zero**

In ordering MAR rates reduced to zero after three years, the Commission mistakenly found that Rambus's license agreement with Samsung contemplated royalty rates for RDRAM that "ultimately declined all the way to zero." Remedy Op. 21. The Samsung RDRAM license did not, however, provide for a final zero royalty for all RDRAM. Rather, the license agreement provides that the Samsung RDRAM rate declines to zero only for a specific RDRAM generation upon reaching a significant sales volume, but then reverts to the higher rates for the subsequent generation. Thus, the agreement specifies that, when Samsung switched from 16 megabit ("Mb") RDRAM to 64 Mb RDRAM, the rate would return to the higher royalty-rate figure. *See* CX1592. Specifically, the Samsung license makes clear that, while the royalty rate for the 16 Mb RDRAM declines to 0% five years after shipment of the 500,000th unit, it reverts to 2% for the first sales of the next-generation 64-megabit RDRAM. *See* CX1592, at 3, 9, 17-18 (providing tiered royalty rate structure for "current" [16 Mb RDRAM] followed by second tiered royalty rate structure for "extended" [64 Mb RDRAM]).

As the record evidence indicates, the DRAM industry transitions to new product generations about every 1-2 years. *See* CX2747 at 32 (Micron presentation showing that 16 Mb parts were dominant in mid-1997, 64 Mb parts in early 1999, 128 Mb parts in


early 2001, and 256 Mb parts in early 2002); Lee Tr. at 10997-98 (testifying that Micron introduced 64 Mb SDRAM in 1997, 128 Mb SDRAM in 1999, and 256 SDRAM in 2000). Therefore, the reduction of the royalty on earlier generations to zero five years after shipment of the 500,000th unit was unlikely to have much, if any, practical impact on Rambus's revenues so long as Samsung continued to manufacture and sell successive generations of RDRAM. While Samsung may have wanted royalty rates for RDRAM generally to decline to zero after five years, rather than revert to higher rates for successive RDRAM generations, the parties never agreed to that. See CX1099 at 2 (e-mail dated 1/23/2000 from Rambus's Geoff Tate stating that Samsung wanted "to change all rdram royalty rates so that it isn't by density: i.e. so that within 5 years they pay 0% royalties. we said they have the best deal and cutting royalties below 1% isn't something we can do.").

Accordingly, even on the assumption that the Samsung license provides an appropriate model for licenses under the Commission's Order, the Commission should modify that Order to allow Rambus to recover for the duration of its patents the MAR rates applicable in the first three years of the Order. (Rambus's proposed revision appears in ¶ I.I and ¶ I.P of the Blackline Proposed Order.)

### III. CONCLUSION

For the foregoing reasons, Rambus requests that the Commission grant its motion for reconsideration and issue an amended order clarifying the remedy, as proposed above. A proposed amended order and a blackline comparison to the Commission's Order are submitted herewith.

Respectfully submitted,



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Attorneys for Respondent Rambus Inc.

February 16, 2007

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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

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	)	
<b>In the Matter of</b>	)	
	)	
<b>RAMBUS INCORPORATED,</b>	)	<b>Docket No. 9302</b>
	)	
<b>a corporation.</b>	)	
	)	
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**AMENDED FINAL ORDER**

This matter having been heard by the Commission upon the appeal of Counsel Supporting the Complaint and the cross-appeal of Respondent; and the Commission having determined that Respondent has violated Section 5 of the Federal Trade Commission Act, for the reasons stated in the Opinion of the Commission issued on July 31, 2006; and the Commission having reversed and vacated the Initial Decision, and vacated the Order accompanying the Initial Decision, by Order issued on July 31, 2006, for the reasons stated in the Opinion of the Commission; and the Commission having considered the briefs filed by, and oral arguments presented by, Counsel Supporting the Complaint and Respondent on the issues of remedy, the Commission has now determined to issue a Final Order to remedy Respondent's violations of Section 5 of the Federal Trade Commission Act. Accordingly,

It is ordered that the following Order to cease and desist be, and it hereby is, entered:

I.

**IT IS ORDERED** that for purposes of this Order, the following definitions shall apply:

- A. "Action" means any lawsuit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, in the United States or anywhere else in the world.
- B. "Compliance Officer" means the Person employed by Respondent pursuant to Paragraph III. of this Order.
- C. "DRAM" means Dynamic Random Access Memory.
- D. "JEDEC" means the JEDEC Solid State Technology Association, originally known as the Joint Electron Device Engineering Council, a non-stock corporation organized and existing under the laws of the Commonwealth of Virginia.
- E. JEDEC-Compliant DRAM Product means:
  - 1. a JEDEC-Compliant SDRAM chip and
  - 2. a JEDEC-Compliant DDR SDRAM chip.
- F. JEDEC-Compliant Non-DRAM Product means a memory controller or an other non-memory-chip component designed to interface with:
  - 1. JEDEC-Compliant SDRAM,
  - 2. JEDEC-Compliant DDR SDRAM, or
  - 3. both JEDEC-Compliant SDRAM and JEDEC-Compliant DDR SDRAM.
- G. JEDEC-Compliant DDR SDRAM means any DRAM that complies with the JEDEC DDR SDRAM specification, published as JESD 79, as revised on or before July 31, 2006 (the "DDR SDRAM Standards").
- H. JEDEC-Compliant SDRAM means any DRAM that complies with the JEDEC SDRAM Standard, published as JC 21-C, Release 4, as revised on or before July 31, 2006; or the JEDEC SDRAM standard, published as JC 21-C, Release 9, as revised on or before July 31, 2006 (the "SDRAM Standards").
- I. "Maximum Allowable Royalty Rates" means
  - 1. The maximum allowable royalty rates shall be no greater than the following percentages of Net Sales of any JEDEC- Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product:
    - a) 0.25% for a JEDEC-Compliant SDRAM chip;
    - b) 0.5% for a JEDEC-Compliant DDR SDRAM chip;
    - c) 0.5% for a JEDEC-Compliant Non-DRAM Product designed to interface with JEDEC-Compliant SDRAM; and



- d) 1.0% for a JEDEC-Compliant Non-DRAM Product designed to interface with JEDEC-Compliant DDR SDRAM.
2. The maximum allowable royalty rate for any product that incorporates multiple JEDEC-Compliant DRAM Products, multiple JEDEC-Compliant Non-DRAM Products, or one or more JEDEC-Compliant DRAM Products and one or more JEDEC-Compliant Non-DRAM Products shall be no greater than the royalty rate that produces the following total royalty payment:
- a) 0.25% of the average net sales price of JEDEC-Compliant SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant SDRAM chips in the product; plus
  - b) 0.5% of the average net sales price of JEDEC-Compliant DDR SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant DDR SDRAM chips in the product; plus
  - c) 0.5% of the average net sales price of JEDEC-Compliant Non-DRAM Products that are designed to interface with JEDEC-Compliant SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant Non-DRAM Products in the product that are designed to interface with JEDEC-Compliant SDRAM; plus
  - d) 1.0% of the average net sales price of JEDEC-Compliant Non-DRAM Products that are designed to interface with JEDEC-Compliant DDR SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant Non-DRAM Products in the product that are designed to interface with JEDEC-Compliant DDR SDRAM.
3. Notwithstanding the calculations described in Paragraph I.I.1. and Paragraph I.J., the royalties per unit for JEDEC-Compliant Non-DRAM Products shall be limited to the following:
- a) For a JEDEC-Compliant Non-DRAM Product designed to interface with SDRAM, royalties per unit shall not exceed the amount obtained by multiplying .005 by the average net sales per unit for single data rate controllers – as those products are defined in Rambus’s licenses for JEDEC-Compliant Non-DRAM products in effect prior to July 31, 2006 – that all licensees reported to Rambus, pursuant to those licenses, prior to July 31, 2006.
  - b) For a JEDEC-Compliant Non-DRAM Product designed to interface with DDR SDRAM, royalties per unit shall not exceed the amount obtained by multiplying .01 by the average net sales per unit for double data rate controllers – as those products are defined in Rambus’s licenses for JEDEC-Compliant Non-DRAM products in effect prior to July 31, 2006 – that all licensees reported to Rambus, pursuant to those licenses, prior to July 31, 2006.

4. JEDEC-Compliant Non-DRAM Products that comply with both the SDRAM Standards and the DDR SDRAM Standards shall all be treated, for purposes of calculating the Maximum Allowable Royalty Rates for such products pursuant to Paragraphs I.I.1.-3., as products that comply with DDR SDRAM Standards.
- J. "Net Sales" means the gross sales amount invoiced or otherwise charged to customers of a licensee or its subsidiaries, less amounts invoiced for returned goods for which a refund is given, less separately stated charges for insurance, handling, duty, freight, and taxes, where such items are included in the invoiced price, and less credit amounts invoiced; provided, however, that (1) for each JEDEC-Compliant DRAM Product sold by the licensee at a combined price covering both the JEDEC-Compliant DRAM Product and a module, board, or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant DRAM Product alone, during the relevant calendar period, less the deductions specified above; and (2) for each JEDEC-Compliant Non-DRAM product sold by the licensee at a combined price covering both the JEDEC-Compliant Non-DRAM Product and a board or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant Non-DRAM Product alone, during the relevant calendar period, less the deductions specified above.
- K. "Person" means natural person, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or legal entity, including any governmental entity.
- L. "Relevant Foreign Patents" means all current or future patents issued by a foreign government to Respondent that claim a priority date of June 17, 1996, or before.
- M. "Relevant U.S. Patents" means all current or future United States patents that claim priority back to U.S. Patent Application Number 07/510,898, filed on April 18, 1990, or to any other U.S. Patent Application filed by or on behalf of Rambus on or before June 17, 1996.
- N. "Respondent" or "Rambus" means Rambus Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Rambus Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- O. "Standard-Setting Organization" means any group, organization, association, membership or stock corporation, government body, or other entity that, through voluntary participation of interested or affected parties, is engaged in the development, promulgation, promotion or monitoring of product or process standards for the electronics industry, or any segment thereof, anywhere in the world.

## II.

**IT IS FURTHER ORDERED** that, while a member of or a participant in a Standard-Setting Organization, Respondent:

- A. Shall not make any misrepresentation or omission to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications (including, but not limited to, failing to cooperate with the Compliance Officer in the satisfaction of his or her responsibilities as described in Paragraph III., below);
- B. Shall make complete, accurate, and timely disclosures to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications to the extent the rules, practices, and policies of such Standard-Setting Organization require such disclosure (including, but not limited to, cooperating with the Compliance Officer's satisfaction of his or her responsibilities as described in Paragraph III., below); and
- C. Shall be prohibited from taking any other action or refraining from taking any other action that would lead the Standard-Setting Organization to develop a standard that would infringe a claim in any issued or future Rambus patents without knowledge by the Standard-Setting Organization of Respondent's patents and patent applications and of the potential scope thereof.

## III.

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall employ, at Respondent's expense, a Compliance Officer, or shall include within the responsibilities of a current employee of Respondent all the responsibilities of a Compliance Officer, as described in this Paragraph III.
  1. The employee serving as the Compliance Officer shall be employed subject to the approval of the Commission, which approval Respondent shall seek pursuant to § 2.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f).
  2. The Compliance Officer shall be the sole representative of Respondent for the purpose of communicating Respondent's existing and potential patent rights related to any standard under consideration by any and all Standard-Setting Organizations of which Respondent is a member or in which Respondent is a participant; provided, however, that the Compliance Officer may, subject to the approval of the Commission, delegate a portion of his or her responsibilities to another employee of Respondent if he or she is unable to satisfy his or her responsibilities as described in this Paragraph III. because of the large number of Standard-Setting Organizations of which Respondent is a member or in which Respondent

is a participant or because of the large number of standards under consideration by the Standard-Setting Organizations at any one time.

- B. Respondent shall:
1. Provide the Compliance Officer with full and complete access to Respondent's books, records, documents, personnel, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Compliance Officer may reasonably request;
  2. Assure that the Compliance Officer has all information necessary to satisfy his or her responsibilities as described in this Paragraph III.;
  3. Cooperate with any reasonable request of the Compliance Officer, including, but not limited to, requests to develop or compile data and information for the Compliance Officer's use; and
  4. Take no action to interfere with or impede the Compliance Officer's ability to satisfy his or her responsibilities as described in this Paragraph III.
- C. Failure of the Compliance Officer to satisfy his or her responsibilities as described in this Paragraph III. shall be considered a violation of this Order by Respondent, except to the extent that such failure results from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Compliance Officer.
- D. If at any time the Commission determines that the Compliance Officer has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may require Respondent to employ a substitute to serve as Compliance Officer, or include within a different current employee's job responsibilities those of the Compliance Officer, in the same manner as provided by this Order.
- E. Respondent shall, in its reports to the Commission submitted pursuant to Paragraph IX. of this Order, include a description of all disclosures made to all Standard-Setting Organizations pursuant to this Paragraph III., including the date of the disclosure, the patents and patent applications disclosed, the standards under consideration, and the Standard-Setting Organization to which it was made. The Compliance Officer shall verify each such report and submit supplemental reports directly to the Commission or its staff, on a confidential basis, to the extent the Compliance Officer considers such supplemental reports necessary.

#### IV.

**IT IS FURTHER ORDERED** that:

- A. Respondent shall cease any and all efforts by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, to seek to collect or to collect, under the Relevant U.S. Patents and, with regard to imports or exports to or from

the United States, the Relevant Foreign Patents, any fees, royalties or other payments, in cash or in kind, relating 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, that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order.

- B. Respondent shall allow any party to a license agreement that requires payment, under the Relevant U.S. Patents and, with regard to imports or exports to or from the United States, the Relevant Foreign Patents, of any fees, royalties or other consideration, in cash or in kind, relating 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, that are in excess of the Maximum Allowable Royalty Rates of this Order or are otherwise inconsistent with this Order, to terminate that license agreement – at the option of the licensee – without penalty, and release that licensee from any further payments pursuant to that license agreement that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order. Nothing in this Paragraph IV.B shall be construed to allow a licensee’s election to terminate its license agreement to excuse the licensee from paying to Respondent the full royalties specified in the license for the period before the licensee elects to terminate the license. The release required by this Paragraph IV.B shall not be construed to discharge any rights or obligations except those arising from the existing license agreement.
- C. In the event that Paragraph IV.B. of this Order is vacated or modified upon judicial review pursuant to 15 U.S.C. § 45(c), any termination of a license agreement or release from obligations of a license agreement accomplished pursuant to Paragraph IV.B of this Order shall become void, unless
1. the parties to the license that was terminated or released agree to an alternative resolution; or
  2. voiding such termination or release would be inconsistent with the terms of the judicial decree.

V.

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall offer and make available to all interested persons, a worldwide, nonexclusive license under the Relevant U.S. Patents, to make, have made, use, offer to sell, or sell JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products. Such licenses shall not seek to collect any fees, royalties or other consideration, in cash or in kind, in excess of or in addition to the Maximum Allowable Royalty Rates, other than fees in an amount not to exceed the fair market value of any services to be rendered by Respondent to the licensee to the extent such services have been rendered at the request of the licensee.
- B. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may include in the licenses offered pursuant to Paragraph V.A.,
1. a requirement that the licensee grant Rambus a royalty-free, nonexclusive license under the licensee's patents to make, have made, use, offer to sell, and sell any product, the manufacture, use, offer to sale, or sale of which would, if not authorized, infringe one of the licensee's patents by reason of the implementation or use of any Rambus interface technology or of any of the licensee's improvements to a Rambus interface technology (or by reason of the use of any apparatus required by (i) any Rambus interface technology or (ii) any of the licensee's improvements to a Rambus interface technology), where such infringement:
    - a) would not have occurred but for the implementation of the Rambus interface technology or the licensee's improvement and
    - b) could not have been avoided by another commercially reasonable implementation or resulted from use of an example included in the Rambus interface technology or in the licensee's improvement;and
  2. a right to sublicense Rambus's rights under the license provided pursuant to Paragraph V.B.1., to any and all of the other licensees of any Rambus interface technology that have provided reciprocal rights through Rambus to the licensee under Paragraph V.A. at no separate, additional royalty or other charge to that licensee, provided that such sublicensed rights shall be limited to the products as to which Rambus receives a license (as identified in Paragraph V.B.1.), and provided further that no sublicense shall be granted for the use of rights with respect to
    - a) semiconductor manufacturing technology, and
    - b) any other portion of any integrated circuit including, without limitation, the core of a memory integrated circuit.

- C. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may include in the licenses offered pursuant to Paragraph V.A., covenants pursuant to which the licensee would agree, for the period after this Order becomes final:
1. not to seek relief under any claim arising out of Rambus's conduct at JEDEC; and
  2. not to assert that Respondent's patents are not enforceable because of Rambus's conduct at JEDEC.
- D. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may offer as an alternative to the license offered pursuant to Paragraph V.A., which alternative the licensee may elect at its option, a license identical to that offered pursuant to Paragraph V.A., except that it may include:
1. a clause providing that the licensee pay Rambus a flat license fee in lieu of running royalties; and/or
  2. a contingency clause providing that, in the event that this Order is overturned or modified upon judicial review, the licensee shall be required to make additional payments to Rambus. Such additional payments may include payments of additional royalties on Net Sales of JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products during the period of time between the effective date of this Order and any judicial decree modifying or terminating this Order. Any contingency clause written pursuant to this provision shall state that the licensee shall not be required to make additional payments to Rambus in the event that such payments would be inconsistent with the judicial decree modifying or terminating this Order.
- E. A licensee pursuant to Paragraph V.A. may sublicense to its subsidiaries the rights that arise under a license pursuant to Paragraph V.A. at no additional royalty or charge to the licensee or sublicensee.
- F. The license described in Paragraph V.A. shall continue until expiration of the last to expire of the Relevant U.S. Patents; provided, however, that:
1. The licensee may, solely at the option of the licensee, terminate the license at any time upon sixty (60) days' written notice to Respondent; and
  2. If either party defaults in the performance of any material obligation under the license described in Paragraph V.A. and if any such default is not corrected within forty-five (45) days after the defaulting party receives written notice thereof from the non-defaulting party, the non-defaulting party, at its option, may, in addition to any other remedies it may have, terminate the license.
- G. Rambus shall not argue in any Action that a licensee's acceptance of, or participation in, a license pursuant to Paragraph V.A. of this Order bars the licensee from:
1. asserting that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed or

2. offering any defense based on contentions that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed.

## VI.

### **IT IS FURTHER ORDERED** that:

- A. Respondent shall cease and desist any and all efforts it has undertaken by any means, either directly or indirectly, in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, to the extent that Respondent: (1) has asserted that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States, infringes any Relevant Foreign Patents and (2) for periods after this Order becomes final, is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or that would otherwise be inconsistent with the requirements of this Order.
- B. Notwithstanding the provisions of Paragraph VI.A., if a petition for review of this Amended Final Order is filed pursuant to 15 U.S.C. § 45(c), until all appeals are exhausted, Respondent may attempt to obtain a judgment in an amount in excess of the Maximum Allowable Royalty Rates, provided that Respondent may not seek to collect or execute upon such a judgment for any amount in excess of the Maximum Allowable Royalty Rates.
- C. Notwithstanding the provisions of Paragraph VI.A., if a Person asserts or continues to assert, after this Order becomes effective, any claim, counterclaim, or defense against Respondent, with respect to Respondent’s enforcement of its patents for the period after this Order become effective, based on Respondent’s conduct at JEDEC, Respondent may continue to seek relief or execute upon a judgment from that Person that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates for the period after this Order becomes effective.
- D. Nothing in this Order shall prevent Respondent from seeking, in addition to compensatory damages for infringement, injunctive relief pursuant to 35 U.S.C. § 283, increased damages pursuant to 35 U.S.C. § 284, or attorney’s fees pursuant to 35 U.S.C. § 285.

## VII.



**IT IS FURTHER ORDERED** that:

- A. Respondent shall not undertake any new efforts by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, pursuant to which Respondent: (1) asserts that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product any time after the date this Order becomes final, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States any time after the date this Order becomes final, infringes any Relevant Foreign Patents, and (2) for periods after this Order becomes final, is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or would otherwise be inconsistent with the requirements of this Order.
- B. Notwithstanding the provisions of Paragraph VII.A., if a petition for review of this Amended Final Order is filed pursuant to 15 U.S.C. § 45(c), until all appeals are exhausted, Respondent may attempt to obtain a judgment in an amount in excess of the Maximum Allowable Royalty Rates, provided that Respondent may not seek to collect or execute upon such a judgment for any amount in excess of the Maximum Allowable Royalty Rates.
- C. Notwithstanding the provisions of Paragraph VII.A., if a Person asserts or continues to assert, after the Order become effective, any claim, counterclaim, or defense against Respondent, with respect to Respondent's enforcement of its patents for the period after this Order becomes effective, based on Respondent's conduct at JEDEC, Respondent may undertake a new effort to obtain relief from that Person that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates for the period after this Order becomes final.
- D. Nothing in this Order shall prevent Respondent from seeking, in addition to compensatory damages for infringement, injunctive relief pursuant to 35 U.S.C. § 283, increased damages pursuant to 35 U.S.C. § 284, or attorney's fees pursuant to 35 U.S.C. § 285.

**VIII.**

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to JEDEC, to those members of JEDEC that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or

JEDEC-Compliant Non-DRAM Products, and to any other Person that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products.

- B. No later than ten (10) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to every officer and director of Respondent, to every employee or agent of Respondent whose responsibilities include acting as Respondent's designated representative to any Standard-Setting Organization, and to every employee or agent having managerial responsibility for any of Respondent's obligations under this Order.
- C. Until ten (10) years after the date this Order becomes final, Respondent shall furnish a copy of this Order and the complaint in this matter to each new officer and director of Respondent and to every new employee or agent of Respondent whose responsibilities will include acting as Respondent's designated representative to any Standard-Setting Organization or who will have managerial responsibility for any of Respondent's obligations under the Order. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this Paragraph IX.C., "new employee" shall include without limitation any of Respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any Standard-Setting Organization.
- D. Until ten (10) years after the date this Order becomes final, Respondent shall furnish each Standard-Setting Organization of which it is a member and which it joins a copy of this Order, and Respondent shall identify to each such organization the name of the Compliance Officer who will serve as Respondent's designated representative to the Standard-Setting Organization.

## IX.

**IT IS FURTHER ORDERED** that:

- A. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:
  - 1. no later than sixty (60) days after the date this Order becomes final; and
  - 2. annually for ten (10) years on the anniversary of the date this Order becomes final.
- B. Respondents shall include in its reports, among other things required by the Commission, a full description of the efforts being made to comply with this Order, a description of all substantive contacts or negotiations relating to Respondent's participation in any Standard-Setting Organization of which Respondent is a member, the identity of all parties contacted, copies of all written

communications to and from such parties, internal documents and communications, and all reports and recommendations concerning Respondent's participation in any Standard-Setting Organization.

- C. Until ten (10) years after the date this Order becomes final, Respondent shall maintain records adequate to describe in detail any action taken in connection with the activities covered by this Order, including, but not limited to, the annual amount of royalties received from each licensee pursuant to Paragraph V. of this Order.

**X.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matter contained in this Order; and
- B. Upon five days' notice to Respondent and without restraint or interference from Respondent, to interview the Compliance Officer and any other of Respondent's officers, directors, or employees, who may have counsel present, regarding any such matters.

**XI.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to (1) any proposed dissolution of Respondent; (2) any proposed acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment or creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate twenty (20) years from the date this Order becomes final.

By the Commission, Commissioner Harbour and Commissioner Rosch dissenting.

Donald S. Clark  
Secretary

SEAL

ISSUED: \_\_\_\_\_, 2007

**BLACKLINED  
AMENDED  
ORDER**

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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

	)	
	)	
<b>In the Matter of</b>	)	
	)	
<b>RAMBUS INCORPORATED,</b>	)	<b>Docket No. 9302</b>
	)	
<b>a corporation.</b>	)	
	)	
	)	
	)	

**AMENDED FINAL ORDER**

This matter having been heard by the Commission upon the appeal of Counsel Supporting the Complaint and the cross-appeal of Respondent; and the Commission having determined that Respondent has violated Section 5 of the Federal Trade Commission Act, for the reasons stated in the Opinion of the Commission issued on July 31, 2006; and the Commission having reversed and vacated the Initial Decision, and vacated the Order accompanying the Initial Decision, by Order issued on July 31, 2006, for the reasons stated in the Opinion of the Commission; and the Commission having considered the briefs filed by, and oral arguments presented by, Counsel Supporting the Complaint and Respondent on the issues of remedy, the Commission has now determined to issue a Final Order to remedy Respondent's violations of Section 5 of the Federal Trade Commission Act. Accordingly,

It is ordered that the following Order to cease and desist be, and it hereby is, entered:

I.

**IT IS ORDERED** that for purposes of this Order, the following definitions shall apply:

- A. "Action" means any lawsuit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, in the United States or anywhere else in the world.
- B. "Compliance Officer" means the Person employed by Respondent pursuant to Paragraph III. of this Order.
- C. "DRAM" means Dynamic Random Access Memory.
- D. ~~"First Royalty Period" means the period that begins on the date this Order is issued and ends on the date three years after the date this Order is issued.~~
- D. ~~E.~~ "JEDEC" means the JEDEC Solid State Technology Association, originally known as the Joint Electron Device Engineering Council, a non-stock corporation organized and existing under the laws of the Commonwealth of Virginia.
- E. ~~F.~~ JEDEC-Compliant DRAM Product means:
  - 1. a JEDEC-Compliant SDRAM chip and
  - 2. a JEDEC-Compliant DDR SDRAM chip.
- E. ~~G.~~ JEDEC-Compliant Non-DRAM Product means a memory controllers or an other non-memory-chip components that comply component designed to interface with:
  - 1. the JEDEC-Compliant SDRAM Standards,
  - 2. the JEDEC-Compliant DDR SDRAM Standards, or
  - 3. both the JEDEC-Compliant SDRAM Standards and the JEDEC-Compliant DDR SDRAM Standards.
- G. ~~H.~~ JEDEC-Compliant DDR SDRAM means any DRAM that complies with the JEDEC DDR SDRAM specification, published as JESD 79, as revised on or before July 31, 2006 (the "DDR SDRAM Standards").
- H. ~~I.~~ JEDEC-Compliant SDRAM means any DRAM that complies with the JEDEC SDRAM Standard, published as JC 21-C, Release 4, as revised on or before July 31, 2006; or the JEDEC SDRAM standard, published as JC 21-C, Release 9, as revised on or before July 31, 2006 (the "SDRAM Standards").
- I. ~~J.~~ "Maximum Allowable Royalty Rates" means
  - 1. ~~During the First Royalty Rate Period, the~~ The maximum allowable royalty rates shall be no greater than the following percentages of Net Sales of any

JEDEC- Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products:

- a) 0.25% for a JEDEC-Compliant SDRAM chip;
- b) 0.5% for a JEDEC-Compliant DDR SDRAM chip;
- c) 0.5% for a JEDEC-Compliant Non-DRAM Products that comply with SDRAM Standards Product designed to interface with JEDEC-Compliant SDRAM; and
- d) 1.0% for a JEDEC-Compliant Non-DRAM Products that comply with Product designed to interface with JEDEC-Compliant DDR SDRAM Standards.

2. During the Second Royalty Rate Period, ~~the~~The maximum allowable royalty rate for any product that incorporates multiple JEDEC-Compliant DRAM Products, multiple JEDEC-Compliant Non-DRAM Products, or one or more JEDEC-Compliant DRAM Products and one or more JEDEC-Compliant Non-DRAM Products shall be 0.0%-no greater than the royalty rate that produces the following total royalty payment:

- a) 0.25% of the average net sales price of JEDEC-Compliant SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant SDRAM chips in the product; plus
- b) 0.5% of the average net sales price of JEDEC-Compliant DDR SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant DDR SDRAM chips in the product; plus
- c) 0.5% of the average net sales price of JEDEC-Compliant Non-DRAM Products that are designed to interface with JEDEC-Compliant SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant Non-DRAM Products in the product that are designed to interface with JEDEC-Compliant SDRAM; plus
- d) 1.0% of the average net sales price of JEDEC-Compliant Non-DRAM Products that are designed to interface with JEDEC-Compliant DDR SDRAM reported by all licensees to Rambus during the period, times the number of JEDEC-Compliant Non-DRAM Products in the product that are designed to interface with JEDEC-Compliant DDR SDRAM.

3. Notwithstanding the calculations described in Paragraph I.J.1. and Paragraph I.K.J., the royalties per unit for JEDEC-Compliant Non-DRAM Products shall be limited to the following:

- a) For a JEDEC-Compliant Non-DRAM Products that comply Product designed to interface with the SDRAM-Standards, royalties per unit shall not exceed the amount obtained by multiplying .005 by the average net sales per unit for single data rate controllers – as those products are defined in Rambus’s licenses for JEDEC-Compliant Non-DRAM products in effect



prior to July 31, 2006 – that all licensees reported to Rambus, pursuant to those licenses, prior to July 31, 2006.

b) For ~~a JEDEC-Compliant Non-DRAM products that comply~~ **Product designed to interface** with the DDR SDRAM-~~Standards~~, royalties per unit shall not exceed the amount obtained by multiplying .01 by the average net sales per unit for double data rate controllers – as those products are defined in Rambus’s licenses for JEDEC-Compliant Non-DRAM products in effect prior to July 31, 2006 – that all licensees reported to Rambus, pursuant to those licenses, prior to July 31, 2006.

4. JEDEC-Compliant Non-DRAM Products that comply with both the SDRAM Standards and the DDR SDRAM Standards shall all be treated, for purposes of calculating the Maximum Allowable Royalty Rates for such products pursuant to Paragraphs I.J.1.-3., as products that comply with DDR SDRAM Standards.

- J.** ~~K.~~ "Net Sales" means the gross sales amount invoiced or otherwise charged to customers of a licensee or its subsidiaries, less amounts invoiced for returned goods for which a refund is given, less separately stated charges for insurance, handling, duty, freight, and taxes, where such items are included in the invoiced price, and less credit amounts invoiced; provided, however, that (1) for each JEDEC-Compliant DRAM Product sold by the licensee at a combined price covering both the JEDEC-Compliant DRAM Product and a module, board, or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant DRAM Product alone, during the relevant calendar period, less the deductions specified above; and (2) for each JEDEC-Compliant Non-DRAM product sold by the licensee at a combined price covering both the JEDEC-Compliant Non-DRAM Product and a board or system, Net Sales shall be calculated based on the licensee's average gross selling price for the relevant JEDEC-Compliant Non-DRAM Product alone, during the relevant calendar period, less the deductions specified above.
- K.** ~~L.~~ "Person" means natural person, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or legal entity, including any governmental entity.
- L.** ~~M.~~ "Relevant Foreign Patents" means all current or future patents issued by a foreign government to Respondent that claim a priority date of June 17, 1996, or before.
- M.** ~~N.~~ "Relevant U.S. Patents" means all current or future United States patents that claim priority back to U.S. Patent Application Number 07/510,898, filed on April 18, 1990, or to any other U.S. Patent Application filed by or on behalf of Rambus on or before June 17, 1996.
- N.** ~~O.~~ "Respondent" or "Rambus" means Rambus Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Rambus Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- P.** ~~"Second Royalty Period" means a period to begin on the date after the First Royalty Period expires and to end on the date on which the last of Respondent's Relevant U.S. Patents and Relevant Foreign Patents expires.~~
- O.** ~~Q.~~ "Standard-Setting Organization" means any group, organization, association, membership or stock corporation, government body, or other entity that, through voluntary participation of interested or affected parties, is engaged in the development, promulgation, promotion or monitoring of product or process standards for the electronics industry, or any segment thereof, anywhere in the world.

## II.

**IT IS FURTHER ORDERED** that, while a member of or a participant in a Standard-Setting Organization, Respondent:

- A. Shall not make any misrepresentation or omission to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications (including, but not limited to, failing to cooperate with the Compliance Officer in the satisfaction of his or her responsibilities as described in Paragraph III., below);
- B. Shall make complete, accurate, and timely disclosures to the Standard-Setting Organization or its members concerning Respondent's patents or patent applications to the extent the rules, practices, and policies of such Standard-Setting Organization require such disclosure (including, but not limited to, cooperating with the Compliance Officer's satisfaction of his or her responsibilities as described in Paragraph III., below); and
- C. Shall be prohibited from taking any other action or refraining from taking any other action that would lead the Standard-Setting Organization to develop a standard that would infringe a claim in any issued or future Rambus patents without knowledge by the Standard-Setting Organization of Respondent's patents and patent applications and of the potential scope thereof.

## III.

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall employ, at Respondent's expense, a Compliance Officer, or shall include within the responsibilities of a current employee of Respondent all the responsibilities of a Compliance Officer, as described in this Paragraph III.
  1. The employee serving as the Compliance Officer shall be employed subject to the approval of the Commission, which approval Respondent shall seek pursuant to § 2.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f).
  2. The Compliance Officer shall be the sole representative of Respondent for the purpose of communicating Respondent's existing and potential patent rights related to any standard under consideration by any and all Standard-Setting Organizations of which Respondent is a member or in which Respondent is a participant; provided, however, that the Compliance Officer may, subject to the approval of the Commission, delegate a portion of his or her responsibilities to another employee of Respondent if he or she is unable to satisfy his or her responsibilities as described in this Paragraph III. because of the large number of Standard-Setting Organizations of which Respondent is a member or in which Respondent

is a participant or because of the large number of standards under consideration by the Standard-Setting Organizations at any one time.

- B. Respondent shall:
1. Provide the Compliance Officer with full and complete access to Respondent's books, records, documents, personnel, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Compliance Officer may reasonably request;
  2. Assure that the Compliance Officer has all information necessary to satisfy his or her responsibilities as described in this Paragraph III.;
  3. Cooperate with any reasonable request of the Compliance Officer, including, but not limited to, requests to develop or compile data and information for the Compliance Officer's use; and
  4. Take no action to interfere with or impede the Compliance Officer's ability to satisfy his or her responsibilities as described in this Paragraph III.
- C. Failure of the Compliance Officer to satisfy his or her responsibilities as described in this Paragraph III. shall be considered a violation of this Order by Respondent, except to the extent that such failure results from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Compliance Officer.
- D. If at any time the Commission determines that the Compliance Officer has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may require Respondent to employ a substitute to serve as Compliance Officer, or include within a different current employee's job responsibilities those of the Compliance Officer, in the same manner as provided by this Order.
- E. Respondent shall, in its reports to the Commission submitted pursuant to Paragraph IX. of this Order, include a description of all disclosures made to all Standard-Setting Organizations pursuant to this Paragraph III., including the date of the disclosure, the patents and patent applications disclosed, the standards under consideration, and the Standard-Setting Organization to which it was made. The Compliance Officer shall verify each such report and submit supplemental reports directly to the Commission or its staff, on a confidential basis, to the extent the Compliance Officer considers such supplemental reports necessary.

#### IV.

**IT IS FURTHER ORDERED** that:

- A. Respondent shall cease any and all efforts by any means, either directly or indirectly, in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, to seek to collect or to collect, under the Relevant U.S. Patents and, with regard to imports or exports to or from the United States, the Relevant Foreign Patents, any fees, royalties or other payments, in cash or in kind, relating 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, that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order.
- B. Respondent shall allow any party to a license agreement that requires payment, under the Relevant U.S. Patents and, with regard to imports or exports to or from the United States, the Relevant Foreign Patents, of any fees, royalties or other consideration, in cash or in kind, relating 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, that are in excess of the Maximum Allowable Royalty Rates of this Order or are otherwise inconsistent with this Order, to terminate ~~or rescind~~ that license agreement – at the option of the licensee – without penalty, and release that licensee from any further payments pursuant to that license agreement that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order. Nothing in this Paragraph IV.B shall be construed to allow a licensee’s election to terminate its license agreement to excuse the licensee from paying to Respondent the full royalties specified in the license for the period before the licensee elects to terminate the license. The release required by this Paragraph IV.B shall not be construed to discharge any rights or obligations except those arising from the existing license agreement.
- C. In the event that Paragraph IV.B. of this Order is vacated or modified upon judicial review pursuant to 15 U.S.C. § 45(c), any termination of a license agreement or release from obligations of a license agreement accomplished pursuant to Paragraph IV.B of this Order shall become void, unless
1. the parties to the license that was terminated or released agree to an alternative resolution; or
  2. voiding such termination or release would be inconsistent with the terms of the judicial decree.

V.

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall offer and make available to all interested persons, a worldwide, nonexclusive license under the Relevant U.S. Patents, to make, have made, use, offer to sell, or sell JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products. Such licenses shall not seek to collect any fees, royalties or other consideration, in cash or in kind, in excess of or in addition to the Maximum Allowable Royalty Rates, other than fees in an amount not to exceed the fair market value of any services to be rendered by Respondent to the licensee to the extent such services have been rendered at the request of the licensee.
- B. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may include in the licenses offered pursuant to Paragraph V.A.,
1. a requirement that the licensee grant Rambus a royalty-free, nonexclusive license under the licensee's patents to make, have made, use, offer to sell, and sell any product, the manufacture, use, offer to sale, or sale of which would, if not authorized, infringe one of the licensee's patents by reason of the implementation or use of any Rambus interface technology or of any of the licensee's improvements to a Rambus interface technology (or by reason of the use of any apparatus required by (i) any Rambus interface technology or (ii) any of the licensee's improvements to a Rambus interface technology), where such infringement:
    - a) would not have occurred but for the implementation of the Rambus interface technology or the licensee's improvement and
    - b) could not have been avoided by another commercially reasonable implementation or resulted from use of an example included in the Rambus interface technology or in the licensee's improvement; and
  2. a right to sublicense Rambus's rights under the license provided pursuant to Paragraph V.B.1., to any and all of the other licensees of any Rambus interface technology that have provided reciprocal rights through Rambus to the licensee under Paragraph V.A. at no separate, additional royalty or other charge to that licensee, provided that such sublicensed rights shall be limited to the products as to which Rambus receives a license (as identified in Paragraph V.B.1.), and provided further that no sublicense shall be granted for the use of rights with respect to
    - a) semiconductor manufacturing technology, and
    - b) any other portion of any integrated circuit including, without limitation, the core of a memory integrated circuit.

- C. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may include in the licenses offered pursuant to Paragraph V.A., covenants pursuant to which the licensee would agree, for the period after this Order becomes final:
1. not to seek relief under any claim arising out of Rambus's conduct at JEDEC; and
  2. not to assert that Respondent's patents are not enforceable because of Rambus's conduct at JEDEC.
- D. Notwithstanding the provisions of Paragraph V.A. of this Order, Rambus may offer as an alternative to the license offered pursuant to Paragraph V.A., which alternative the licensee may elect at its option, a license identical to that offered pursuant to Paragraph V.A., except that it may include:
1. a clause providing that the licensee pay Rambus a flat license fee in lieu of running royalties; and/or
  2. a contingency clause providing that, in the event that this Order is overturned or modified upon judicial review, the licensee shall be required to make additional payments to Rambus. Such additional payments may include payments of additional royalties on Net Sales of JEDEC-Compliant DRAM Products and JEDEC-Compliant Non-DRAM Products during the period of time between the effective date of this Order and any judicial decree modifying or terminating this Order. Any contingency clause written pursuant to this provision shall state that the licensee shall not be required to make additional payments to Rambus in the event that such payments would be inconsistent with the judicial decree modifying or terminating this Order.
- E. C-A licensee pursuant to Paragraph V.A. may sublicense to its subsidiaries the rights that arise under a license pursuant to Paragraph V.A. at no additional royalty or charge to the licensee or sublicensee.
- E. D-The license described in Paragraph V.A. shall continue until expiration of the last to expire of the Relevant U.S. Patents; provided, however, that:
1. The licensee may, solely at the option of the licensee, terminate the license at any time upon sixty (60) days' written notice to Respondent; and
  2. If either party defaults in the performance of any material obligation under the license described in Paragraph V.A. and if any such default is not corrected within forty-five (45) days after the defaulting party receives written notice thereof from the non-defaulting party, the non-defaulting party, at its option, may, in addition to any other remedies it may have, terminate the license.

- G.** ~~E.~~ Rambus shall not argue in any Action that a licensee's acceptance of, or participation in, a license pursuant to Paragraph V.A. of this Order bars the licensee from:
1. asserting that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed or
  2. offering any defense based on contentions that any Relevant U.S. Patent or Relevant Foreign Patent is invalid, unenforceable, or not infringed.

## VI.

### **IT IS FURTHER ORDERED that:**

- A.** ~~IT IS FURTHER ORDERED~~ that Respondent shall cease and desist any and all efforts it has undertaken by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, to the extent that Respondent: (1) has asserted that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States, infringes any Relevant Foreign Patents and (2) for periods after this Order becomes final, is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or that would otherwise be inconsistent with the requirements of this Order.
- B.** Notwithstanding the provisions of Paragraph VI.A., if a petition for review of this Amended Final Order is filed pursuant to 15 U.S.C. § 45(c), until all appeals are exhausted, Respondent may attempt to obtain a judgment in an amount in excess of the Maximum Allowable Royalty Rates, provided that Respondent may not seek to collect or execute upon such a judgment for any amount in excess of the Maximum Allowable Royalty Rates.
- C.** Notwithstanding the provisions of Paragraph VI.A., if a Person asserts or continues to assert, after this Order becomes effective, any claim, counterclaim, or defense against Respondent, with respect to Respondent's enforcement of its patents for the period after this Order become effective, based on Respondent's conduct at JEDEC, Respondent may continue to seek relief or execute upon a judgment from that Person that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates for the period after this Order becomes effective.
- D.** Nothing in this Order shall prevent Respondent from seeking, in addition to compensatory damages for infringement, injunctive relief pursuant to 35



U.S.C. § 283, increased damages pursuant to 35 U.S.C. § 284, or attorney's fees pursuant to 35 U.S.C. § 285.

VII.

IT IS FURTHER ORDERED that :

- A.** Respondent shall not undertake any new efforts by any means, either directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, including, without limitation, the threat or prosecution of, or assertion of any affirmative defense in, any Action, pursuant to which Respondent: (1) asserts that any Person, by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product any time after the date this Order becomes final, infringes any Relevant U.S. Patents or by manufacturing, selling, or otherwise using any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product for import or export to or from the United States any time after the date this Order becomes final, infringes any Relevant Foreign Patents, and (2) for periods after this Order becomes final, is seeking relief that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates or would otherwise be inconsistent with the requirements of this Order.
- B.** Notwithstanding the provisions of Paragraph VII.A., if a petition for review of this Amended Final Order is filed pursuant to 15 U.S.C. § 45(c), until all appeals are exhausted, Respondent may attempt to obtain a judgment in an amount in excess of the Maximum Allowable Royalty Rates, provided that Respondent may not seek to collect or execute upon such a judgment for any amount in excess of the Maximum Allowable Royalty Rates.
- C.** Notwithstanding the provisions of Paragraph VII.A., if a Person asserts or continues to assert, after the Order become effective, any claim, counterclaim, or defense against Respondent, with respect to Respondent's enforcement of its patents for the period after this Order becomes effective, based on Respondent's conduct at JEDEC, Respondent may undertake a new effort to obtain relief from that Person that would result in payments to Respondent in excess of the Maximum Allowable Royalty Rates for the period after this Order becomes final.
- D.** Nothing in this Order shall prevent Respondent from seeking, in addition to compensatory damages for infringement, injunctive relief pursuant to 35 U.S.C. § 283, increased damages pursuant to 35 U.S.C. § 284, or attorney's fees pursuant to 35 U.S.C. § 285.

VIII.

**IT IS FURTHER ORDERED** that:

- A. No later than thirty (30) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to JEDEC, to those members of JEDEC that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products, and to any other Person that Respondent contacted regarding possible infringement of any of its patents by JEDEC-Compliant DRAM Products or JEDEC-Compliant Non-DRAM Products.
- B. No later than ten (10) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the complaint in this matter to every officer and director of Respondent, to every employee or agent of Respondent whose responsibilities include acting as Respondent's designated representative to any Standard-Setting Organization, and to every employee or agent having managerial responsibility for any of Respondent's obligations under this Order.
- C. Until ten (10) years after the date this Order becomes final, Respondent shall furnish a copy of this Order and the complaint in this matter to each new officer and director of Respondent and to every new employee or agent of Respondent whose responsibilities will include acting as Respondent's designated representative to any Standard-Setting Organization or who will have managerial responsibility for any of Respondent's obligations under the Order. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this Paragraph IX.C., "new employee" shall include without limitation any of Respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any Standard-Setting Organization.
- D. Until ten (10) years after the date this Order becomes final, Respondent shall furnish each Standard-Setting Organization of which it is a member and which it joins a copy of this Order, and Respondent shall identify to each such organization the name of the Compliance Officer who will serve as Respondent's designated representative to the Standard-Setting Organization.

**IX.**

**IT IS FURTHER ORDERED** that:

- A. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:
  - 1. no later than sixty (60) days after the date this Order becomes final; and

2. annually for ten (10) years on the anniversary of the date this Order becomes final.
- B. Respondents shall include in its reports, among other things required by the Commission, a full description of the efforts being made to comply with this Order, a description of all substantive contacts or negotiations relating to Respondent's participation in any Standard-Setting Organization of which Respondent is a member, the identity of all parties contacted, copies of all written communications to and from such parties, internal documents and communications, and all reports and recommendations concerning Respondent's participation in any Standard-Setting Organization.
  - C. Until ten (10) years after the date this Order becomes final, Respondent shall maintain records adequate to describe in detail any action taken in connection with the activities covered by this Order, including, but not limited to, the annual amount of royalties received from each licensee pursuant to Paragraph V. of this Order.

#### X.

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matter contained in this Order; and
- B. Upon five days' notice to Respondent and without restraint or interference from Respondent, to interview the Compliance Officer and any other of Respondent's officers, directors, or employees, who may have counsel present, regarding any such matters.

#### XI.

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to (1) any proposed dissolution of Respondent; (2) any proposed acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment or creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate twenty (20) years from the date this Order becomes final.

By the Commission, Commissioner Harbour and Commissioner Rosch dissenting.

Donald S. Clark  
Secretary

SEAL

ISSUED: February 2, \_\_\_\_\_, 2007

# EXHIBIT

A

**NON-PUBLIC**

**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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**DECLARATION OF WILLIAM DELEY  
IN SUPPORT OF RAMBUS'S MOTION  
FOR RECONSIDERATION AND FOR STAY OF ORDER PENDING APPEAL**

**[NON-PUBLIC]**

# EXHIBIT

B

**PUBLIC**

**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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**DECLARATION OF JARED SMITH IN SUPPORT OF  
RAMBUS'S PETITION FOR RECONSIDERATION OF  
THE COMMISSION'S FINAL ORDER AND ITS  
MOTION FOR STAY OF ORDER PENDING APPEAL**



I, Jared Smith, do hereby declare and say:

1. I am currently Director of Sales at Rambus Inc. I have worked in sales at Rambus since joining the company in 2001. As a result of my job responsibilities, I am familiar with the process of negotiating licenses for use of Rambus's patents and the terms and conditions of those patent licenses. I have participated in negotiating the terms and conditions of the majority of Rambus's current patent licenses.

2. I am providing this declaration to the Federal Trade Commission in support of Rambus's Petition for Reconsideration of the Final Order in this matter and its Motion for Stay of Order Pending Appeal. I have personal knowledge of the facts set forth in this declaration.

3. Patent license negotiations involve more than the economic terms described in the Order. In addition to pure economic terms such as royalty rates, parties negotiate other important terms and conditions, such as the scope of the license grant, products and entities covered under the license, and covenants not to sue. In many cases, the agreed upon royalty rate (or license fee) is based on trade-offs and concessions on one or more of these other non-economic terms. In other words, the negotiation process always involves "horse-trading" such that license terms, particularly royalty rates (or license fees), rarely "stand on their own." Rather, a particular term or condition is generally weighed against the language used elsewhere in the agreement.

4. Not surprisingly, patent license negotiations take a long time to conclude. Over a period of months and in some cases years, the parties exchange

proposals and counterproposals by phone, fax, email and in-person communications. Many times it takes weeks or months to agree upon even a basic framework for the agreement.

5. Many of Rambus's relationships with its licensees date back many years, and most of Rambus's current patent licenses have terms of five years.

6. In general, Rambus's patent licenses grant licensees the right to use Rambus's technologies in multiple products. For example, some licenses cover use of Rambus's patents in not only SDRAM and DDR SDRAM, but also DDR2 SDRAM—as well use in products that interface with SDRAM, DDR SDRAM, and DDR2 SDRAM.

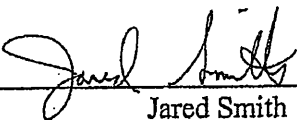
7. While Rambus would prefer to calculate royalties based on a running royalty (“per-unit royalties”), not all prospective licensees can or want to do so. Prospective licensees give different reasons for rejecting a running royalty. Some could obtain the detailed information necessary to calculate a per-unit royalty only by incurring great administrative expenses and burdens (e.g., to record and report per-unit sales). Others demand the certainty of fixed quarterly payments instead of a running per-unit royalty. These interests have led some of Rambus's licensees to request “fixed payments” instead of a running per-unit royalty.

8. I have reviewed the Commission's February 2, 2007, Final Order. Based on my experience, the Order is likely to give rise to significant, additional complexities within the terms of the licenses, particularly those licenses with fixed-fee arrangements. Implementing these complexities in compliance with the Order will be burdensome and time consuming and will likely cause Rambus to lose a substantial

amount of the value and goodwill in the existing patent license agreements.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 16th day of February, 2006, at Mountain View, California.

  
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Jared Smith