

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

COMPLAINT COUNSEL'S OPPOSITION, IN PART, TO MOTION OF
RESPONDENT RAMBUS INC. FOR STAY OF ORDER PENDING APPEAL

I. INTRODUCTION

By its Motion served on Complaint Counsel on February 16, 2007, respondent Rambus Inc. ("Rambus") seeks a stay of the entirety of the Commission's Final Order pending appeal. While Complaint Counsel do not believe a stay of the entirety of the Commission's Final Order is warranted, Complaint Counsel do not object to a partial stay of the Final Order in the form of an interest-bearing escrow arrangement (as suggested by Rambus, Motion at 15-16). Such a limited order in response to Rambus's Motion will address virtually all of the concerns identified by Rambus in its Motion, while preserving in large part the beneficial effects to be achieved by the Commission's Final Order during the time that the appeal is pending.

II. THE APPLICABLE STANDARD

Prior to 1994, the Federal Trade Commission Act provided that Commission orders automatically were stayed pending appeal. *See California Dental Association*, Dkt. No. 9259, 1996 FTC LEXIS 277, at *9 (May 22, 1996). In 1994 Congress eliminated the automatic stay,

finding that the automatic stay had encouraged respondents to file petitions for review ““based on frivolous or other unmeritorious claims largely for the purpose or effect of delay[ing],”” often for years, compliance with the Federal Trade Commission Act. *Id.* at *8-9 (quoting S. Rep. No. 130, 103d Cong., 1st Sess., at 11 (1993)). Following repeal of the automatic stay, the Commission was to stay its own order only when it had ruled on “an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Id.* at *9-10 (citation omitted).

This standard is reflected in Commission Rule § 3.56(c), 16 C.F.R. § 3.56(c), which provides that in determining whether to grant a stay the Commission will consider (1) “the likelihood of the applicant’s success on appeal;” (2) “whether the applicant will suffer irreparable harm if a stay is not granted;” (3) “the degree of injury to other parties if a stay is granted;” and (4) “why the stay is in the public interest.” *See also North Texas Specialty Physicians*, Dkt. No. 9312, 2006 FTC LEXIS 10, at *2 (Jan. 20, 2006); *Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998).

III. RAMBUS’S MOTION FOR STAY OF THE ENTIRETY OF THE FINAL ORDER SHOULD BE DENIED

Rambus seeks a stay of the Final Order in its entirety, but presents no credible arguments or evidence as to why the entire Final Order should be stayed. Rambus has overstated its likelihood of success on appeal, has overstated the harm it would suffer from failure to stay the Final Order, and has understated the harm to other parties from a stay of the Final Order.

Complaint Counsel disagree with Rambus’s argument that there is a likelihood of success on the merits of an appeal. The arguments stated by Rambus (Motion at 3-7) appear to provide a glimpse of the issues it intends to raise in its appeal, but Complaint Counsel believe that the

sound analysis contained in the Commission’s carefully-reasoned Opinions on Liability and Remedy is not susceptible to likely reversal. Rather the Commission’s decision, in our view, is likely to become a valuable precedent for the future development of the law pertaining to the conduct of parties in the standard-setting process.

Rambus’s argument that it faces irreparable harm in the absence of a stay is also exaggerated. Rambus suggests that without a stay it will bleed away its future financial “lifeblood” if required to forego collection of excess royalties on SDRAM and DDR SDRAM during the pendency of an appeal (Motion at 13). The reality, however, is that the DRAM industry has already moved on to later iterations of JEDEC standards that Rambus is free to pursue for royalties completely unimpeded by the Final Order. As shown in the chart in Attachment A, current industry estimates indicate that in 2007, SDRAM and DDR SDRAM chips will generate roughly \$7 billion in worldwide sales. The expected worldwide sales of other JEDEC-standard chips that contain the relevant Rambus patented technologies – DDR2 and DDR3 – is estimated to be more than \$26 billion. This lopsided trend toward later iterations of JEDEC standards not touched by the Final Order is expected to continue even more dramatically in future years. Thus there will continue to be substantial quantities of worldwide JEDEC-standard DRAM sales that Rambus can pursue for royalties, during the appeal and later, unimpeded by the Final Order. Rambus is not likely to bleed to death.

Rambus also argues that it will suffer from “market confusion and loss of goodwill” if it is required to implement the provisions of the Final Order in connection with its existing patent licensees (Motion at 11-13). Rambus ignores, however, that the Commission has found that Rambus was the perpetrator of more than a decade of deception directed at the DRAM industry.

Although Rambus argues that it should be able to preserve the existing pattern of licensing that it has been able to achieve as a result of its past conduct, Complaint Counsel believe that undoing the effects of this unlawful conduct is one of the core public interest objectives of the Final Order.

Complaint Counsel believe that Rambus has fallen far short of the showing necessary to establish grounds for a stay for the entirety of the Final Order. Indeed, the substantive provisions contained in Paragraphs II, III, VIII, IX, X, and XI are not addressed in any fashion by the arguments or the affidavits offered by Rambus in support of its Motion.¹ With respect to these Paragraphs, Rambus has failed to comply with the requirement of Commission Rule § 3.56(c), 16 C.F.R. § 3.56(c), that an application for a stay “state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements.”

Accordingly, Rambus’s motion for a stay of the entirety of the Final Order should be denied.

¹ Those paragraphs of the Final Order address issues other than Rambus’s efforts to enforce its patents and collect royalties under its licenses. Paragraphs II and III of the Final Order concern Rambus’s future dealings with Standard-Setting Organizations. Paragraph VIII concerns Rambus giving notice of the Final Order to certain entities. Paragraph IX of the Final Order concerns compliance reports to the Commission and the preservation of records of Rambus that are relevant to compliance with the Final Order. Paragraph X of the Final Order concerns the Commission’s access to information held by Rambus. Paragraph XI of the Final Order concerns Rambus’s notice to the Commission of changes in Rambus that could affect its compliance obligations. *Cf. North Texas Specialty Physicians*, Dkt. No. 9312, 2006 FTC LEXIS 10 (Jan. 20, 2006) (denying full stay of order, but granting limited stay as to termination of preexisting contracts).

IV. RAMBUS’S CONCERNS CAN BE FULLY SATISFIED BY A PARTIAL AND LIMITED STAY OF THE FINAL ORDER ESTABLISHING AN ESCROW FOR EXCESSIVE ROYALTIES DURING THE APPEAL.

Complaint Counsel believe that Rambus could be protected from the possible adverse risks it has said it faces during an appeal by granting a partial and limited stay of the provisions of Paragraphs IV through VII of the Order – the provisions that deal with Rambus’s efforts to enforce its patents and collect royalties under its licenses. Such a partial stay will leave these provisions of the Final Order in effect, but will establish an escrow procedure that will allow Rambus to license the Relevant U.S. Patents² and Relevant Foreign Patents³ (collectively “Relevant Patents”) for amounts in excess of the Maximum Allowable Royalty Rates⁴ (“MARR”) so long as the licensees place the excess amounts in escrow pending appeal of the Final Order. It will also allow Rambus to continue to enforce the Relevant Patents, but only on the condition that any royalties in excess of MARR that are collected as the result of such enforcement be placed in escrow pending appeal of the Final Order. A proposed stay order implementing such a limited and partial stay (“Proposed Order”) is attached as Attachment B to this filing.

The Proposed Order we suggest will permit Rambus to acquire, and to seek to acquire, rights to consideration in excess of MARR (“Excess Consideration”), but only if Rambus satisfies the conditions of subparagraphs 1.a. through 1.e. The first such condition, specified in

² See Paragraph I.N. of the Final Order (definition of “Relevant U.S. Patents”).

³ See Paragraph I.M. of the Final Order (definition of “Relevant Foreign Patents”).

⁴ See Paragraph I.J. of the Final Order (definition of “Maximum Allowable Royalty Rates”).

Subparagraph 1.a., is that the Excess Consideration either (1) be held in escrow by an escrow agent approved the Commission and in a manner approved by the Commission or (2) be retained pursuant to contingent contract by the party paying such consideration.

Complaint Counsel believe it is essential that any escrow arrangement be approved by the Commission. Absent a requirement for Commission approval, Rambus would be free to structure the arrangement for its own benefit, rather than the benefit of the parties that have paid into escrow (“Payers”). For example, Rambus might structure the arrangement so that some of the administrative costs of escrow would be covered indirectly by a reduction in the rate of interest that the Excess Consideration accrues in escrow.

The mechanism for Commission approval of an escrow arrangement will be the same as that employed in merger cases, in which the Commission orders divestiture to an acquirer or acquirers that “receive[s] the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.”⁵ The Commission will decide whether to approve an escrow agent (rather than an acquirer) and an escrow agreement between the Rambus and an escrow agent (rather than a divestiture agreement).

Subparagraph 1.b. will prevent Excess Consideration from being placed in escrow until the Commission approves an escrow arrangement. Allowing the collection of Excess Consideration by an unapproved escrow agent in a manner not yet approved by the Commission

⁵ See, e.g. *Service Corporation International*, Dkt. No. C-4174, 2006 FTC LEXIS 89, *19 (Dec. 29, 2006); *Cytec Industries Inc.*, Dkt No. C-4132, 2005 FTC LEXIS 53, *20 (April 7, 2005); *Chicago Bridge & Iron Company*, Dkt No. 9300, 2004 FTC LEXIS 250, *12 (Dec. 21, 2004). See also, Commission Rule § 2.41(f), 16 C.F.R. § 2.41(f).

could undermine the purposes of the Proposed Order, if the Commission ultimately did not approve that escrow arrangement.

Subparagraphs 1.c. and 1.d. specify that the Excess Consideration could not be released from escrow, or paid out pursuant to a contingent contract, except by order of the Commission. There are two reasons why the release and pay-out should await a future Commission order. First, there are many conceivable outcomes to any appeal – not only a decision simply affirming or reversing the Commission’s decision, but also a decision to affirm in part and reverse in part, or to remand with instructions. Consequently, it does not appear practical now to anticipate and plan for all possible outcomes. Second, there will need to be clauses in the escrow agreement and in the contingent contracts specifying “triggering” events under which the Excess Consideration is to be released or paid out. Complaint Counsel believe this “trigger” should be clear and unambiguous.

Subparagraph 1.e. sets upper limits on Rambus’s royalties for the relevant technology. Absent this upper limit, Rambus could deny potential licensees the benefit of MARR license terms by demanding more than the potential licensees could possibly afford to pay. Those potential licensees, and the public interest, could suffer irreparable harm from their inability to use the relevant technology pending the appeal. The royalty terms specified in Subparagraph 1.e. reflect the SDRAM and DDR SDRAM royalty rates that Rambus itself has argued “would have been reasonable in the but-for world.”⁶ The terms for Non-DRAM products specified in

⁶ *Brief of Respondent Rambus Inc. Addressing Issues Relating to Remedy*, at 20 (Sept. 15, 2006).

Subparagraphs 1.e.(3) and 1.e.(4) have been calculated by applying the same ratios as between MARR royalty rates for DRAM products and Non-DRAM products.

The Commission should note that limiting the royalties that Rambus may charge to those specified in Subparagraph 1.e. will not eliminate all possibility of irreparable harm to potential licensees. There may be potential licensees that would have been able to pay MARR, but that cannot afford to pay Subparagraph 1.e. amounts into escrow. The only way to eliminate all possibility of such irreparable harm to potential licensees, however, is to deny completely Rambus's request for a stay pending appeal.

Subparagraphs 1.f. and 1.g. specify that Rambus should pay all escrow costs, and gives the escrow agent the duty and power to insure that Rambus does so. In particular, the escrow agent will have the power, at its own discretion, to redistribute the Excess Consideration to the Payers if Rambus fails to advance the escrow agent sufficient funds to cover all foreseeable escrow costs, including the cost of possible redistribution to Payers.

Subparagraph 2 of the Proposed Order contains (1) a statement as to the purpose of holding Excess Consideration in escrow and (2) a listing of some of the factors that the Commission will consider in deciding whether to grant prior approval to an escrow arrangement. This puts Rambus on notice as to some of the issues that it will need to address in its petition for prior approval.

V. CONCLUSION

For all of these reasons Complaint Counsel suggest that the Commission, if it wishes to respond to the request by Rambus to stay the Final Order, issue the Proposed Order attached hereto as Attachment B.

Respectfully submitted,

Jeffrey Schmidt
Director

Daniel P. Ducore
Assistant Director, Compliance Division

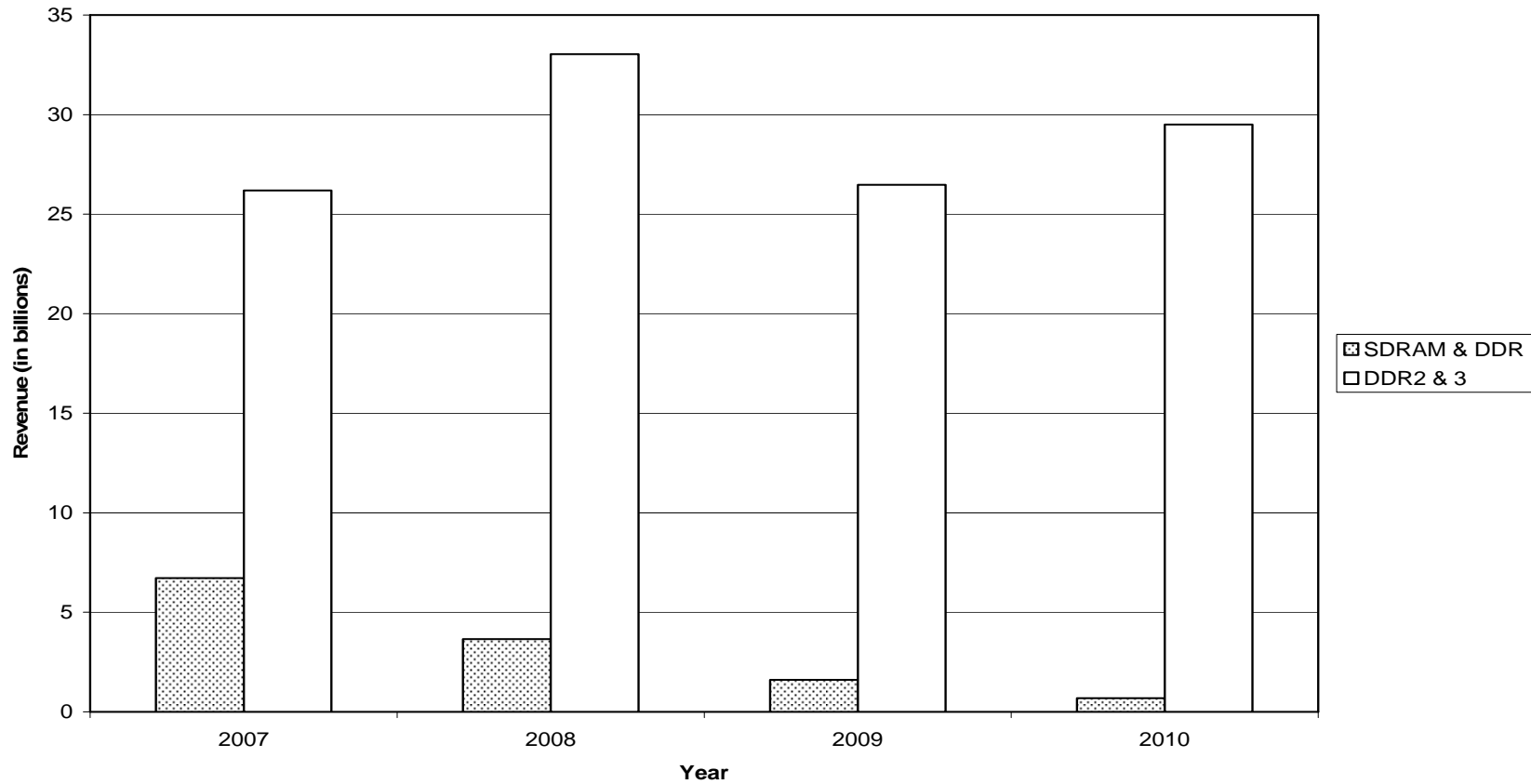
Rendell A. Davis, Jr.
Attorney, Compliance Division

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

DATE: February 26, 2007

Geoffrey D. Oliver
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DRAM Revenue



SDRAM, DDR and DDR2/3 market share breakdown from *TAM by Technology (by Mbit) – Q2 2006 Update* (iSuppli); total DRAM revenue from *Worldwide DRAM Revenue History and Forecast, 2000-2010* (Gartner Dataquest August 2006) [Attachment C in Complaint Counsel’s Response to Rambus’s Petition for Reconsideration of the Commission’s Final Order].

Attachment B

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

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**PROPOSED ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT’S MOTION FOR STAY OF ORDER PENDING APPEAL**

The Commission issued its Opinion and Final Order in this matter on February 2, 2007, and all parties were served as of February 12, 2007. Pursuant to Rule 3.56 of the Commission’s Rules of Practice, 16 C.F.R. § 3.56, Respondent Rambus Inc. moved for a stay of the Final Order pending judicial review on February 16, 2007. The Commission has determined to grant Respondent’s motion in part and to deny it in part..

Accordingly:

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

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

- a. all Excess Consideration is (1) collected and held by an escrow agent that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, or (2) retained pursuant to contingent contract by the party paying such consideration.
 - b. Excess Consideration is neither collected by an escrow agent nor held in escrow unless and until the escrow agent and the manner of collecting Excess Consideration, and of holding it in escrow, have received the prior approval of the Commission; *PROVIDED, HOWEVER, THAT* after such approval is granted, the escrow agent may collect Excess Consideration accruing prior to the grant of such approval, and may hold it in escrow;
 - c. the Excess Consideration (and accrued interest) in escrow is held in escrow until redistributed, pursuant to an order of the Commission, either to Respondent or to the parties that paid such consideration;
 - d. there is only one contingency under which the Excess Consideration (and any accrued interest) retained pursuant to contingent contract is payable to Respondent: the issuance by the Commission of an order authorizing Respondent to receive such Excess Consideration (and any such accrued interest);
 - e. the total amount of fees, royalties, payments, judgments, and other consideration, both cash and in-kind, collected by Respondent, and sought to be collected by Respondent, for manufacture, sale, and use occurring during the First Royalty Period and the Second Royalty Period does not exceed (1) royalties of 0.75% for JEDEC-Compliant SDRAM, (2) royalties of 3.5% for JEDEC-Compliant DDR SDRAM, (3) royalties of 1.5% for JEDEC-Compliant Non-DRAM Products that comply with SDRAM Standards, and (4) royalties of 7% for JEDEC-Compliant Non-DRAM Products that comply with DDR SDRAM Standards;
 - f. Respondent bears all costs of collecting the Excess Consideration, of holding and administering it in escrow, and of redistributing it (“Escrow Costs”); and
 - g. the escrow agent, pursuant to its contract with Respondent and pursuant to written representations it makes to parties paying Excess Consideration into escrow (“Payers”), has a fiduciary duty to the Payers, including, but not limited to, a fiduciary duty to insure that none of the Excess Consideration (or accrued interest) is used to pay Escrow Costs; and, in the event that Respondent has not advanced the escrow agent sufficient funds to insure that all foreseeable Escrow Costs, including the cost of possible redistribution to Payers, will be covered by Respondent, the escrow agent will have the authority, at its own discretion, to immediately redistribute all of the Excess Consideration to the Payers.
2. The purpose of requiring that Excess Consideration be held in escrow is to insure, to the extent possible, that in the event that the relevant provisions of the Final Order are upheld

on appeal, the Payers will be made whole. Consequently, the Commission will approve a manner of collecting Excess Consideration, and of holding it in escrow, only if there will be no commingling of Excess Consideration with other funds, and only if there will be a reliable accounting, with monthly reports to Payers, of the Excess Consideration in escrow. In determining whether to approve a manner of collecting Excess Consideration, and of holding it in escrow, the Commission will consider, *inter alia*, whether the interest to be earned by the Excess Consideration in escrow is consistent with interest from other investments with similar levels of liquidity and risk.

3. In all other respects, Paragraphs IV, V.A., VI, and VII of the Final Order are not stayed.

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

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

CERTIFICATE OF SERVICE

I, David Horn, hereby certify that on February 26, 2007, I caused a copy of the attached, *Complaint Counsel's Opposition, in Part, to Motion of Respondent Rambus Inc. for Stay of Order Pending Appeal*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.,
Washington, D.C. 20580

by electronic transmission and hand delivery to:

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David Horn