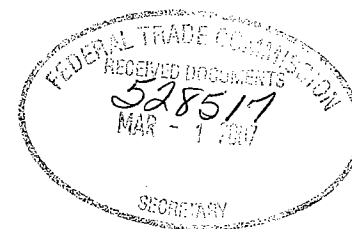


PUBLIC

**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

**REPLY OF RESPONDENT RAMBUS INC. IN SUPPORT OF
MOTION FOR STAY OF ORDER PENDING APPEAL**

MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100

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

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. Rambus Has Established That The Commission Should Stay Its Order. ...	2
B. Complaint Counsel’s Proposed Escrow Arrangement Is Flawed.	5
1. An Escrow Arrangement Will Not Prevent Rambus From Suffering Irreparable Harm.	5
2. Complaint Counsel’s Proposed Escrow Arrangement Would, In Any Event, Have To Be Substantially Modified.	7
III. CONCLUSION	12

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>In re California Dental Ass'n</i> , No. 9259, 1996 FTC LEXIS 277 (May 22, 1996)	2, 3
<i>Packwood v. Senate Select Committee on Ethics</i> , 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers)	4
<i>Pittway v. Black & Decker</i> , 667 F. Supp. 585 (N.D. Ill. 1987)	5
<i>Washington Metropolitan Transit Commission v. Holiday Tours, Inc.</i> , 559 F.2d 841 (D.C. Cir. 1977)	2

REGULATIONS

16 C.F.R. § 3.56	1
------------------------	---

I. INTRODUCTION

In its Motion for Stay of Order Pending Appeal (“Motion for Stay”), respondent Rambus Inc. (“Rambus”) sought a full stay of the Commission’s February 2, 2007, Final Order (“Order”), pursuant to 16 C.F.R. § 3.56, until the final disposition of its appeals in federal courts. Complaint Counsel’s Opposition (“CC Opp.”) largely ignores the points made in Rambus’s Motion for Stay, which demonstrate that the Commission should stay the Order.

Complaint Counsel’s Opposition is based almost entirely on a single, fundamental misapprehension: that Rambus is poised to collect, pending appeal, enormous royalties from the use of Rambus’s patented technologies in DDR2 devices. *See* CC Opp. 3 & Attach. A. This premise is erroneous. At the present time, 70% or more of DDR2 production is unlicensed and results in no royalty income to Rambus. Four of the six largest manufacturers of DDR2 chips (Samsung, Hynix, Micron, and Nanya) are engaged in litigation with Rambus that shows no sign of abating. Hynix continues to infringe Rambus’s patents even though a federal jury – almost one full year ago – rejected Hynix’s invalidity arguments and found that its DDR2 devices infringed Rambus’s patents. Complaint Counsel’s interpretation of the Commission’s Order and opinion on remedy *rewards* past infringers, contrary to law and logic. In short, and as Rambus demonstrated in its Motion to Dismiss, the Commission’s order creates a clear and immediate threat to the “lifeblood” of Rambus, and both the facts and the law support a full stay of the Commission’s order.

Although a full stay remains the proper course, and the only course that would not entail irreparable harm to Rambus, Complaint Counsel propose a partial stay of the Order, combined with an escrow arrangement that would create more problems than it

would solve. And Complaint Counsel's proposal would cause Rambus irreparable harm in many of the same ways the Order would if unstayed. Should the Commission decide not to enter a full stay, it should at least stay Paragraphs IV, V.A., VI, and VII of the Order. If the Commission decides to issue a partial stay with an escrow arrangement, it should modify Complaint Counsel's proposal to alleviate its most serious deficiencies.¹

II. ARGUMENT

A. **Rambus Has Established That The Commission Should Stay Its Order.**

In the Motion for Stay, Rambus demonstrated that the Commission should stay its Order pending appeal. Complaint Counsel and Rambus agree on the factors governing a decision whether to grant a stay: (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 likely to result from the requested stay; and (4) why the stay is in the public interest. *See* Motion for Stay 3 (citing 16 C.F.R. § 3.56(c); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977); *In re California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *2-3 (May 22, 1996)); CC Opp. 2. Rambus addressed each of these factors, but Complaint Counsel ignore almost all of Rambus's arguments showing that these factors are satisfied.

As to the first factor, Rambus established four reasons why it has established a sufficient likelihood of success on appeal: (1) the complexity of the factual record; (2) the conflicts between the factual findings of Chief Judge McGuire and the Commission; (3) the novel and difficult legal issues presented, including those regarding the Commission's remedial authority; and (4) the nearly unprecedented imposition of

¹ Rambus shortly intends to file an Answer to Complaint Counsel's Petition for Reconsideration of Paragraph III.C of the Order, and a motion for leave to reply to Complaint Counsel's Response to Rambus's Petition for Reconsideration.

royalty-free compulsory licensing. Motion for Stay 3-7. Complaint Counsel register their personal “disagree[ment]” with Rambus’s position, but they do not identify any flaws in Rambus’s analysis. CC Opp. 2. Nor do they disagree that an applicant for a stay need not persuade the Commission that its order will be reversed; the applicant need show only that it has raised serious and substantial questions going to the merits of the Order. *See* Motion for Stay 3-4. Indeed, the Commission already has rejected the suggestion that it “must harbor doubt about its decision in order to grant the stay.” *California Dental Ass’n*, 1996 FTC LEXIS 277, at *9.

As to the second factor, Rambus identified four distinct ways in which it will suffer irreparable harm absent a stay: (1) irrevocable loss of substantial royalties and damage awards it would otherwise have collected while the appeal was pending; (2) deprivation of its statutory right to exclude others from using its patented technologies; (3) destruction of goodwill; and (4) extraordinary injury from loss of licensing revenue. Motion for Stay 7-13. Complaint Counsel do not deny that Rambus will suffer substantial harm if the Order is not stayed. Specifically, Complaint Counsel do not contest that the Commission’s Order would work an irrevocable loss of royalties and a deprivation of statutory rights; these undisputedly irreparable injuries alone are sufficient to warrant a stay.

With respect to the destruction of goodwill, Complaint Counsel assert that “the Commission has found that Rambus was the perpetrator of more than a decade of deception,” CC Opp. 3 (emphasis in original), but that assertion improperly assumes the accuracy of the very legal conclusion that Rambus will dispute on appeal – whether the company engaged in wrongdoing at all. The tribunal reviewing an application for stay of

a decision is supposed to presume that the decision was *incorrect*, and then ascertain the harms that would befall the movant if the decision were nonetheless allowed to stand pending review. *Cf. Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers) (listing as one criterion for stay pending appeal “a likelihood of irreparable harm, assuming the correctness of the applicant’s position, if the judgment is not stayed”). Complaint Counsel also ignore the harm an unstayed Order would have on existing business relationships. Many parties desire to use Rambus’s technologies and have entered into – or wish to enter into – mutually agreeable arrangements with Rambus for such use. Complaint Counsel do not address Rambus’s showing that it would be extremely disruptive to require Rambus and its licensees to terminate, renegotiate, and then possibly terminate and renegotiate again, their licenses for use of Rambus’s technologies.

In response to Rambus’s explanation of the fourth type of irreparable harm – the harm caused if the Commission does not clarify the Order to avoid extraordinary financial harm to Rambus – Complaint Counsel suggest only that “Rambus is not likely to bleed to death” because the Order does not constrain its licensing for DDR2 and DDR3. CC Opp. 3. But Rambus has not licensed most of the manufacturers of these products. Indeed, as noted above, four of the six largest DDR2 manufacturers have not taken licenses, even after one of them has been found to infringe Rambus’s patents. Contrary to Complaint Counsel’s suggestion, there is no reason to believe that these manufacturers would begin paying royalties on DDR2 and DDR3 pending appeal.

In any event, Complaint Counsel completely miss the point that the Order will cause Rambus huge, irreparable losses with respect to SDRAM and DDR SDRAM if it is

not stayed and is subsequently set aside on appeal. Complaint Counsel also overlook that, if (as they contend, *see* CC Resp. to Pet. for Reconsideration (CC Resp. PFR) 3-5) the Order prevents Rambus from collecting royalties or damages for *past* use of Rambus's technologies, it would retroactively apply to a period in which SDRAM and DDR SDRAM were the dominant technologies. Complaint Counsel's suggestion that the Order will have only a limited future effect is clearly incorrect.

As noted in the Motion for Stay, the Commission considers the third and fourth stay factors (the risk of injury to other parties to the litigation and the public interest) together, and Rambus has demonstrated that a stay would harm neither. *See* Motion for Stay 14-15. Protecting patent rights "is always acting in the public interest." *Pittway v. Black & Decker*, 667 F. Supp. 585, 593 (N.D. Ill. 1987). Complaint Counsel do not respond to these points.

In short, Rambus has demonstrated that the four factors weigh strongly in favor of granting a stay, with few, if any, substantive objections raised by Complaint Counsel. The Motion for Stay should therefore be granted.

B. Complaint Counsel's Proposed Escrow Arrangement Is Flawed.

1. An Escrow Arrangement Will Not Prevent Rambus From Suffering Irreparable Harm.

Complaint Counsel appear to acknowledge that a stay should be issued, but they argue that a partial stay implementing an escrow arrangement will suffice. To be sure, as Rambus explained in the Motion for Stay, a sensible escrow arrangement could ensure that a stay would not harm third parties. *See* Motion for Stay 15-16. However, an escrow arrangement will not avoid significant irreparable harm to Rambus.

If, pending appeal, Rambus cannot collect the royalties to which it would otherwise be entitled should the Order be reversed, its lifeblood will be materially reduced in ways that cannot later be repaired. Rambus is a public company that relies on sustained positive cash flow from royalty income (for use of its technologies) to support such things as its on-going core research and development efforts and employee salaries. Any reduction in royalty income will force Rambus to alter its business operations in ways that can never be undone, even if all royalties are later recovered. The serious financial problems created by even a temporary constriction of cash flow would be exacerbated if the Order were construed, as Complaint Counsel suggest, to prevent Rambus from seeking to collect royalties and damages in excess of MAR rates for the period *before* the Order becomes final. *See* CC Resp. PFR 3-5; *cf.* Rambus's Pet. for Reconsideration (Rambus PFR) 2-5.

Further, Complaint Counsel's proposed partial stay and escrow arrangement would not protect Rambus's goodwill. If accepted, that proposal would require disruption of the existing relationships between Rambus and its licensees, as they struggle to work out new payment arrangements. The damage done by such disruptions would not disappear, and is likely to grow still worse if the Commission's decision is reversed on appeal. Additionally, Complaint Counsel's partial stay would in no way ameliorate the irreparable harm to Rambus from the loss of the right to exclude others from using its patented technology during the pendency of the appeal.²

² These harms could be avoided by a complete stay of Paragraphs IV, V.A., VI, and VII of the Order, without any provision of an escrow arrangement. A stay limited to those sections would enable those portions of the Order that concern Rambus's continued participation in standard setting organizations to become effective promptly.

2. Complaint Counsel's Proposed Escrow Arrangement Would, In Any Event, Have To Be Substantially Modified.

Even if a sound escrow arrangement were thought to be appropriate, Complaint Counsel's proposal would need to be altered in the following ways to avoid unnecessarily creating still more problems for the Commission, Rambus and its licensees.

First, Complaint Counsel's proposal would stay Paragraphs IV, V.A., VI, and VII of the Order only "until the court of appeals issues a ruling disposing of the petition for review." CC Proposed Order (CCPO) at 1. This provision would guarantee needless confusion and uncertainty after an appellate decision. It is likely that at least one of the parties will seek rehearing or Supreme Court review of the court of appeals' decision, yet Complaint Counsel's proposal would have the stay end before resolution of such proceedings. That would simply incite further requests for a stay, or impose further irreparable harm on Rambus, and would create uncertainty for third parties. It would be far wiser to order the stay to remain in effect "until the expiration of all periods for petitions for rehearing, rehearing en banc, or certiorari, or until final disposition of all such petitions and any proceedings initiated by a grant of such a petition," as provided in the proposed order Rambus submitted with its Motion for Stay. A revision of Complaint Counsel's proposed order showing this and other changes is attached hereto.³ *See* Blackline CCPO at 1.

Second, Complaint Counsel would prohibit any escrow agent from collecting or holding "Excess Consideration" *before* the Commission approves the escrow agent and its manner of operation. *See* CCPO ¶ 1.b. This condition serves little purpose and would

³ Rambus's revision of Complaint Counsel's proposed order, which incorporates the modifications Rambus proposes in text as well as other changes, *see* note 5 *infra*, is attached hereto as Exhibit A. A document comparing Complaint Counsel's proposed order with Rambus's revision ("Blackline CCPO") is attached as Exhibit B.

be unnecessarily disruptive to existing arrangements between Rambus and its licensees. If the Commission did not approve an escrow agent before the Order becomes final, those licensees would have to alter their usual operations twice. They first would have to stop paying Excess Consideration to Rambus as soon as the Order takes effect, and they later would have to resume paying Excess Consideration to an escrow agent after the Commission approves one.

The requirement of prior Commission approval serves no important purpose. Rambus has every incentive to identify a responsible escrow agent as quickly as possible. Rambus would, for example, benefit from entering into license agreements with non-licensees as soon as possible, but non-licensees are not likely to take licenses requiring payment of Excess Consideration until the Commission approves an escrow agent. There is no risk Rambus will endeavor to abscond with funds because the very nature of an escrow arrangement puts those funds out of the hands of Rambus and in the hands of a neutral third party. Licensees will be spared confusion and inconvenience, and their interests will be adequately protected, by a simple requirement that Excess Consideration be put in escrow immediately, with a neutral, third-party bank or other financial institution (and promptly transferred thereafter to a Commission-approved escrow account). To ensure that Rambus is not dilatory, the Order could require Rambus to propose an escrow arrangement before the Order takes effect, but it should not preclude an interim escrow arrangement until the Commission has signed off on all the details of the final arrangement. *See* Blackline CCPO ¶¶ 1.a, 1.b.

Third, paragraphs 1.c and 1.d of Complaint Counsel's proposal are incomplete because neither adequately describes when the Commission will decide upon the

disposition of the funds in escrow. Instead, Complaint Counsel's proposal simply provides that the Commission shall order distribution from escrow at some uncertain time (presumably after all appeals are exhausted). There is no reason to require either Rambus or its licensees to wait for distribution from the escrow account once the stay of the Commission's Order terminates. Accordingly, Rambus proposes adding to paragraphs 1.c and 1.d language providing for prompt Commission action once a mandate issues from the court of appeals. *See* Blackline CCPO ¶¶ 1.c, 1.d.

Fourth, Complaint Counsel's proposal would impose ceilings on the Excess Consideration that Rambus may seek to collect. *See* CCPO ¶ 1.e. If the Commission's Order is affirmed, such ceilings would have been unnecessary because payors will be made almost entirely whole when the Excess Consideration (plus interest) is refunded. On the other hand, as Complaint Counsel recognize, the ceiling will impose irreparable harm on Rambus if the Commission Order is reversed because there will be no mechanism for Rambus to collect consideration the licensee may otherwise agree to pay in excess of the ceilings. *See* CC Opp. 8. This, of course, is the very type of harm Complaint Counsel's escrow proposal is intended to prevent.

Complaint Counsel assert that the proposed ceilings are "rates that Rambus itself has argued 'would have been reasonable in the but-for world.'" CC Opp. 7. The fact that those rates are "reasonable" rates in particular constructions of the but-for world does not mean that licensees, judges, or juries would not find higher rates reasonable in a but-for world or in the real world. Indeed, Hitachi agreed to pay higher rates in settlement of litigation, and a federal court jury agreed that Rambus should be compensated at higher rates in the ongoing Hynix litigation.

