PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
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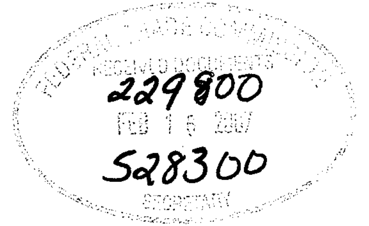
J. Thomas Rosch



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

MOTION OF RESPONDENT RAMBUS INC. FOR STAY OF ORDER PENDING APPEAL

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I. INTRODUCTION

Pursuant to 16 C.F.R. § 3.56, respondent Rambus Inc. ("Rambus") seeks a stay of the February 2, 2007, Final Order ("Order") of the Federal Trade Commission ("Commission") until the final disposition of Rambus's appeals in the federal courts. The Order was based upon the Commission's opinions of July 31, 2006 ("Liability Op.") and February 2, 2007 ("Remedy Op."). Taken together, the Order and opinions (1) reverse the Initial Decision by Chief Administrative Law Judge McGuire, who, after hearing extensive live testimony and reviewing a voluminous record, concluded that Rambus had not violated Section 5 of the Federal Trade Commission Act; (2) conclude that Rambus engaged in exclusionary conduct in violation of Section 2 of the Sherman Act (and, therefore, Section 5) based on disputed facts and an unprecedented legal theory; and (3) require the extraordinary (indeed, virtually unprecedented in a contested FTC case) remedy of compulsory licensing of numerous patents at rates no higher than those established by the Commission—rates well below those Rambus currently charges.

Unless it is stayed, the Order will cause extraordinary and irreparable harm to Rambus even while Rambus pursues its appeal of the difficult issues of first impression raised in this case. As currently framed, the Order bars Rambus from (1) licensing its patents at royalty rates above specified Maximum Allowable Royalty (MAR) rates in numerous products manufactured in compliance with JEDEC Solid State Technology Association ("JEDEC") standards; and (2) seeking anything more than MAR rates when enforcing its patent rights against those who decline to take a license from Rambus for

future use even on the low rates that the Order requires Rambus to offer.[1]

The Commission has recognized that "[r]oyalties are the lifeblood of Rambus." Remedy Op. 14 (alteration in original). The Commission's Order, however, threatens irrevocably to cut off much of that lifeblood. Even if the Order is set aside or significantly modified on appeal, Rambus is unlikely ever to recover the substantial revenue it will forego during the pendency of the appeal. As written, the Order provides no express mechanism by which Rambus could recover that shortfall. Accordingly, this is *not* a case where money damages will later be available to redress losses incurred by Rambus during the pendency of the appeal because of the Order. Moreover, by effectively requiring termination and renegotiation of Rambus's current licenses for pertinent technologies, the Order is likely to create significant market uncertainty, loss of goodwill, further litigation, and—depending on whether certain provisions in the Order are clarified and how they are construed in the future (*see* n.1, *supra*)—serious financial harm to Rambus that would compromise its ability to do business.

II. ARGUMENT

Under the Commission's rules, "[a]ny party subject to a cease and desist order under section 5 of the FTC Act . . . may apply to the Commission for a stay of that order

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[1] Companies adverse to Rambus may be inspired to read the Commission's Order even more sweepingly—to require Rambus, for example, to allow all its current licensees to demand refunds of all royalties paid in the past, even though the licensees have already enjoyed the benefits of their licenses. Rambus's concurrently filed Petition for Reconsideration explains why the Commission's Order should be amended to make clear that Rambus is not required to allow unilateral "rescission" by existing licensees, and why the Commission's Order should also be altered in other respects. The irreparable harm to Rambus would be even greater if the Commission were to reject Rambus's arguments in that Petition. *See* Part II.B.4, *infra*.

pending judicial review." 16 C.F.R. § 3.56(b). An applicant for a stay must address the following factors: (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. *Id.* § 3.56(c). These requirements largely track the four-factor test set out in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977); *see also In re California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *2-3 (May 22, 1996) (setting forth the above four factors prior to their codification in Rule 3.56 and citing *Holiday Tours*). All four factors support a stay of the Order pending the outcome of Rambus's appeal.

A. <u>Rambus Has Established The Necessary Likelihood Of Success.</u>

The first factor enumerated in Rule 3.56, the likelihood of success on appeal, does not require a showing that "ultimate success by the movant is a mathematical probability." *Holiday Tours*, 559 F.2d at 843 (rejecting the view that "50% plus probability is required"). As *Holiday Tours* explains, "[p]rior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision." *Id.* at 844-845. A court or agency may therefore grant a stay "even though its own approach may be contrary to the movant's view of the merits." *Id.* at 843. The Commission takes the same approach. *See California Dental Ass'n*, 1996 FTC LEXIS 277, at *9 ("It can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay."). Accordingly, a stay pending appeal is appropriate when a movant's appeal

involves serious and substantial questions going to the merits of the decision and the movant will suffer irreparable harm absent a stay. *See Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993).

The Commission has held that the first stay factor can be substantially satisfied by showing that the Commission's decision was "based upon a complex factual record." *See In re Novartis Corp.*, No. 9279, 1999 FTC LEXIS 211, at *4-5 (Aug. 5, 1999) (granting partial stay even though the Commission was "confident of the correctness of its decision" and noting that "it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits"); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 697 (1998) (ordering partial stay and holding that "[t]he difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits").

If there was ever a case in which a stay is appropriate because of the complexity of the factual record, this is it. The administrative hearing in this case lasted 54 days and resulted in an evidentiary record that included live testimony from 44 witnesses, 1,770 admitted exhibits, and a trial transcript of nearly 12,000 pages. *See* Initial Decision 4-5. Because of the huge volume of evidence introduced at trial and the "complexity of the issues presented," the Initial Decision ran 334 pages and included 1,665 findings of fact. *See id.* Chief Judge McGuire meticulously examined all the evidence on the issues presented and determined that Complaint Counsel had not met their burden of proof. The Commission's two opinions to the contrary take up 150 pages of text, include more than

800 footnotes, and required more than two years to prepare. The Commission has acknowledged that the issues presented here are complex and difficult. *See, e.g.*, Remedy Op. 16 (observing that the construction of the "'but for world'" in this case is "no simple or certain task").

The fact that the Commission's factual findings on those complex issues conflict in many ways with Chief Judge McGuire's findings also supports issuance of a stay of the Order pending appeal. The reviewing court will be required to consider the ALJ's findings as well as the Commission's own contrary findings to determine whether the Commission's decision is supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-496 (1951); *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-1063 (11th Cir. 2005) (reviewing court "may examine the FTC's findings more closely where they differ from those of the ALJ"); *Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991) (holding that the evidence relied upon by an agency "in cases where it does not accept the ALJ's findings 'must be stronger than . . . in cases where the findings are accepted'").[2]

In addition to the many difficult legal and factual issues addressed in the Commission's liability opinion, the Commission's remedial Order raises significant legal

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[2] Also relevant to the court of appeals' decision will be the Federal Circuit's determination that Rambus did not breach any duty of disclosure imposed by JEDEC; its conclusion that Rambus did not, while a JEDEC member, possess any pending patent claims that would have been infringed by any technology considered for standardization while Rambus was a JEDEC member; and its unanimous finding that JEDEC did not commence DDR standardization until after Rambus had withdrawn from membership. *See Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081 (Fed. Cir. 2003).

questions that must be addressed on appeal. For example, there is substantial room for debate as to whether the Commission has the statutory authority to set royalty rates as an antitrust remedy. The Order itself recognizes that "[t]he Supreme Court has not yet addressed the scope of the Commission's remedial authority where, as here, the Commission has applied the legal standards of Section 2," and acknowledges that "modern cases . . . have provided limited guidance" with respect to antitrust remedy issues. Remedy Op. at 2, 8. For the same reasons, the Commission's authority to compel Rambus to license its patents is also questionable, especially because compulsory licensing of patents "is a rarity in our patent system." *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980); *see also Hartford-Empire Co. v. United States*, 323 U.S. 386, 433 (1945) (noting that Congress has repeatedly refused to extend remedy of compulsory licensing).

Moreover, *royalty-free* compulsory licensing—which the Order explicitly imposes for all of the covered patents after three years (and effectively imposes for some of these patents immediately[3])—is virtually unknown in our patent system. *See, e.g., United*

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[3] Rambus has more than a hundred United States patents (and over 50 foreign patents) that claim priority to dates before June 17, 1996 and, thus, fall within the Commission's definition of "relevant" patents. *See* Anderson Decl. ¶ 3 (attached as Exhibit B). A number of these patents relate to technologies used in JEDEC-compliant SDRAM and DDR SDRAM, but that are not within the four technology markets that the Commission found were unlawfully monopolized. *Id.* ¶ 4.

Other Rambus patents covered by the Commission's Order claim particular implementations of certain features that, while not required by the relevant standards, could be used in JEDEC-compliant parts. *Id.* ¶ 5. The Commission's Order thus invites the DRAM manufacturers to use the technologies covered by these patents in their SDRAM and DDR SDRAM designs cost-free, despite the fact that they need not do so in order to comply with JEDEC standards.

States v. National Lead Co., 332 U.S. 319, 338-349 (1947) (rejecting imposition of royalty-free patent license as an antitrust remedy and suggesting that such a remedy is "inequitable" absent "special proof" to justify it); *Hartford-Empire*, 323 U.S. at 415 (observing that decree in antitrust case compelling royalty-free licensing of valid patents would amount to forfeiture of defendants' property and that the decree should be modified to allow for reasonable royalties). Indeed, Complaint Counsel has not cited (and Respondent is not aware of) any case in which an appellate court has affirmed an order imposing a royalty-free licensing remedy in an antitrust action.[4]

In short, Rambus amply satisfies the requirement that it show a reasonable likelihood of success on appeal.

B. Rambus Will Suffer Irreparable Harm In The Absence Of A Stay.

If the Commission's Order is not stayed pending appeal, Rambus will suffer four distinct forms of irreparable harm. First, even if the Order is reversed on appeal, it forces Rambus to forego permanently any royalties or damage awards that the company would otherwise have collected or recovered for use of its patents during the pendency of its appeal. This foregone revenue may amount to as much as [ ], assuming that the appeal takes three years to resolve. *See* DeLey Decl. ¶4 (non-public) (attached as Exhibit A). Second, the Order deprives Rambus of its statutory right to exclude others from use of its patented technologies; even if the Order is reversed, Rambus cannot ever recover the opportunity it will have lost to exercise its exclusionary right during the

[4] The one ruling the Commission identifies as imposing a royalty-free licensing remedy—*United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953)—is a district court decision.

pendency of its appeal. Third, the Order threatens Rambus's goodwill by effectively requiring termination and renegotiation of existing licenses for the technologies at issue. Finally, the Order could well threaten extraordinary financial harm to Rambus that would would significantly affect Rambus's ability to operate under its current business model, especially if the Commission does not clarify certain provisions in the Order.

1. Irrevocable Loss Of Royalties

The Commission's Order requires Rambus to forego substantial revenues without providing Rambus any means to recover them if the Order is reversed or modified on appeal. Two examples illustrate the problem.

First, during the pendency of the appeal, Rambus will be compelled to offer licenses to DRAM manufacturers at no more than the Commission's Maximum Allowable Royalty Rates. If the Commission's Order is overturned, Rambus will presumably be able to terminate those compelled licenses and charge, prospectively, whatever royalties the market will bear at that time.[5] But (unless modified in response to the Petition for Reconsideration) the Order does not state that the licenses Rambus negotiated 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 to collect licensing revenues that it was forced to

[5] As discussed in Rambus's Petition for Reconsideration, the injury to Rambus would be even more severe if the Order is construed to require Rambus to give a *release* to its licensees that would bar even a prospective attempt to recover higher fees after the Order is reversed.

foregо during the pendency of its appeal. If Rambus were to sue manufacturers for infringement to recover the foregone royalties, the manufacturers could argue that they were licensed during the relevant time period.

Second, if a DRAM manufacturer refused to take a license from Rambus even under the licensee-favorable terms that the Order compels Rambus to offer, Rambus could presumably sue that manufacturer for infringement occurring after the Order becomes effective. The Commission's Order, however, would limit Rambus's recovery in such an infringement action to the Maximum Allowable Royalty Rates for post-Order infringement (unless it is modified as Rambus suggests in its Petition for Reconsideration). If the Order is overturned on appeal, Rambus might 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 Royalty Rates, the infringing manufacturers would likely argue that a second attempt to recover the full measure of infringement damages should be barred by *res judicata*.

Financial losses such as these would constitute irreparable harm because they could not be recovered even if the Commission's Order is overturned on appeal. As the Eighth Circuit explained in *Iowa Utilities Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996)—where it held that the threat of an irrevocable loss of license fees justified a stay pending appeal—"[t]he threat of unrecoverable economic loss" constitutes irreparable harm. *See also Baker Elec. Coop. Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (preliminary injunction was necessary to prevent financial loss that movant could not

recover in the future). The Commission itself has recognized that stays are appropriate when its orders will cause financial losses that would not be recoverable after a successful appeal. In *Novartis*, the Commission stayed a corrective advertising order after the respondent pointed out that relabeling its products as required would impose costs that could not be recovered if the Commission's decision were reversed on appeal. The Commission acknowledged that, because the costs that Novartis would incur in complying with the order "could not be recovered in the event that Novartis prevail[ed,] . . . *such costs constitute irreparable injury.*" 1999 FTC LEXIS 211, at *6 (emphasis added).

2. Loss Of Right To Exclude

The Commission's Order also irreparably deprives Rambus of a property right guaranteed by the Patent Act—the right to exclude. *See* 35 U.S.C. § 154(a)(1). By compelling Rambus to grant others access to its patented technology, the Order inflicts non-economic injuries on Rambus that cannot be redressed by later monetary compensation. As the Federal Circuit has recognized, infringement of a patentee's rights can cause "market effects never fully compensable in money." *See Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985). Similarly, by requiring Rambus to allow others to use its technologies, the Commission's Order will affect the relevant markets in ways that go beyond the impact of Rambus's foregone royalties. *See Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1457 (Fed. Cir. 1988) ("[T]he nature of the patent grant weighs against holding that monetary damages will suffice to make the patentee whole."). Put another way, the Order deprives Rambus not only of the

opportunity to make money, but also of its statutory right to make use of its patents in the way that the company deems most appropriate. That injury is irreparable. *See Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 420 (1908). ("It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation.").[6]

3. Market Confusion And Loss Of Goodwill

If the Order is not stayed, Rambus will also suffer irreparable injury in the form of market confusion and loss of goodwill. The Order allows Rambus's current licensees to terminate their licenses and sign new licenses—indeed, it appears to anticipate such a procedure. This process will inevitably damage Rambus's current relationships with its licensees, which often date back many years. *See* Smith Decl. ¶ 5 (attached as Exhibit C). License negotiations involve a complicated series of trade-offs and involve many terms and provisions beyond the ones described in the Commission's Order. *See id.* at ¶ 3. It is unlikely that DRAM manufacturers will simply accept new licenses at the Commission's specified rates without renegotiating other terms and bargaining for additional concessions, especially since the Commission has set only *maximum* rates. Indeed, the Commission's Order could well result in reduced royalty rates similar to those that the Commission itself rejected. This is because licensees would be able to

[6] In *eBay, Inc. v. MercExchange, LLC,* 126 S. Ct. 1837 (2006), the Supreme Court ruled that a final judgment of infringement of a patent does not, by itself, categorically require a district court to enter an injunction against further infringement, and that permanent injunctions are governed by the traditional four-factor equitable test. The Court did not, however, cast doubt on the proposition that a patentee's loss of its right to exclude others from its patented invention can constitute irreparable harm, and expressly reaffirmed *Continental Paper Bag* in other respects. *See id.* at 1840-1841.

negotiate rates under conditions similar to those that produced the Infineon rates, reached when "Rambus was at the most disadvantageous stage of its infringement litigation—*i.e.*, when it had lost its case at the trial court level." Remedy Op. 22-23 n.139. And if the Commission's Order is reversed on appeal, the licenses compelled by the Commission under its Order would presumably terminate, and Rambus and the licensees would need to begin negotiations anew, causing further confusion and disruption to the market.

The Commission has recognized that a party is irreparably injured where an order would cause marketplace confusion and loss of goodwill and where costly steps would have to be taken to restore prior market conditions if the Order is reversed on appeal. *See California Dental Ass'n*, 1996 FTC LEXIS 277, at *7 (finding irreparable harm where compliance with an order would cause confusion or require costly notification if reversed on appeal); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (concluding that a party may suffer irreparable harm through "loss of reputation, good will, and business opportunities"). A similar situation would obtain here if Rambus were required to cancel its current licenses, negotiate new ones, and then cancel the new ones and negotiate again after the Commission's Order is reversed.

Moreover, there is no assurance that current licensees will sign new agreements with Rambus, even under the licensee-favorable terms imposed by the Order. Current licensees may simply terminate their existing agreements without bothering to negotiate further, preferring to take the risk that Rambus will see no incentive to sue them, given that the Order caps infringement damages that Rambus may recover for future infringement. A situation in which Rambus would be effectively required to sue its

current licensees in order to obtain compensation for use of its intellectual property would be very damaging to Rambus's goodwill.

4. Extraordinary Harm From Loss Of Revenues

Royalties are Rambus's financial "lifeblood." Remedy Op. 14. As a result, if the Commission neither amends its Order as suggested in Rambus's Petition for Reconsideration nor issues a stay of the Order, Rambus may suffer serious financial harm. Specifically, Paragraph IV.B of the Order allows existing licensees to "rescind" their licenses. As explained in the Petition for Reconsideration, this provision could be interpreted to allow all current licensees to repudiate their existing license agreements (and, indeed, one DRAM manufacturer has already so argued). Although the Petition explains that this interpretation should be rejected, accepting it could require Rambus to refund all past royalties (or at least those that exceed the rates specified in the Order). In that case, Rambus could be required to refund as much as [ ]. *See* DeLey Decl. ¶3. Such a monetary loss would constitute an extraordinary business injury that would significantly affect Rambus's ability to operate under its current business model. Such disruption constitutes irreparable harm justifying a stay. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (holding that issuance of preliminary injunction was not abuse of discretion where "absent preliminary relief [respondents] would suffer a substantial loss of business"); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (holding that threat to existence of business constitutes irreparable harm); *Holiday Tours*, 559 F.2d at 843 (movant established irreparable harm by showing that order would result in "its destruction in its current form").

C. Staying The Order Would Serve The Public Interest And Would Not Significantly Harm Other Parties.

"Because complaint counsel represents the public interest in effective law enforcement," the Commission considers together the third and fourth factors enumerated in Rule 3.56 (the risk of injury to other parties to the litigation and the public interest). *See Novartis*, 1999 FTC LEXIS 211, at *7; *California Dental Ass'n*, 1996 FTC LEXIS 277, at *7. It does not follow, however—and the Commission has never suggested—that unstayed operation of a Commission order is always in the public interest. The Commission is obligated to consider other aspects of the public interest, including the effective operation of the patent system established by Congress.

Congress has authorized patentees such as Rambus to go to court to enforce their rights, including the right to obtain a reasonable royalty for use of their technologies. 35 U.S.C. § 284. These and other rights would be swept away by the Commission's Order, at least for the pendency of the appeal. By requiring Rambus to license its patents at drastically reduced rates—and for free after three years—the Commission effectively affords would-be infringers the right to practice Rambus's patents without Rambus's voluntary consent. Where, as here, patent rights are at stake, protecting those rights from "would-be infringers," even while a legal challenge to the rights is pending, "is always acting in the public interest." *Pittway v. Black & Decker*, 667 F. Supp. 585, 593 (N.D. Ill. 1987).

Complaint Counsel may argue that the Commission should deny a stay because other parties, such as DRAM manufacturers, would be harmed by continued operation of

Rambus's existing licenses, or by allowing Rambus to negotiate future licenses unconstrained by the Commission's maximum allowable rates. But the uncertainty created by the Commission's Order will undoubtedly benefit potential licensees in their negotiations with Rambus even if the Order is stayed. Just as Rambus was forced to offer concessionary license terms to Infineon and Samsung after suffering reverses in prior litigation, *see* Remedy Op. 22-23 n.139, the cloud that the Commission's Order casts over Rambus's patent rights will give an advantage to licensees and would-be licensees until the appeals process is completed.

Any disadvantage that a stay causes licensees would be purely monetary—unlike the qualitatively different and irreparable damage that Rambus is likely to suffer absent a stay. Moreover, the Commission can readily protect the licensees' monetary interests when it stays the Order. The Commission could, for example, require that while the stay is in effect, any royalties in excess of the Maximum Allowable Royalty Rates due to Rambus under existing or future licenses, or any patent infringement damages awarded to Rambus for damages while the Order is in effect, that are in excess of the Maximum Allowable Royalty Rates, be paid into interest-bearing escrow accounts pending resolution of the appeal. The escrowed funds could be refunded to the payor if the Order is upheld on appeal, or paid to Rambus if the Order is reversed or vacated. This arrangement would allow Rambus and other parties to negotiate and otherwise adjust their rights vis-à-vis one another under the *status quo ante*, while ensuring that licensees will not be unfairly disadvantaged if the Commission's Order is ultimately affirmed.

Courts have recognized that such escrow arrangements can preserve the parties'

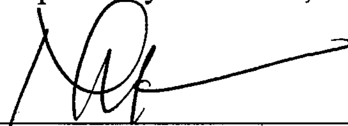
positions and freedom to negotiate during appeals of difficult patent cases. In *BBA Nonwovens Simpsonville Inc. v. Superior Nonwovens LLC*, 303 F.3d 1332 (Fed. Cir. 2002), for example, the Federal Circuit noted a district court's decision to impose a royalty escrow procedure in which royalties owed on part of a licensee's net sales were placed in escrow pending appeal. Similarly, in *In re Hayes Microcomputer Products Inc. Patent Litigation*, 982 F.2d 1527 (Fed. Cir. 1992), a district court stayed its injunction against infringement pending appeal, but preserved the status quo by permitting infringing sales to continue subject to a 1.75% royalty payment into escrow. *See also Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 516 (Fed. Cir. 1990) ("Gencor shall establish an escrow account to which it shall contribute $50,000.00 for each drying unit of the type adjudged at trial to infringe the patent-in-suit that is sold during the pendency of the appeal.").

In this case, an order requiring payment of license fees into escrow would not be difficult to administer. Where agreements already exist, Rambus would need only to inform licensees that any portion of their payments in excess of the Maximum Allowable Royalty Rates specified in the Commission's Order should be directed to an escrow account. There would be no disruption whatsoever for new licensees; their escrow payments could be specified when their license agreements are drafted. In an analogous patent case, the Seventh Circuit described the payment of royalties into an escrow account as a "practical and sensible temporary solution" whereby the "financial risk for both parties is minimized" during the period pending appeal of a patent's validity. *Precision Shooting Equip. Co. v. Allen*, 646 F.2d 313, 318 (7th Cir. 1981).

III. CONCLUSION

For all the foregoing reasons, the Commission should stay the effect and enforcement of its Order pending final disposition of Rambus's appeals.

Respectfully submitted,



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Attorneys for Respondent Rambus Inc.

February 16, 2007

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

ORDER GRANTING APPLICATION FOR STAY OF ORDER PENDING APPEAL

Upon consideration of respondent Rambus Inc.'s application to stay enforcement of the Commission's order, issued February 2, 2007,

IT IS ORDERED that enforcement of the Commission's Final Order of February 2, 2007, be stayed upon the filing of a timely petition for review of the Order in an appropriate court of appeals pursuant to 15 U.S.C. § 45(c). This stay shall remain effective 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.

EXHIBIT

A

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COMMISSIONERS: Deborah Platt Majoras, Chairman
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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