

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

ANSWER OF RESPONDENT RAMBUS INC.
TO COMPLAINT COUNSEL'S PETITION FOR RECONSIDERATION OF
PARAGRAPH III.C

Pursuant to Rule 3.55 of the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.55, Respondent Rambus Inc. ("Rambus") hereby opposes Complaint Counsel's Petition for Reconsideration, filed on February 26, 2007.¹

Complaint Counsel's Petition for Reconsideration ("CC PFR") seeks modification of Paragraph III of the Commission's Final Order or, alternatively, removal of that Paragraph

¹ Rambus filed its Petition for Reconsideration on February 16, 2007. On February 26, 2007, Complaint Counsel filed a document entitled "Complaint Counsel's Response to Rambus' Petition for Reconsideration of the Commission's Final Order, and Complaint Counsel's Petition for Reconsideration of Paragraph III.C." To the extent that document seeks reconsideration of Paragraph III.C of the Commission's Final Order (a paragraph Rambus did not address in its own Petition for Reconsideration), it was not timely filed. Under Rule 3.55, any petition for reconsideration of the Final Order was due by February 23, 2007, 14 days after February 9, 2007, the day the Commission served its Final Order upon all parties. The untimeliness of Complaint Counsel's Petition is especially inappropriate in light of the fact that Complaint Counsel in fact received copies of the Final Order and the Opinion of the Commission on Remedy on February 2, 2007, 24 days before they filed their Petition.

altogether. CC PFR 9-10. Paragraph III of the Commission's Final Order requires Rambus to employ a "Compliance Officer" who, among other things, "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." It further provides that if the Compliance Officer fails to carry out his duties, that failure will be considered a violation of the order by Rambus, absent certain circumstances:

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.

Final Order, Paragraph III.C (emphasis added).

Complaint Counsel contend that the italicized language in Paragraph III.C should be deleted from the Final Order because it improperly insulates Rambus from intentional misconduct by the Compliance Officer. According to Complaint Counsel, "[e]xcusing Rambus from the Compliance Officer's egregious or willful conduct could create the perverse situation in which deliberate acts to avoid the disclosures required by Paragraph II of the Order would not be attributable to Rambus, or actionable by the Commission." CC PFR 9.

Complaint Counsel's concerns are overstated and misplaced. First, the Order makes Rambus' selection of a Compliance Officer "subject to the approval of the Commission" (Paragraph III.A.1), and allows the Commission to remove the Officer if he fails to "act or fail[s] to act diligently" (Paragraph III.D). Therefore, although the Compliance Officer will be "Rambus's own employee" (CC PFR 9), the Commission holds ultimate authority over that Officer's selection and retention.

Second, with one exception, Paragraph III of the Order imposes no substantive

obligations on the Officer that are not also imposed directly upon Rambus by some other Paragraph of the Order. In particular, Paragraph II of the Order comprehensively forbids Rambus from, among other things, misrepresenting or otherwise concealing the status of its patent rights and pending patent rights before a Standard-Setting Organization (SSO) of which it is a member, and requires Rambus to abide by the rules of such SSOs regarding disclosure of patents or patent applications. Paragraph IX of the Order further requires Rambus to submit regular compliance reports regarding its disclosures to SSOs. Paragraph III imposes only three additional duties on the Compliance Officer himself. The Officer must:

- (1) act as Rambus's "sole representative" for the communication of its existing or potential patent rights to SSOs (Paragraph III.A.2);
- (2) verify the compliance reports that Rambus must submit pursuant to Paragraph IX (Paragraph III.E); and
- (3) make "confidential" additional disclosures to supplement Rambus's compliance reports (Paragraph III.E).

The portion of Paragraph III.C at issue thus means only that Rambus will not be deemed to have violated the Order if the Compliance Officer fails one of these three duties because of his "misfeasance, gross negligence, willful or wanton acts, or bad faith." It is entirely appropriate that, in such extraordinary circumstances, a violation of the Order by the Compliance Officer should not also be considered a violation by Rambus. Violations of either of the first two requirements—which govern only *procedures* designed to ensure that Rambus complies with the Commission's Order—do not constitute a violation of the *substance* of the Order. As to the last requirement, Rambus should not be held responsible *at all* if the Compliance Officer fails to make "confidential" reports to the Commission as necessary, because, by definition, Rambus cannot ensure that he is making such reports.

Third, Rambus has powerful incentives to ensure that the Compliance Officer—and, in

fact, all of its officers and employees—comply with every aspect of the Commission’s Order. Paragraph I.O of the Order defines “Respondent” to include, among other things, the company’s “directors, officers, employees, agents, representatives, successors, and assigns.” Any failure to comply with a provision of the Order would subject Rambus to significant monetary penalties under 15 U.S.C. § 45(I) and would allow the Commission to seek further relief from the federal courts.

If the Commission nevertheless finds merit in Complaint Counsel’s concern, Rambus urges the Commission to adopt Complaint Counsel’s alternative proposal—to “delete Paragraph III in its entirety.” CC PFR 10. As described above—and as Complaint Counsel apparently agree—Paragraph III of the Order is not necessary to ensure that Rambus will comply with the substantive provisions of the Order.

Respectfully submitted,



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March 7, 2007

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**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S PETITION
FOR RECONSIDERATION OF PARAGRAPH III.C OF THE
COMMISSION'S FINAL ORDER**

Upon consideration of Complaint Counsel's Petition for Reconsideration of the
Commission's Final Order issued February 2, 2007,

IT IS ORDERED that Complaint Counsel's petition is **DENIED**.

By the Commission.

Donald S. Clark
Secretary

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