



PROVIDED, HOWEVER, THAT if Respondent proposes an escrow agent and manner of collecting Excess Consideration to the Commission before April 12, 2007, an escrow agent may, for a period of up to six months, collect Excess Consideration accruing prior to the grant of such approval, and may hold it in escrow;

- b. the Excess Consideration (and accrued interest) in escrow will be held pursuant to the terms of the escrow agreement, which will provide for such Excess Consideration (and accrued interest) to be held until redistributed, pursuant to an

the Excess Consideration (including interest); and 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. Escrow amounts will be invested in money market accounts or in a list of investments set forth as an exhibit to the escrow agreement.

**OPINION OF THE COMMISSION ON RESPONDENT'S
MOTION FOR STAY OF FINAL ORDER PENDING APPEAL**

On February 16, 2007, respondent Rambus Inc. applied for a stay pending appeal of the Commission's Final Order of February 2, 2007. Although Rambus seeks a stay of the Commission's Order in its entirety (Stay Motion at 1), it acknowledges that the harms it alleges in support of its motion could be ameliorated by a partial stay of the Order's provisions regarding Rambus's efforts to enforce its patents and collect royalties, while leaving the provisions that concern Rambus's participation in standard setting organizations immediately effective. Rambus Stay Motion at 15-16; Rambus Reply at 6 n.2. Complaint Counsel do not object to a partial stay, provided that any royalties in excess of the maximum allowable royalty rates ("MARR") are placed in escrow during the pendency of Rambus's appeal. Complaint Counsel Opposition at 5. Rambus, having initially proposed such an arrangement (Stay Motion at 15-16), nonetheless contends that any provision that limits its access to royalty payments in excess of the MARR during the pendency of an appeal could hinder the company's research and development efforts. Rambus further objects to the specific form of escrow that Complaint Counsel propose (Rambus Reply at 5-6), and proposes an alternative form of order to establish an escrow for any royalties that are in excess of the MARR. Rambus Reply at 7, Exhs. A & B.

For the reasons stated below, the Commission conditionally stays Paragraphs IV, V.A., VI, and VII of its Final Order, effective upon the filing of a timely petition for review in an appropriate court of appeals and until the court of appeals issues its mandate. The Commission denies Rambus's application in all other respects.¹

Applicable Standard

Section 5(g) of the Federal Trade Commission Act ("FTC Act") provides that FTC adjudicative orders, other than divestiture orders, shall take effect automatically "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by * * * the Commission" or "an appropriate court of appeals." 15 U.S.C. § 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. Respondent has satisfied this requirement in its February 2 motion.

Pursuant to Rule 3.56(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of

¹ Rambus does not articulate any reasons for staying provisions of the Order that prohibit Rambus, while participating in a standard-setting organization, from, *inter alia*, making any misrepresentations concerning its patents and patent applications and from failing to make any required disclosures regarding its patents and patent applications. Final Order ¶ II. Similarly, Rambus does not contend that a stay is warranted as to provisions of the Order that are designed to facilitate compliance. For these reasons alone, Rambus's request for a broader stay must be denied. *See* 16 C.F.R. § 3.56(c) (requiring stay applicant to "state the reasons a stay is warranted and the facts relied upon" and supply "supporting affidavits or other sworn statements").

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. We consider each of these factors below. Rule 3.56(c) further provides that an application for a stay must state the reasons a stay is warranted and include "supporting affidavits or other sworn statements, and a copy

Commission has acknowledged 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.”

decisions merely hold that the nature of the patent grant weighs against holding that monetary damages will *always* suffice to make the patentee whole. As the Federal Circuit explained subsequently in *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990), a concept that every patentee is *always* irreparably harmed by an alleged infringer's pre-trial sales disserves the patent system as much as the proposition that no patentee can ever be irreparably harmed when an alleged infringer can respond in damages. *Id.* at 683. The court said that, like all generalities, neither concept was universally applicable. *Id.* See also *Calmar, Inc. v. Emson Research, Inc.*, 838 F. Supp. 453, 456 (C.D. Cal. 1993). In the present case, Rambus's purported right to exclude is abridged pending appeal only as to uses that are compliant with two JEDEC standards, leaving Rambus's patents unaffected for all other purposes.⁵ Given these limitations, we are unable to conclude that Rambus's alleged non-economic injuries are substantial enough to

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Conclusion

The decision to grant a limited stay of our Final Order is a difficult one. Undoubtedly, it will entail some harm to the public interest by allowing Rambus to continue to collect monopoly rents during the pendency of its appeal. However, given the complexity of the factual and legal issues underlying our decision to prohibit Rambus from collecting royalty payments in excess of the MARR, we conclude that these interests must be balanced against its competing private interests during the brief pendency of an appeal. Apart from the stayed provisions (Paragraphs IV, V.A., VI, and VII), all other provisions of our Final Order will become effective on April 12, 2007.⁷ *See* 15 U.S.C. § 45(g); 16 C.F.R. §§ 3.56(a), 4.3(a).

ISSUED: March 16, 2007

⁷ By the terms of the Commission's Order, Paragraphs V.B. through V.E. impose no requirements on Rambus until the effective date of Paragraph V.A.