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RAMBUS UPDATE

FTC Grants a Partial Stay to Rambus

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Memory technology developer Rambus, Inc. secured an important, but not unexpected tactical victory on Friday, when the Federal Trade Commission released an order partially staying the sanctions that it imposed on February 2, 2007. In the earlier order, the FTC prohibited Rambus from charging royalties in excess of those the Commissioners determined Rambus could have charged to implement two standards, absent its abuse of the standards process that created those standards. Under the new order, Rambus will be permitted to continue to charge the rates it demanded prior to the FTC's intervention – but only if it causes the excess amounts to be paid by its licensees into a court-approved escrow account. The order is conditional, and will not become effective, unless Rambus files its anticipated appeal of the original decision in a Court of Appeals prior to April 12, the effective date of the February 2 decision.

The Commissioners' latest Order will be welcomed by Rambus' stockholders, because Rambus would otherwise have been required to either drop its rates on April 12, or seek to renegotiate all of its licenses in such a way as to require make-up payments from its licensees, should it ultimately succeed on appeal.

But the new Order will not be good news for Rambus licensees, who will be deprived of the near-term use of royalties that the FTC has already held to be excessive, and illegally obtained. Those funds may eventually be returned to the licensees – with interest, but minus the fees of the escrow agent – if Rambus loses its appeal at some yet to be determined point in the future.

Friday's Order denied Rambus's plea to stay the other terms of the Commission's original ruling, because (as noted in a footnote to last Friday's decision) Rambus did not "articulate any reasons for staying" these provisions. That Rambus would have failed to do so is not surprising, given that these other provisions bar Rambus from misrepresenting or failing to disclose its patents in standard setting organizations (e.g., in so many words, "thou shalt not cheat").

While the Commissioners called their decision "a difficult one" in the Conclusion of the Order, in fact the partial stay was not contested by the FTC's own Complaint Counsel, presumably because he believed the relief sought by Rambus to be reasonable under the FTC's own Rules of Practice and Procedure (16 C.F.R. Section 3.56(c)). Under those rules, the party asking for relief must address the following four factors:

1. The likelihood that the applicant will succeed on appeal

2. That it would suffer "irreparable harm" if the stay is not granted

3. The degree of injury that other parties would suffer if the stay is granted

4. Why the stay is in the public interest

As it happens, the first factor is rather easily addressed, given that there is precedent that the mere fact that a "complex factual record" is involved is sufficient to give rise to a chance that another court may come out differently.

The second factor is most obvious, given the possibility that Rambus might not find itself able to recover the excess funds by any other means.

The third factor is addressed by the escrow arrangement, which the FTC will review, and which the Commissioners describe at length in the order in an effort to ensure that the impact on licensees (other than the interim loss of use of their funds) will be as gentle as possible. Moreover, the Commissioners note that the damage to licensees will not be irreparable if Rambus loses its appeal, while the damage to Rambus might well be, if its appeal succeeds.

The Commissioners do not address the last "prong" of the test convincingly, or directly. Unlike the first two factors, which are addressed specifically, the Order discusses the last two tests together, balancing the relative harm to Rambus of one outcome, and to the public of the other. That analysis primarily addresses factor 3 – which addresses the negative impacts, but not factor 4 – which deals with the positive effects (e.g., not whether harm will result, but whether a positive result will obtain). The closest that the Order comes to addressing the fourth test head on is this simple statement:

> …we note that a blanket stay of the provisions prohibiting Rambus from collecting excess royalties would frustrate the Commission's efforts to restore competition to the relevant markets.

The Order also includes a further point of significance to the marketplace: a clarification (to the extent that any clarification was in fact necessary) that the Commissioners' February 2 order was intended to impose only a "forward-looking remedy." Rambus had rather implausibly asked for a total stay of the economic sanctions of the original Order, contending that it was unclear whether it might have to disgorge past royalties in excess of those now permitted. Not surprisingly, the Commissioners opted to clarify their intention instead.

While an appeals court will determine whether the Commissioners' February 2 Order stands or falls, the FTC will retain authority over the escrowed funds, and will oversee their distribution in one direction or the other, upon delivery of a final "mandate" by the appellate court.

Action will now turn, to an entirely new venue: the Court of Appeals in which Rambus brings its appeal. At that point, the seemingly endless merry-go-round of the Rambus saga will begin once again – more than a decade and a half after the occurrence of the events that gave rise to this never ending standards drama.

> *The new Order can be found here,. You can find past pleadings and orders, as well as track further action on the FTC's prosecution of Rambus here: FTC Docket 9302.*

> *A press release issued by Rambus on last Friday's order can be found here.*

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