

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

RAMBUS INC.

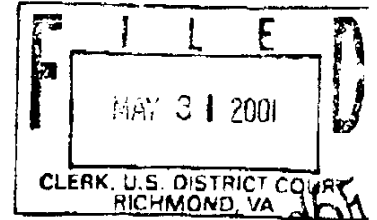
Plaintiff,

v.

INFINEON TECHNOLOGIES AG, et al.

Defendants.

Civil Action No.: 3:00CV524



**PLAINTIFF RAMBUS INC.'S MEMORANDUM IN SUPPORT OF ITS
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

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I. INTRODUCTION.

Rambus is entitled to judgment as a matter of law on Infineon's fraud and construction fraud claims. Federal Rule of Civil Procedure 50(b) provides that where a party has unsuccessfully requested a judgment as a matter of law ("JMOL"), it may renew that request by filing a motion within ten days after entry of judgment. The issue to be decided on a renewed JMOL motion is whether there is any legally sufficient basis for a reasonable jury to have found against the moving party on the issues raised by the motion. *See Fed. R. Civ. P. 50(a)(1).*

A party is entitled to JMOL where the other party, having the burden of proof, fails to make a showing on an essential element of a claim or defense. *Tidewater Fin. Co. v. Fiserv Solutions, Inc.*, 192 F.R.D. 516, 522 (E.D. Va. 2000) (citing *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996)). JMOL is proper when there can be only one reasonable conclusion as to the proper judgment. *Scheduled Airlines Traffic Offices, Inc. v. Objective Inc.*, 180 F.3d 583, 588 (4th Cir. 1999).

Here, as Rambus argued in its original JMOL, no reasonable jury could have found for Infineon on its fraud claims. Infineon failed to prove by clear and convincing evidence the requisite elements of fraud, including that Rambus had a duty to disclose its patent applications, that it failed to disclose information in violation of a duty, that it intended to mislead Infineon or induce its reliance, or that Infineon reasonably relied on any alleged nondisclosure. Infineon also failed to establish that any compensable damage resulted from Rambus' alleged nondisclosures. Accordingly, Rambus is entitled to JMOL.

In any event, under the uncontroverted evidence, Infineon knew from as early as 1992 that Rambus' patents might cover standards promulgated at JEDEC and knew as early as September 1993 that Rambus' first patent (i.e., the '703 patent) pertained to those standards. Numerous events occurred through 1997 that reinforced that knowledge. That knowledge, at a

minimum, put Infineon on inquiry notice as to whether it had a claim against Rambus for any nondisclosures during Rambus' participation in JEDEC. Infineon, however, did nothing to investigate that claim—it simply waited until early 2001 and filed a fraud counterclaim as a knee-jerk defense to Rambus' infringement action. Thus, Infineon's fraud claims are barred by Virginia's two-year statute of limitations and JMOL is required on that independent ground.

Rambus is also entitled to a JMOL because a properly instructed jury would have found in its favor. Rambus requested an instruction pursuant to *Kingsdown Medical Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867 (Fed. Cir. 1988), and its progeny that would have correctly told the jury a patent applicant may properly amend or add claims intended to cover a competitor's product about which the applicant has learned during the prosecution of a patent application. This Court would only agree to give a modified version of *Kingsdown* that Rambus believed was incorrect and would confuse the jury. The absence of an appropriate *Kingsdown* instruction allowed the jury to conclude it was wrongful for Rambus to amend claims of patent applications, and to file additional patent applications, to read on products made by Infineon—even after Rambus stopped attending JEDEC meetings. The *Kingsdown* instructional error, both independently and in conjunction with other grounds outlined above and discussed in more detail below, requires entry of JMOL for Rambus.

Finally, JMOL must be granted to vacate the punitive damages award because the jury's award of nominal damages for Rambus' alleged fraud, the only possible support for punitive damages, is improper as a matter of law.

II. SUMMARY OF INFINEON'S NOTICE OF RAMBUS' PATENTS.

As the summary of pertinent facts below demonstrates, Infineon knew beginning in 1992 that Rambus' patents might cover technology that had been the subject of standard-setting

discussions at JEDEC meetings both before and after Rambus withdrew from JEDEC. Infineon likewise knew that Rambus fully intended to pursue its patents.

The evidence presented at trial established the following:

- On April 14, 1992, Siemens' Willi Meyer reported about a joint IBM/Siemens conference, stating Siemens' Sync DRAM design study results shows "great similarities" with Rambus DRAM. Meyer concluded Sync DRAM is a "Public Domain version" of a Rambus memory. By this time, Siemens fully understood the similarities between Rambus' proprietary inventions and the developing Sync DRAM products.
- On May 6, 1992, Willi Meyer created a chart on the Pros and Cons of SDRAMs, listing as a "Con" for SDRAMs that "2-Bank Sync [DRAM] may fall under Rambus patents." Siemens had therefore concluded by May 1992 that there were Rambus-related patent problems associated with developing SDRAMs.
- On May 7, 1992, Rambus was asked to comment at a JEDEC JC-42.3 meeting about its patent situation. Having no issued patents at the time (only a confidential patent application), Rambus' Richard Crisp declined to comment. Certainly Siemens/Infineon was on inquiry notice at the time that Rambus may have a patent application that read on the SDRAM standard under development.
- On May 15, 1992, Willi Meyer, who attended the JEDEC meeting, issued his trip report, stating Siemens is concerned about Rambus' patent situation, and acknowledging Rambus' patents are "filed but pending."
- On September 1, 1992, Willi Meyer gave a presentation about Rambus to a group of Siemens' management, including the current CEO of Infineon. The presentation slides called Rambus a "deadly menace to established computer industry," and stated Siemens' goal to "Make it Public Domain -- Join Sync DRAM."
- On September 23, 1993, Rambus attended a JEDEC meeting and disclosed its first and newly-issued United States patent, the '703 patent. There was no response at the meeting to this disclosure. Rambus was never asked by JEDEC or Infineon for any letter of assurance regarding this (or any other) patent.
- On September 28, 1993, Willi Meyer issued his trip report of the September 1993 JEDEC meeting, stating: "Rambus has US patent '703, entitled 'Sync. Generation of Clock' in systems. To date the successful known Rambus patent. Furthermore, there is a WIPO International patent WO 91/16680 (150 claims)." This proves Siemens/Infineon knew about and had analyzed the international counterpart to Rambus' U.S. application and fully appreciated Rambus was seeking patents to cover the inventions disclosed in its patent applications.

- On March 31, 1994, Willi Meyer issued a memo describing Rambus as a memory system including controller, bus, interface, protocol, and memory. He recognized all computers would have to be built like this but hoped royalties would not have to go to Rambus.
- On August 7, 1994, Willi Meyer sent a memo to Siemens' in-house patent lawyer, listing a number of patents and correlating them with products and "issues." In this memo, Meyer listed Rambus' '703 patent, correlating it with the SDRAM product. Meyer then listed "Rambus—US ?,??,??," (referencing a patent number) stating the issues related to this unknown patent(s) are "diverse." Siemens/Infineon understood then that Rambus had the potential to obtain other patents covering diverse issues relating to SDRAMs.
- On September 11, 1995, Rambus presented a letter at a JEDEC JC-42.3 meeting stating "our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee's consideration nor does it make any statement regarding potential infringement of Rambus' intellectual property." The JEDEC patent policy at this (and other) meetings shown to members still stated that members were required to disclose relevant "patents" (not patent applications).
- On June 17, 1996, Rambus sent a letter withdrawing from JEDEC stating it continued to license its proprietary technology per its business plan "and those terms may not be consistent with the terms set by standards bodies, including JEDEC." This letter placed every JEDEC member on notice that Rambus had, or was in the process of obtaining, patents that covered products built to the JEDEC standard.
- On March 13, 1997, Siemens attended a JEDEC JC-42.3 meeting where members discussed that Rambus had a patent on DDR clocking scheme; that the patent applied to NEC's dual clocking proposal to JEDEC; that Rambus' licensing terms appeared unreasonable; and that Rambus had told JEDEC it would not comply with JEDEC patent policy. Certainly by this point, Siemens/Infineon had reason to believe that Rambus had patents covering the JEDEC SDRAM and DDR SDRAM standards being discussed, and that Rambus would not (and had not) "complied" with the JEDEC patent policy.

III. RAMBUS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON INFINEON'S FRAUD COUNTERCLAIMS.

A. Infineon Had the Burden of Proving by Clear and Convincing Evidence the Essential Elements of Fraud.

Infineon claimed Rambus committed actual and constructive fraud in failing to disclose its "relevant" patents and patent applications in JEDEC meetings. To recover for actual fraud, Infineon had to prove, by clear and convincing evidence, that Rambus had a duty to disclose a

material fact, but knowingly failed to do so with the intent to mislead. Infineon also had to prove by clear and convincing evidence that it reasonably relied on Rambus' nondisclosure and that this reliance caused compensable damage to Infineon. See *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 346 (Va. 1998) (elements of actual fraud); *Devansky v. Dryvit Sys. Inc.*, No. 182511, 2000 WL 1210833, at *2 (Va. Cir. Ct. June 23, 2000) (duty required where fraud is premised on failure to disclose); *McDaniel v. Hodges*, 11 S.E.2d 623, 624-25 (Va. 1941) (reliance must be reasonable). To recover for constructive fraud, Infineon had to prove the same elements by clear and convincing evidence except that Rambus acted negligently with the intent that Infineon would act on its alleged misrepresentation. See, e.g., *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 719 (Va. 2000); *Wells v. Weston*, 326 S.E.2d 672 (Va. 1985).

A court must consider the applicable burden of proof in deciding whether JMOL is proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986); see also *Byelick v Vivadelli*, 79 F. Supp. 2d 610, 616 (E.D. Va. 1999) (motions under Rules 50 and 56 require evidence to be viewed "through the prism of the substantive evidentiary burden"). As discussed below, Infineon failed to establish by clear and convincing evidence the requisite elements of actual or constructive fraud for either DDR SDRAMs or SDRAMs. Thus, there is only one reasonable conclusion—that Rambus did not commit fraud—and JMOL is therefore appropriate.

B. No Reasonable Jury Could Have Concluded Rambus Committed Fraud as to DDR SDRAMs.

1. Infineon Failed to Establish by Clear and Convincing Evidence that Rambus Had a Duty (or Could Have Breached Any Duty) to Disclose as to DDR SDRAMs.

Infineon's SDRAMs (single data rate) and DDR SDRAMs (double data rate) are different products, developed at different times, and designed and made to different standards that JEDEC formulated at different times. Thus, a separate JMOL analysis is necessary for each set of

products. Although Infineon failed to establish fraud as to either set of products, its claim as to DDR SDRAMs is the most glaringly deficient.

Infineon's fraud claim for DDR SDRAMs is based entirely on the notion that Rambus' nondisclosure of relevant patents and patent applications at JEDEC somehow misled Infineon into believing Rambus would not assert intellectual property rights against DDR SDRAMs later on. However, *Rambus left JEDEC long before any DDR SDRAM standard-setting began.* Rambus attended its last JEDEC meeting on December 6, 1995 and formally withdrew by letter dated June 17, 1996. (DTX 639.)¹ It was not until December 1996 that JEDEC Committee JC-42.3 first began working on a standard for DDR SDRAMs. (PTX 444.) In 1998, Infineon began its design work on a DDR SDRAM and in 2000, began manufacturing and sampling DDR SDRAMs to customers. The DDR SDRAM standard was not published until June 2000. (DTX 92.)

Infineon conceded JEDEC did not require disclosure of relevant patents or patent applications until the "first showing" of a proposed standard. The first showing of a DDR SDRAM proposal was indisputably in December 1996, one year after Rambus attended its last JEDEC meeting and six months after Rambus' formal resignation. (DTX 43.) JEDEC's Ken McGhee confirmed that DDR SDRAM standard-setting began in late 1996 or 1997. A patent holder must at least be a member of the standard-setting organization before any duty to that organization is imposed. *See, e.g., Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc.*, 103 F.3d 1571 (Fed. Cir. 1997). Accordingly, Rambus could not have had any obligation (and therefore

¹ Rambus' trial exhibits will be referred to as "PTX." and Defendants' trial exhibits as "DTX."

could not have breached any obligation) to disclose patents or patent applications relating to the DDR SDRAM standard-setting activity and, therefore DDR SDRAM products.

In an effort to avoid this evidentiary death knell, Infineon argued that certain "concepts" purportedly relating to the DDR SDRAM standard had been discussed years earlier at JEDEC. Relying exclusively on the testimony of Reese Brown, Infineon asserted that DDR SDRAM standard-setting began before December 1996. However, Mr. Brown testified that:

- The actual DDR SDRAM standard (JESD 79) was not published until June 2000. (DTX 92.)
- He did not know when DDR SDRAM standard-setting began—he could not even identify the year—and therefore could not and did not contradict Mr. McGhee's testimony on this point.
- Of the "concepts" that Infineon had identified that purportedly related to DDR SDRAM standard-setting, Mr. Brown could not say that any of these concepts ever found their way into the DDR SDRAM standard.

It is uncontroverted that there were no DDR SDRAM-related ballots (including as to "concepts") until well after Rambus had withdrawn from JEDEC. Moreover, no duty to disclose could be triggered by a mere discussion of "concepts." Rather, as noted above, such a duty did not arise until the first showing of a proposed standard or portion of a standard. Infineon's position would attempt to prevent Rambus from asserting patents that cover Infineon's DDR SDRAMs simply because at some point, long after Rambus' departure from JEDEC, JEDEC decided to establish a DDR SDRAM standard. Such a rule would stifle innovation and discourage participation in standard-setting organizations. Thus, under even the most exacting

scrutiny of the evidence, JMOL should be granted on Infineon's fraud claims as to DDR SDRAMs.

2. Infineon Failed to Establish by Clear and Convincing Evidence That Rambus Intended to Mislead Infineon or Induce Its Reliance as to DDR SDRAMs.

If Rambus had no duty to make any disclosures to JEDEC about DDR SDRAMs, the issue of intent to mislead is moot. Since Rambus was not a member of JEDEC or present at its meetings when the DDR SDRAM standard was discussed or voted on, it obviously could not have intended to mislead any JEDEC participants as to any patents and patent applications relating to the DDR SDRAM standard. (DTX 639.) Thus, yet another required element of Infineon's fraud claim is missing, further warranting JMOL for Rambus.

3. Infineon Failed to Establish by Clear and Convincing Evidence That It Reasonably Relied on Any Alleged Nondisclosure by Rambus as to DDR SDRAMs.

JMOL for Rambus must also be granted on Infineon's DDR SDRAM fraud claim because Infineon failed to show, by clear and convincing evidence, its reasonable reliance on Rambus' conduct. As discussed above, Rambus was not a member of JEDEC or present at its meetings during the DDR SDRAM standard-setting time frame—therefore, any reliance by Infineon on Rambus' silence as to DDR SDRAMs would not only be unreasonable but inexplicable.

In any event, it cannot be disputed that JEDEC members had notice as early as 1992 that Rambus intended to enforce its intellectual property rights notwithstanding its JEDEC participation. This notice continued up until Rambus' withdrawal from JEDEC. In fact, Rambus' June 1996 formal withdrawal letter expressly stated Rambus would continue to license its technology on terms consistent with its business plan, that those terms may not be consistent with those set by JEDEC, that Rambus reserved all rights to its intellectual property, that it planned to apply for additional patents to protect that property, and that "*Rambus reserves all*

rights regarding its intellectual property." (DTX 639, emphasis added.) Accordingly, when JEDEC undertook its standard-setting as to DDR SDRAMs in December 1996, its members were well aware that Rambus was pursuing its own business interests and had disavowed any intent to subjugate those interests to JEDEC's plans or goals. Thereafter, no JEDEC member, including Infineon, could possibly have believed Rambus' silence indicated the absence of patents or patent applications related to DDR SDRAMs.

Indeed, the evidence proved that JEDEC participants had no such beliefs. During a March 1997 JEDEC meeting, in conjunction with an NEC DDR SDRAM presentation, several JEDEC participants discussed: (1) their belief Rambus had a patent related to a dual clocking proposal made by NEC; (2) the opinion that Rambus' licensing terms were "unreasonable;" and (3) the fact that Rambus had told JEDEC it did not intend to comply with the JEDEC patent policies. The report of Infineon's Willi Meyer, who attended this meeting, confirms these points were discussed. (DTX 71; PTX 475.) Other facts establishing Infineon's knowledge of Rambus' patents and Rambus' intent to protect its technology are identified below in Section E in the discussion of the statute of limitations.

Notably, it was not until 1998—three years after Rambus attended its last JEDEC meeting—that the DDR standard was set by JEDEC and Infineon began to design a DDR SDRAM product. (DTX 43 (Minutes of 12/96 meeting).) By then, the undisputed evidence establishes: (1) Rambus never acted at all regarding DDR SDRAM because this standard was discussed and set *after* Rambus left JEDEC; and (2) Infineon's DDR SDRAM development began long after Infineon undisputedly knew of Rambus' property rights in DDR SDRAM and that Rambus intended to enforce those rights. For this and the other reasons discussed above, Infineon failed as a matter of law to prove reasonable reliance by clear and convincing evidence.

In fact, any claim of reliance—reasonable or otherwise—is insupportable and contrary to common sense. The absence of the critical element of reasonable reliance as to DDR SDRAMs mandates JMOL for Rambus.

4. Infineon Failed to Establish by Clear and Convincing Evidence That Rambus' Alleged Fraud as to DDR SDRAMs Caused Infineon Recoverable Damage.

As discussed fully in Section D below, Infineon failed to establish by clear and convincing evidence (or any evidence at all) that Rambus' alleged nondisclosure caused Infineon any compensable damages.

C. No Reasonable Jury Could Have Concluded Rambus Committed Fraud as to the SDRAMs.

1. Infineon Failed to Establish by Clear and Convincing Evidence That Rambus Had a Duty to Disclose Its SDRAM Patent Applications.

Infineon claimed Rambus was liable for fraud regarding SDRAMs for failing to disclose to Infineon, through JEDEC, its patents and patent applications related to SDRAMs. This Court, in granting JMOL on Infineon's contract claims, correctly found Rambus had no contractual duty to disclose anything regarding its intellectual property. As discussed below, the law and undisputed facts establish Rambus likewise had no common law duty to disclose its patent applications pertaining to SDRAMs.

First, Rambus acknowledges it had a duty to disclose (and did disclose) all of its actual patents relating to SDRAM to JEDEC and Infineon. Infineon's position at trial was that Rambus also had a duty to disclose to JEDEC its patent *applications* relating to SDRAMs. As noted above, JEDEC did not require anything to be disclosed until the first showing of a proposed standard. At the first showing of the SDRAM standard at JEDEC in 1991 through passage of the SDRAM standard in March 1993, the JEDEC patent policy expressed in the operating manual only required disclosure of *patents*, not patent *applications*. (DTX 44 (JEDEC Manual 21-H))

It was not until months later, in October 1993, that JEDEC's Manual 21-I requiring disclosure of "pending patents" was first promulgated. (DTX 48.)² Further, to the extent Infineon claims Rambus was required to disclose an intent to file patent applications in the future, that duty—especially for patent applications after Rambus left JEDEC—did not exist. (DTX 48 (JEDEC Manual 21-I).) Therefore, the undisputed evidence is that Rambus had no duty to disclose patent applications regarding SDRAM when JEDEC adopted the SDRAM standard.

Moreover, Infineon's claim that Rambus had a common law duty to disclose patent applications fails as a matter of law. No case sanctions liability for failing to disclose confidential, pending patent *applications* in a standards-setting context. Indeed, the law consistently recognizes the right to keep such information confidential. It is well established that during the time an inventor is seeking patent protection, the application is confidential. 35 U.S.C. § 122 (1984); *see also Lear, Inc. v. Adkins*, 395 U.S. 653, 671 (1969). This confidentiality promotes "the Progress of Science and Useful Arts," by protecting an inventor's time, research, and development during the patent process. U.S. Const. art. I, § 8, cl. 8; *see also Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974). "[T]he owner of proprietary information has no obligation to provide it, whether to a competitor, customer, or supplier." *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1363 (Fed. Cir. 1999). Indeed, the applicant *must* keep silent prior to issuance of a patent or risk losing control of its intellectual property. *See, e.g., Va. Code Ann. § 59.1-336* (describing secrecy element in definition of "[t]rade secret"). Thus, as a matter of law and undisputed fact, Rambus had no duty to disclose its patent applications as to SDRAMs.

² Notably, JEDEC's Manual 21-I was directed and provided to the chairman of the committee—

Finally, Infineon came forward with no evidence at trial, through its technical expert or otherwise, that any Rambus patent application pending during Rambus' JEDEC attendance—or any pending claims within any such patent application—"related to" the proposed SDRAM or DDR SDRAM standards. In other words, Infineon offered no proof of a Rambus patent or patent application that would have triggered Rambus' purported duty to disclose. Infineon relied solely on emails from Richard Crisp and others at Rambus, which at best evidenced their belief that claims could be drafted to cover portions of the proposed SDRAM standard—the very portions that had been lifted from Rambus' proprietary technology. This "belief" in the ability to obtain patent claims is simply not proof of anything, and it certainly does not rise to the level of actionable nondisclosure. Without any evidence that Rambus' patents or patent applications actually "related to" or covered the standards under consideration, Infineon did not meet its burden of proving a duty to disclose those patents or patent applications by clear and convincing evidence. Accordingly, JMOL for Rambus must be granted on the SDRAM fraud claim as well.

2. Even if Rambus Did Have a Duty to Disclose Its SDRAM Patent Applications, Infineon Failed to Establish by Clear and Convincing Evidence That Rambus Breached That Duty.

JMOL is also required because Infineon did not show by clear and convincing evidence that Rambus breached any duty to disclose its SDRAM patent applications. The applications for the patents in suit were all filed *after* Rambus left JEDEC, from February 1997 to February 1999. The earliest issuance date is September 1999. (PTX 1-4.) The claims in the patents in suit obviously did not exist when Rambus was a member of JEDEC and therefore could not have been disclosed.

not JEDEC's members.

In any event, even assuming Rambus had a duty to disclose the SDRAM patent applications or its intent to make those applications, it did so. The written description that gave rise to the patents in suit was the same written description as in the original United States application and the foreign counterpart application. Rambus' international application became publicly available in October 1991; after that, its content was available to anyone who wanted to read it. (PTX 13.) This application contained the description and details of the inventions claimed in the patents in suit.

Before Rambus set foot in a JEDEC meeting, it had already thoroughly disclosed its patents, technology, and inventions regarding SDRAMs to Infineon's predecessor, Siemens. In November 1990 (after obtaining a nondisclosure agreement), Rambus sent Siemens a copy of Rambus' Technical Description which was based on the written description in Rambus' original United States application. (PTX 136.) Siemens studied it carefully, met with Rambus repeatedly to discuss it, and sent Rambus a detailed list of questions about it. Rambus also licensed its technology—also based on the patent application—to numerous DRAM manufacturers and JEDEC members, including Siemens, with SDRAM technology throughout the 1990s. Pursuant to these licenses with Siemens (later Infineon) and other JEDEC members, Rambus disclosed much of its patent portfolio, including the patents Infineon now claims Rambus failed to disclose.

Rambus' JEDEC representative, Richard Crisp, disclosed the existence of Rambus' first U.S. patent, U.S. Patent No. 5,243,703 ("the '703 patent"), in a September 1993 JEDEC meeting. (PTX 455 (Meyer Trip Report).) The '703 Patent is a divisional application of the original United States application and is a divisional of the patents in suit. Crisp's disclosure of the '703 patent, in turn, identified the existence of all the divisional patent applications and one

continuing application. With that information, any JEDEC member could obtain copies from the PTO of: (1) the original United States application; (2) the continuation application that resulted in U.S. Patent No. 5,319,755 (the '755 patent); and (3) the prosecution history of the '755 patent. Thus, Rambus' patent prosecution efforts were an open book to JEDEC and Infineon. Finally, Rambus' withdrawal letter to JEDEC disclosed its 23 United States and foreign patents (including every patent held by Rambus which potentially pertained to SDRAMs) and further disclosed that Rambus would continue to file patent applications in the future. (DTX 639.)

In sum, Rambus' business plan, historical conduct, and licensing relationship with Infineon and other JEDEC members, along with documented disclosures of its patents and patent applications, belies any showing, much less by clear and convincing evidence, that Rambus failed to disclose its SDRAM patents or patent applications to JEDEC or Infineon. Accordingly, the only reasonable judgment, even assuming Rambus had a duty to disclose its patent applications after it left JEDEC or its intention to make future applications, is that Rambus did not breach that duty. Infineon's failure of proof on this issue is another independent ground for granting JMOL for Rambus.

3. Infineon Failed to Establish by Clear and Convincing Evidence That Rambus Intended to Mislead Infineon or Induce Its Reliance as to SDRAMs.

Even if Rambus had a continuing duty to disclose patent applications and breached that duty, actual fraud requires the defendant act knowingly and intentionally with the intent to mislead. *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 346 (Va. 1998). In light of the extensive information Rambus did disclose and the nature of its business, the most damning conclusion one could reach is that Rambus mistakenly believed it had no duty to disclose patent applications or an intent to file those applications after it left JEDEC. Thus,

JMOL should be granted for failure to prove intent on Infineon's claim of actual fraud regarding SDRAMs.

In order to prove Rambus committed constructive fraud, Infineon had to prove by clear and convincing evidence that Rambus negligently intended Infineon to act on Rambus' alleged nondisclosure of patent applications. *Economopolous v. Kolaitis*, 528 S.E.2d 714, 719 (Va. 2000). Far from intending to induce reliance, Rambus took the initiative to state explicitly to JEDEC several times that members should not construe Rambus' silence as any representation regarding potential infringement on its technology. (See PTX 874; DTX 639.) The only reasonable conclusion based on the evidence is that Rambus had no intent to induce reliance by its failure to disclose its patent applications, or intention to file applications, after it left JEDEC.

4. Infineon Failed to Establish by Clear and Convincing Evidence That It Reasonably Relied on Any Alleged Nondisclosure by Rambus as to SDRAMs.

Under Virginia law, reliance must be reasonable under the circumstances. *McDaniel v. Hodges*, 11 S.E.2d 623, 624-25 (Va. 1941). Accordingly, Infineon's claim that it relied on Rambus' conduct in JEDEC meetings cannot be considered in a vacuum, but in light of the undisputed evidence showing the entire course of dealing between Rambus and Infineon over the several years before Infineon first designed a SDRAM product in 1996.

For example, beginning in 1990-91, Infineon, through its predecessor Siemens, had known about Rambus' DRAM technology and identified Rambus' actual and potential patents as a threat to its business. Siemens studied Rambus' inventions from a technological, legal, and marketing standpoint. On May 6, 1992, Siemens' JEDEC representative Willi Meyer acknowledged a "2-Bank Sync may fall under Rambus patents." (PTX 810.) Later that month, Meyer reported to Infineon management that "Siemens and Phillips [are] concerned about patent situation with regard to Rambus," and acknowledged, "Rambus patents [are] filed but pending."

(PTX 173.) Thereafter, in September, 1992, Meyer made his "What is Rambus?" presentation to Infineon's upper management in which he expressed Infineon's concern that Rambus was a "deadly menace to the established computer industry." In the presentation, Meyer recommended various alternatives, including that Siemens/Infineon "buy Rambus and dump it" to protect the status quo or "join Sync DRAM" and make Rambus technology "public domain." (PTX 816.)

On March 30, 1994, a memorandum from Meyer copied to Infineon's current Chief Operating Officer concluded: "Rambus is not a memory, it is a memory system including controller, bus, interface, protocol and memory. One day all computers will be built like this, but hopefully without the royalties going to RAMBUS." (PTX 846; PTX 846A.) Further, on August 7, 1994, Meyer provided Infineon's patent lawyer a chart listing various companies and their SDRAM-related patents (PTX 883.) In describing Rambus' patents, Meyer listed Rambus' previously-disclosed '703 patent next to the word "SDRAM," then included seven question marks in the form of a patent number ("US ?,???,???) next to the word "diverse." This demonstrates Infineon understood Rambus had pending patents, that these patents might cover SDRAMs, and that Rambus had forthcoming patents that would cover "diverse" issues.

After all of Infineon's investigation and resulting knowledge about Rambus and its patent rights for SDRAMs, Infineon, in 1996, began designing its first SDRAM product. Infineon fully understood it was taking Rambus' technology and putting it in its SDRAM designs and simply opted to take the risk that it might some day be required to pay Rambus reasonable royalties. In fact, Infineon knew there were potential Rambus patent problems for SDRAMs as early as 1992 and that Rambus was seeking additional patents to protect its intellectual property—the same intellectual property Rambus had disclosed to Infineon in 1990. Infineon had identified Rambus as a "threat" to Infineon and the computer industry precisely because of Rambus' SDRAM

technology and patent policy. From the early 1990's on, Infineon knew the '703 patent disclosure related to SDRAMs and knew full well that Rambus would assert its patents to protect its intellectual property in SDRAMs. Thus, the only reasonable judgment is that by 1996, Infineon could not reasonably interpret Rambus' nondisclosure as assurance Rambus would not pursue patents on its technology.

D. Infineon Failed to Establish by Clear and Convincing Evidence That Rambus' Alleged Fraud as to Either DDR SDRAMs or SDRAMs Caused Any Compensable Harm.

As discussed above, Infineon had to prove by clear and convincing evidence that its reliance on Rambus' alleged nondisclosure caused it harm. *See Richmond Metro. Auth.*, 507 S.E.2d at 346. Significantly, the harm caused by Infineon's reliance must have been *compensable* harm. *See Murray v. Hudid*, 385 S.E.2d 898, 903-04 (Va. 1989); *see also Lloyd v. Smith*, 142 S.E. 363, 367 (Va. 1928) (no fraud cause of action arises unless "*legally recoverable*" damages as a result thereof are shown, emphasis added).

Infineon has never shown it suffered *any* damage as a result of Rambus' alleged nondisclosures, much less recoverable damage. Since Infineon prevailed by JMOL on Rambus' infringement claim, Infineon obviously cannot argue it was misled into designing infringing products. Moreover, Infineon presented no evidence that Rambus' alleged nondisclosures caused Infineon either to do something, or to refrain from doing something, to its detriment. *See Gossen Corp. v. Marley Mouldings, Inc.*, 977 F. Supp. 1346, 1355 (E.D. Wis. 1997) (alleged infringer must change economic position during the period it was allegedly misled). In fact, as discussed above, JEDEC did not even begin to consider—and certainly did not pass—a standard pertaining to DDR SDRAM memory products until long after Rambus had left JEDEC. (DTX 92; JEDEC Standard JESD-79.) Thus, Infineon failed to demonstrate *any* harm as a result of Rambus' alleged fraud.

During trial, Infineon claimed, for the first time, that its fraud damages consisted of \$560,000 in attorneys' fees it incurred defending the patent case brought by Rambus. However, those fees resulted from the patent litigation and were not caused by the alleged fraud. Thus, they do not satisfy the requirement that *Infineon's reliance on Rambus' alleged nondisclosures* caused compensable harm.

Even if Infineon's claimed attorneys' fees had been caused by the alleged fraud, they are not compensable damages in a fraud case. *See Sailors & Merchants Bank & Trust v. Sacasa*, No. 93837, 1991 WL 834778 (Va. Cir. Ct. Feb. 11, 1991). *Prospect Development Co. v. Bershader*, 515 S.E.2d 291 (Va. 1999), cited recently by Infineon, does not stand for the contrary proposition. In *Bershader*, the plaintiff claimed damages for the cost of replacing trees that had been removed as a result of the defendants' fraud. *Id.* at 300. The Chancellor awarded plaintiff his claimed damages (although the award was reversed on appeal). The plaintiff also sought attorneys' fees as the prevailing party, not as damages caused by the fraud. *See id.* at 301 (court quotes Chancellor justifying award of fees for "defend everything and deny everything" litigation strategy). Thus, *Bershader* does not stand for the proposition that a fraud claim can be premised on no damage other than litigation expenses incurred in ensuing litigation.

In any event, federal law does not permit recovery of litigation-related attorneys' fees as damages in this case. As Rambus pointed out in its original JMOL, the Noerr-Pennington doctrine protects litigants' First Amendment right to prosecute lawsuits without the fear of having to pay the adversary's litigation costs. Noerr-Pennington immunity "protects those who attempt to use the power of government organs, including the judiciary, to further private ends." *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 937 (Fed. Cir. 1995). The doctrine applies to any claim seeking damages flowing from constitutionally protected activity, which would clearly

include the prosecution of a patent case. *See White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (“While the Noerr-Pennington doctrine originally arose in the antitrust context, it . . . applies equally in all contexts.”).³ For example, in *In re Circuit Breaker Litig.*, the Noerr-Pennington doctrine rendered plaintiffs immune from a counterclaim for intentional interference with economic advantage. *See In re Circuit Breaker Litig.*, 984 F. Supp. 1267, 1283 (C.D. Cal. 1997) (“Thus, Defendants must establish injuries stemming from a disruption of a relationship, not the filing of *In re Circuit Breaker Litigation* or Plaintiffs’ other petitioning activities.”).

If it violates the Noerr-Pennington doctrine to allow recovery of attorneys’ fees as damages, it certainly violates the doctrine to allow those fees to be deemed compensable damages for purposes of establishing a fraud claim. The chilling effect on the party seeking to exercise its constitutional rights is the same whether the adversary’s litigation expenses are awarded as damages or are instead deemed to constitute the requisite (and otherwise missing) causally connected damages that allow the adversary to pursue a tort claim.

Neither of the two exceptions to the Noerr-Pennington doctrine applies here. Infineon has already conceded it cannot establish a *Walker Process* violation and has never pled or asserted the other exception—“sham litigation.” Thus, the Noerr-Pennington doctrine applies and prohibits Infineon from asserting that its litigation expenses were compensable damages for purposes of its fraud claims.

Accordingly, there is no evidence of a causal connection between Rambus’ alleged fraud and any compensable harm to Infineon. On this basis alone, and even if Infineon had adequately

³ Courts in other circuits, including the Federal Circuit, agree the immunity of Noerr-Pennington applies beyond the antitrust context. *See, e.g., FilmTec Corp.*, 67 F.3d at 937; *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988); *S. Dakota v. Kansas City S. Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989).

proven the other elements of its fraud claim (which it did not), JMOL on Infineon's fraud claims should be granted.

E. No Reasonable Jury Could Have Found Infineon Was Not at Least on Inquiry Notice of Rambus' Alleged Fraud Claim More Than Two Years Before Infineon Filed Its Counterclaims.

Under Virginia law, a cause of action accrues when the fraud is discovered or, "by the exercise of due diligence," should have been discovered. Va. Code Ann. § 8.01-249(1). An action for fraud must be brought within two years thereafter. *Id.* § 8.01-243. Statute of limitations serve a useful public purpose in avoiding stale claims and discouraging litigants from sleeping on their rights. *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965); *Lavery v. Automation Mgmt. Consultants, Inc.*, 360 S.E.2d 336, 338 (Va. 1987).

Here, Infineon filed its fraud counterclaims in January, 2001. If the undisputed evidence established Infineon was at least on inquiry notice of its fraud claims by January, 1999, those claims are barred as a matter of law. As the summary discussed above in Section II demonstrates, by early 1997 (and actually much earlier) Infineon was, at a minimum, on inquiry notice that it should investigate whether it had a claim against Rambus for violating a JEDEC related duty. Instead of doing so, Infineon waited well beyond the statutory limitations period and asserted its fraud counterclaims only when Rambus asserted its infringement claims.⁴ Such a "lying in the weeds" strategy contravenes the mandate and purpose of Virginia's statute of

⁴ Infineon has argued that Rambus' assertion of its infringement claim was Infineon's first notice of Rambus' alleged fraud. This argument is specious. As discussed above, Infineon knew for years that Rambus intended to fully and aggressively protect its technology with patents. Infineon likewise knew that Rambus' patents might cover SDRAMs and DDR SDRAMs. Thus, Rambus' infringement claim against Infineon presented Infineon with no new information, only a sudden motive to counterattack with a series of counterclaims, including fraud. The fraud counterclaims, however, were already barred by the two year statute of limitations.

limitations. No reasonable jury could have found against Rambus on the statute of limitations and Rambus is entitled to JMOL on this ground as well.

F. The Absence of a *Kingsdown* Instruction Misled the Jury Into Finding Fraud Without an Adequate Evidentiary Basis.

Jury instructions, taken as a whole, must correctly and comprehensively instruct the jury on the issues raised by the evidence. See *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 853-54 (Fed. Cir. 1991); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991). Instructional error requires the grant of a JMOL where, applying a proper instruction and viewing the evidence in the light most favorable to the nonmoving party, the verdict is unsupported by substantial evidence. See, e.g., *Jamesbury Corp. v. Litton Indus. Prods., Inc.*, 756 F.2d 1556, 1559-60 (Fed. Cir. 1985).

Here, Rambus requested an instruction, consistent with *Kingsdown Medical Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867 (Fed. Cir. 1988) ("*Kingsdown*") and its progeny that: "It is not improper to amend or add patent claims intended to cover a competitor's product about which the applicant has learned during the prosecution of the patent application, including a continuation or divisional patent application." After dialogue with the Court, Rambus indicated its willingness to add to its proposed instruction the language, "provided that the claims are supported by the original patent application." The Court, however, refused to give the *Kingsdown* instruction unless it included language that the "amended or added claims are not based on information obtained by engaging in wrongful conduct." Rambus believed the Court's suggested language would have rendered the instruction incorrect and confusing to the jury. Accordingly, Rambus declined the Court's version of the *Kingsdown* instruction.

Kingsdown eviscerates Infineon's fraud claim. Infineon's theory is that Rambus, once it had participated in the JEDEC proceedings, had an ongoing duty not to pursue patent

applications that would render other JEDEC participants infringers. Under *Kingsdown*, however, Rambus was entirely within its rights to do so. Particularly as to the DDR SDRAM products, which JEDEC addressed and Infineon designed years after Rambus had withdrawn from JEDEC, the only explanation for the jury's fraud verdict is its mistaken belief that Rambus was somehow duty-bound to avoid patents that might cover the products of its former JEDEC co-participants. Because the evidence would have required a verdict for Rambus by a jury properly given a *Kingsdown* instruction, JMOL for Rambus is appropriate. See *Jamesbury Corp. v. Litton Indus Prods., Inc.*, 756 F.2d 1556 (Fed. Cir. 1985).

IV. NOMINAL DAMAGES ARE NOT AVAILABLE FOR FRAUD, THEREFORE THE PUNITIVE DAMAGE AWARD MUST BE VACATED.

The punitive damages award must be vacated because the jury's award of nominal damages for Rambus' alleged fraud, the only possible support for punitive damages, is improper as a matter of law. JMOL should be granted to vacate an improper element of damages awarded by a jury. See *State Farm Fire & Casualty Co. v. Barton*, 897 F.2d 729, 733-34 (4th Cir. 1990) (JNOV/JMOL should have been granted to remove improper consequential damages award). Here, the jury awarded only nominal damages for Rambus' alleged fraud. However, under controlling Virginia law, nominal damages are not available for fraud. *Murray v. Hadid*, 385 S.E.2d 898, 904 (Va. 1989) ("Because there was no proof that actual damages were proximately caused by [defendant's] fraud, the trial court correctly set aside the \$984,000 jury award."); *Lloyd v. Smith*, 142 S.E. 363, 367-68 (Va. 1928) ("Neither fraud nor damage can be presumed Fraud without resulting pecuniary damage is not a ground for the exercise of

remedial jurisdiction.”). An award of punitive damages must be predicated on either compensatory or nominal damages. *Valley Acceptance Corp. v. Glasby*, 337 S.E. 2d 291, 297 (Va. 1985). Because the punitive damages award here rests solely on nominal damages, which are themselves unavailable as a matter of law, the punitive damages award must be vacated.

V. CONCLUSION.

Rambus recognizes the grant of a renewed JMOL is a serious step this Court would take only after the most careful consideration. However, the fraud verdict against Rambus – a verdict that is wholly unsupported by the evidence—is also extremely serious. A dispassionate review of the requirements of a fraud claim in light of the undisputed evidence presented at trial compels JMOL for Rambus as to both claims, the fact that Infineon prevailed on Rambus' infringement claims renders it impossible for Infineon to have been misled to its detriment. As to DDR SDRAM, Rambus—which had left JEDEC long before JEDEC even began discussing the DDR SDRAM standard—could not possibly have committed any actionable nondisclosure. As to SDRAM, the evidence was clear that Rambus disclosed its patents as required by JEDEC rules and that, in any event, its technology was public information that had been specifically provided to Infineon. Moreover, none of Rambus' alleged nondisclosures resulted in compensable damage to Infineon and its claimed attorneys' fees cannot fill this void. Further, the uncontroverted evidence establishes that Infineon was at least on inquiry notice of a potential claim against Rambus no later than 1997 (and actually much earlier) and that its counterclaims filed in 2001 are therefore barred by the statute of limitations. JMOL is also proper because, had

⁵ See Robert L. Dunn, *Recovery of Damages for Fraud* § 6.1 at 205, § 6.3 at 210 (1988) (“many cases state flatly that nominal damages are not recoverable and that actual damages are a necessary element of a fraud claim.”).

the jury been given a *Kingsdown* instruction, it undoubtedly would have returned a verdict for Rambus on the fraud claims. Finally, the punitive damages award must be vacated because the jury's award of nominal damages for Rambus' alleged fraud, the only possible support for punitive damages, is improper as a matter of law. This is one of the unusual cases in which a JMOL after verdict is proper and necessary. Particularly as to DDR SDRAMs, the fraud verdict constitutes a grave injustice to Rambus. Accordingly, Rambus respectfully requests that this Court order JMOL in Rambus' favor on the fraud claims.

Date: May 31, 2001

RAMBUS INC.

By Counsel



Michael W. Smith (VSB No. 01125)
Craig T. Merritt (VSB No.
R. Braxton Hill, IV (VSB No. 41539)
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219
Telephone: (804) 697-4100
Facsimile: (804) 697-4112

OF COUNSEL:

David E. Monahan
John Allcock
James W. Cannon, Jr.
David Pendarvis
Sean C. Cunningham
Edward H. Sikorski
GRAY CARY WARE &
FREIDENRICH LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
(619) 699 2700

ATTORNEYS FOR PLAINTIFF
RAMBUS INC.

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum in Support of Rambus Inc.'s Renewed Motion for Judgment as a Matter of Law was served this 31st day of May, 2001

on:

C. Torrence Armstrong
Warren E. Zirkle
MCGUIREWOODS, LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
*BY OVERNIGHT DELIVERY and
TELEFAX*

Brian C. Riopelle
Robert M. Tyler
MCGUIREWOODS, LLP
One James Center
901 East Cary Street
Richmond, VA 23219

John M. Desmarais
Gregory S. Arovas
Clifford E. Wilkins
Thomas D. Pease
Maxine Y. Graham
Todd M. Friedman
KIRKLAND & ELLIS
Citigroup Center
153 East 53rd Street
New York, New York 10022
*BY OVERNIGHT DELIVERY and
TELEFAX*