

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of  
RAMBUS INC.,  
a corporation.**

**Docket No. 9302**

**REBUTTAL BRIEF  
OF APPELLEE AND CROSS-APPELLANT RAMBUS INC.**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Pursuant to Rule 3.52 of the Rules of Practice and the Commission's March 18, 2004 Order, Respondent Rambus Inc. ("Rambus") respectfully submits this rebuttal brief in support of its cross-appeal in this matter.<sup>1</sup>

In its initial brief, Rambus demonstrated that Judge McGuire had erred in not requiring Complaint Counsel to prove the essential elements of their claims by clear and convincing evidence. Rambus Initial Brief ("RIB"), pp. 134-140. In response, Complaint Counsel contend that the policies underlying the Supreme Court's decision in *Walker Process* and its progeny do not apply with equal force here to compel the application of a clear and convincing burden of proof. Complaint Counsel Reply Brief ("CCRB"), pp. 101-106. They also contend that there is nothing unusual about the remedy they seek that would justify a heightened burden of proof. Finally, Complaint Counsel dismiss as irrelevant the concerns expressed by other agencies that in a case where important issues depended on "strained and faded memories," it would be "unfair to find a person guilty of dishonest or fraudulent conduct on a mere preponderance of the evidence." *Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification*, 19XX WL 910, \*14 (N.R.C. 1992) (hereinafter "*Leak Rate Data Falsification*"). According to Complaint Counsel, "proving this case in no way depends on strained or faded memories." CCRB, p. 106 n. 93.

For the reasons set out in this rebuttal brief, Complaint Counsel are wrong on all counts.

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<sup>1</sup> Pursuant to Rule 3.52(d), this brief is "limited to rebuttal of matters in the reply to [Rambus's] cross-appeal."

## II. ARGUMENT

### A. The Rationale For Requiring Clear And Convincing Evidence In Walker Process Cases Is Fully Applicable Here.

It is undisputed that when a plaintiff seeks to impose antitrust liability on a patent holder for bad faith enforcement of a patent or because of fraud or inequitable conduct before the PTO in obtaining the patent, the essential elements of those claims must be established by clear and convincing evidence. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 175-6 (1965); *Loctite Corp. v. Ultraseal, Ltd.*, 781 F.2d 861, 877-78 (Fed. Cir. 1985), *overruled on other grounds*, *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979). Courts have consistently required this more stringent standard of proof in order to “prevent frustration of patent law by the long reach of antitrust law.” *Handgards*, 601 F.2d at 996.<sup>2</sup>

Complaint Counsel concede, as they must, that *Walker Process* and its progeny require the application of a clear and convincing burden of proof in antitrust cases where a patentee is alleged to have obtained market power by withholding material information from the PTO or is alleged to have engaged in the bad faith enforcement of a patent. CCRB, pp. 101-102. Complaint Counsel’s principal argument against the application of the heightened standard in this case is that they have asserted no *Walker Process* claims and do not allege fraud or inequitable conduct before the PTO. They argue that the policy-related concerns that led the courts to apply a heightened burden in the *Walker Process* line of cases are not present here. *Id.*

Complaint Counsel err. Here, as in *Walker Process* and its progeny, the

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<sup>2</sup> As the Federal Circuit recently observed, the “determination of *which* actions can cause a patentee or a patent applicant to lose the general protection of the patent law and to risk liability for damages is clearly an issue unique to the patent law” to be decided under Federal Circuit law. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, \_\_\_ F.3d \_\_\_, 2004 U.S. App. LEXIS 14274 at \*41 (Fed. Cir., July 12, 2004) (emphasis added).

plaintiff alleges that the patentee’s failure to disclose material information resulted in its obtaining monopoly power in a market – here, the DRAM market – that it otherwise would not have achieved. Here, as in *Walker Process* and its progeny, the plaintiff alleges that the patentee’s use of the courts to enforce its patents was part of an “anticompetitive scheme” to monopolize a market. Here, as in those cases, the crux of the anticompetitive conduct alleged involves a failure to disclose material patent-related information and a subsequent effort to enforce one’s patents.<sup>3</sup> Accordingly, Complaint Counsel should be held to a heightened burden of proof in this case.

**B. The Remedy Sought Here Should Also Compel The Adoption Of A Heightened Burden Of Proof**

It is not just the close analogy to the theory of liability addressed in *Walker Process* and its progeny that leads to the need for a heightened burden here. As Rambus explained in its opening brief, the remedy sought in this case is also virtually identical to that sought in those cases. RIB, pp. 139-140. In this case, Complaint Counsel seek an order barring Rambus from asserting its statutory and Constitutional rights of access to the federal courts to protect its valid patents. Complaint Counsel’s Proposed Order, pp. 1-3. While such a remedy would conflict with both the relevant case law and the record evidence (*see* RIB, pp. 128-133), the fact that the remedy is sought necessarily affects the burden of proof.

Complaint Counsel cite numerous cases for the proposition that the preponderance standard *typically* governs in FTC enforcement actions. CCRB, pp. 101-104. Rambus agrees. But none of the cases cited by Complaint Counsel that were decided after *Walker Process* involved an attempt to strip a patent holder of its rights of

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<sup>3</sup> While Complaint Counsel refer to an “overall scheme to monopolize technology markets by subverting an open standards process,” they cannot dispute that the principal alleged means of the so-called “subversion” was Rambus’s purported failure to disclose patent-related information. Complaint, ¶¶ 2, 79-80.

access to the courts. *See, e.g., In the Matter of Washington Crab Ass'n*, 66 F.T.C. 45 (1964) (monopolization case charging trade organization with engaging in threats of reprisals, intimidation and physical violence in order to destroy competition in the crab and crab products market); *In re Adventist Health System/West*, 117 F.T.C. 224, 1994 FTC LEXIS 54 (1994) (challenge to acquisition of hospitals).<sup>4</sup>

Complaint Counsel tell the Commission that there is no link between the nature of the remedy sought in the *Walker Process* line of cases and the burden of proof required there. As Rambus explained in its initial brief, however, the courts have recognized the right of access to the courts to be a fundamental part of the bundle of rights that accompanies the issuance of a valid patent. *See* RIB, pp. 3-4, *citing CVD, Inc. v. Raytheon Co.*, 769 F.2d 842 (1st Cir. 1985). The court in *CVD, Inc.* observed that in order to protect “the federal interests in patent law enforcement and the free access to the courts,” the courts in cases raising *Walker Process* and *Handgards* allegations have required “‘clear and convincing evidence’ of fraud in asserting or pursuing patent infringement claims.” *CVD, Inc.*, 769 F.2d at 849.

Moreover, in other types of cases where, as here, a plaintiff argues that access to the courts should be restricted as a remedy for misconduct, the courts have regularly held that the misconduct *must* be proven by clear and convincing evidence. *See, e.g., Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 535-6 (3d Cir. 1996)

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<sup>4</sup> Complaint Counsel do cite to a case involving patent enforcement rights that was decided prior to *Walker Process*. In *In The Roberts Co.*, 56 F.T.C. 1569, 1960 FTC LEXIS 226 (1960), the Commission addressed a price-fixing conspiracy between two manufacturers of carpet tools and their licensees. One of the means of enforcing the conspiracy was to threaten non-licensees with *sham* patent infringement suits. *Id.* at \*92-3. The remedy ordered by the Commission – that the respondent not threaten suits against competitors “who have not practiced the invention claimed by the patent,” *id.* at \*95 – was far less draconian than that sought here, and it is undisputed in this case that DRAM manufacturers *do* use Rambus’s patented inventions. *Roberts* is thus irrelevant. In any event, it pre-dates *Walker Process* and its progeny.

(holding that where a public official or entity argues for dismissal of a § 1983 claim on the ground that the plaintiff had orally agreed not to pursue such claims in exchange for the dismissal of criminal charges against her, the voluntary nature of such agreements must be established by clear and convincing evidence, in light of the Constitutional nature of “the right of access to the courts. . . .”); *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1477-8 (D.C. Cir. 1995) (holding that before a case can be dismissed on the basis of litigation misconduct, the court must find clear and convincing evidence of such misconduct); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-9 (1st Cir. 1989) (same). *See also Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 778-9, 105 S.Ct. 1620, 1626-7 (1985) (holding that access to the courts to challenge final agency action should *only* be restricted upon a showing of clear and convincing evidence of Congress’s intent to enact such restrictions).

As these cases demonstrate, the nature of the remedy sought by Complaint Counsel means that they should be required to prove the essential elements of their claims by clear and convincing evidence.

**C. The Nature Of The Claims And Of The Evidence Offered To Support Them Also Demonstrate The Need For A Heightened Burden Of Proof.**

In its initial brief and in its briefs to Judge McGuire, Rambus also argued that “the nature of the claims alleged and the evidence offered to support and rebut them” should lead to a heightened burden of proof on the part of Complaint Counsel. RIB, p. 140, *citing Leak Rate Data Falsification*, 19XX WL 910 at \*14 (holding that where an agency’s examination of events comes well after the relevant events transpired, and where the resolution of important issues “depends on strained and faded memories,” it would be “unfair to find a person guilty of dishonest or fraudulent conduct on a mere preponderance of the evidence.”).

Complaint Counsel make two arguments in response. First, they contend that FTC actions “are not bound by a statute of limitations.” CCRB, p. 106 n.93. This

argument misses the point, since Rambus has never contended that this action is barred by a statute of limitations. Moreover, the absence of a limitations period actually *underscores*, not diminishes, the need for heightened scrutiny of the plaintiff's evidence in a case like this one. It is black-letter law that statutes of limitations play an important role in eliminating cases that depend upon "strained and faded memories." *See generally* Areeda, Hovenkamp & Blair, II Antitrust Law ¶ 320 at 205 (2d ed. 2000) (observing that statutes of limitations serve "to relieve courts and parties from 'stale' claims where the best evidence may no longer be available."). As the Areeda treatise notes:

"[r]epose is especially valuable in antitrust, where tests of legality are often vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand, [and where] relevant evidence may disappear over time. Antitrust liability depends not only on the parties' acts but also on many surrounding circumstances, including the behavior of rival firms and general market conditions – matters that may be hard to reconstruct long afterward."

*Id.* In sum, Complaint Counsel's argument that the absence of a statute of limitations somehow "undermines" the need for heightened scrutiny of the evidence is contrary to logic and law.

Complaint Counsel's second, and related, argument is that unlike the *Leak Rate Data Falsification* case, their case "in no way depends on strained or faded memories" and relies instead on "contemporaneous record evidence." CCRB, p. 106 n.93. As a result, they say, a heightened burden of proof is unnecessary.

This argument is demonstrably false. On issue after issue, it is *Rambus* that has relied upon the contemporaneous written evidence, and it is *Complaint Counsel* who have relied upon the "faded memories" of interested witnesses. A few of these critical

issues – and the parties’ respective evidentiary positions on those issues – are set out below.

**Issue No. 1: Did JEDEC require disclosure of patents and/or patent applications, or was disclosure instead voluntary?**

<b>Rambus Evidence</b>	<b>Complaint Counsel Response</b>
Rambus relies in part upon the January 1996 comment letter to the FTC, signed by EIA General Counsel John Kelly, stating that the EIA “ <i>encourage[s]</i> ” the “ <i>voluntary</i> disclosure of patents that relate to the standards in work.” RX 669 at 2 (emphasis added).	Complaint Counsel respond by pointing to the trial testimony of General Counsel Kelly that the phrase “voluntary disclosure of patents” did not mean that <i>disclosure</i> was voluntary, but instead meant that JEDEC <i>membership</i> was voluntary. Kelly, Tr. 2017.
Rambus also cites to the minutes of the February 2000 meeting of the JEDEC Board of Directors, which state that the disclosure of patent applications is “not required under JEDEC bylaws,” RX 1570 at 13, and to an email a few days after the Board meeting by JEDEC Secretary Ken McGhee stating that the “BoD” had discussed the disclosure issue and had determined that the disclosure of patent applications went “one step beyond” the requirements of the patent policy. RX 1582 at 1.	In response, Complaint Counsel rely generally on the trial testimony of various former JEDEC representatives about their recollections of the patent policy. They have also asked the Commission to allow the untimely admission of deposition testimony from Messrs. Rhoden, Kelly and McGhee that the February 2000 Board minutes, and McGhee’s contemporaneous email, are simply mistaken. CCRB, pp. 22-27, 36-37.



**Issue No. 2: Did JEDEC leaders act as if the disclosure of patents and patent applications was required?**

<b>Rambus Evidence</b>	<b>Complaint Counsel Response</b>
<p>Rambus relies in part upon JEDEC minutes that show that JC 42.3 Committee Chairman Gordon Kelley had announced several times that his company (IBM) would not disclose patents or applications and had stated that it is “up to the user of the standard to discover which patents apply,” and upon JEDEC minutes and “patent tracking lists” that show that after Kelly made these announcements, IBM disclosed no further patents or applications. JX 15 at 6; JX 18 at 8; JX 8 at 14-21; JX 19 at 17-23; JX 20 at 15-18; JX 21 at 14-18; JX 25 at 18-26; JX 26 at 15-24; JX 27 at 20-25; JX 28 at 12-18.</p>	<p>Complaint Counsel respond by pointing to oral testimony by Mr. Kelley and by JEDEC Chairman Rhoden that the JEDEC minutes were inaccurate and that Kelley had said only that he could not <i>guarantee</i> that all relevant IBM patents had been disclosed. Rhoden, Tr. 589-90; Kelley, Tr. 2471-3.</p>
<p>Rambus also relies upon documents showing that JEDEC Chairman Desi Rhoden was the named inventor on a patent application that covered a JEDEC standard in its entirety, and upon JEDEC minutes that contain no indication that either he or his co-inventors had disclosed the patent application to JEDEC until five years <i>after</i> the standard was</p>	<p>In response, Complaint Counsel point to oral testimony by Mr. Rhoden claiming that the application had been disclosed. CCRB, p. 37; Rhoden, Tr. 1242.</p>

Rambus Evidence	Complaint Counsel Response
<p>adopted. Rambus Proposed Findings (“RPF”) 243-247; JX 26 at 10; JX 26 at 111; JX 41 at 22-24; RX 2086 at 1; RX 2099-43 at 250.</p>	

**Issue No. 3: Was Rambus A Member Of JEDEC At The Time That JEDEC’s DDR Standardization Process Began?**

Rambus Evidence	Complaint Counsel Response
<p>Rambus relies in part upon a March 1998 email by JEDEC Chairman Rhoden to the JC 42.3 committee that was intended to “recap what has transpired with DDR” and that states that there was a “lot of private and independent work <i>outside</i> of JEDEC for most of 1996 (here is where we missed a good opportunity to start early).” CX 375 at 1-2 (emphasis added). The email then states that the <i>first</i> DDR proposal at JEDEC was in December 1996, which is well after Rambus had withdrawn from JEDEC. <i>Id.</i> Rambus also cites to an April 1997 presentation by Mr. Rhoden that states that “DDR [was] introduced in JEDEC in December 1996.” RX 911 at 3; RPF 407.</p>	<p>In response, Complaint Counsel point to the oral testimony of Chairman Rhoden, who testified that it was only the <i>name</i> “DDR” that was introduced at JEDEC in December 1996. Rhoden, Tr. 1198.</p>

Rambus will not belabor the point in this rebuttal brief. It is apparent that Complaint Counsel's case *does* depend upon the recollections of JEDEC members and other witnesses about events that occurred over a decade ago. As a consequence, and because it would be "unfair to find a person guilty of dishonest or fraudulent conduct on a mere preponderance of the evidence" in a case that "depends on strained and faded memories," *Leak Rate Data Falsification*, 19XX WL 910 at \*14, Complaint Counsel should be held to a heightened burden of proof.

### **III. CONCLUSION**

Given the conflicting statutory interests involved, given the nature of the claims alleged and the evidence offered to support and rebut them, and given the fundamental nature of the rights that would be lost were the proposed remedy ever implemented, Complaint Counsel should bear the burden of proving the essential elements of their claims by clear and convincing evidence.

Dated: July 16, 2004

/s/

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**CERTIFICATE OF SERVICE**

I, Kenneth A. Bamberger, hereby certify that on July 16, 2004, I caused a true and correct copy of the *Rebuttal Brief of Appellee and Cross-Appellant Rambus Inc.* to be served on the following persons by hand delivery:

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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_____	)	

**CERTIFICATION**

I, Kenneth A. Bamberger, hereby certify that the electronic copy of *Rebuttal Brief of Appellee and Cross-Appellant Rambus Inc.* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on July 16, 2004 by other means.

**Kenneth A. Bamberger**  
**July 16, 2004**