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RAMBUS INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 CITY AND COUNTY OF SAN FRANCISCO

17 RAMBUS INC.,

18 Plaintiff,

19 v.

20 MICRON TECHNOLOGY, INC., et
21 al.,

22 Defendants.

CASE NO. 04-431105

**RAMBUS'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, FOR
SUMMARY ADJUDICATION BASED
ON FAILURE TO PROVE INJURY**

[Date: February 23, 2009
Time: 1:30 p.m.
Dept: 304
Judge: Hon. Richard A. Kramer

Complaint Filed: May 5, 2004
Trial Date: March 16, 2009

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1 **I. INTRODUCTION AND BACKGROUND**

2 Rambus contends that Defendants engaged in an unlawful conspiracy that
3 prevented RDRAM from becoming the dominant memory standard. As a result of
4 Defendants' unlawful acts, through which Defendants intended to "drive Rambus away
5 completely," DDR SDRAM and DDR2 SDRAM became the dominant memory standards
6 instead of RDRAM.

7 Rambus expert Avram Tucker has prepared a reasonable estimate of the lost profits
8 suffered by Rambus as a result of Defendants' success in thwarting RDRAM. In
9 particular, Mr. Tucker calculated the net profits Rambus would have earned had the sales
10 of DDR and DDR2 from 2001 through April 2010 instead been RDRAM sales. Mr.
11 Tucker then deducted from this sum the actual royalties and flat fee payments related to
12 DDR or DDR2 sales that Rambus has received from current licensees, as well as an
13 estimate of such sums to be received in the future from those same licensees. The
14 resulting damages figure is over \$4 billion.

15 Remarkably, Defendants now seek summary judgment based on the contention that
16 Rambus cannot prove damages! Defendants' conspiracy succeeded, Rambus has been
17 massively injured, and Defendants' motion should be denied.

18 Stripped to its essentials, Defendants' argument is as follows:

19 (1) "Where alleged anticompetitive conduct causes both a harm and a benefit,
20 the plaintiff cannot recover damages for the harm and still keep the benefit. The two must
21 be offset so that a plaintiff can recover only its net injury;"¹

22 (2) Defendants' scheme to thwart RDRAM both caused a harm to Rambus (a
23 drastic reduction of its income stream from RDRAM sales) and created a "benefit" (the
24 opportunity for Rambus to assert its intellectual property rights against the DDR and
25 DDR2 sales that would not have occurred if RDRAM was the dominant memory);

26 (3) Although Rambus has reported and offset its actual and forecasted royalties
27

28 ¹ Moving Mem. at 8:11-14.

1 earned on DDR and DDR2 from existing licensees, Rambus has not -- and admittedly
2 cannot -- quantify the amount it will receive (if anything) as patent infringement damages
3 in its suits against Defendants and other unlicensed entities based on their sales of DDR
4 and DDR2;

5 (4) the royalty rates Rambus charged for licensing RDRAM were lower than
6 the royalty rates it charged for licensing its technology for use in DDR and DDR2, and
7 therefore the patent damages could be higher than the damages calculated by Mr. Tucker;
8 and

9 (5) Defendants thereby have shown that Rambus cannot meet its burden of
10 proof at trial to show that it has suffered a net injury.

11 Put even more simply, Defendants contend that -- having deprived Rambus of
12 some \$4 billion dollars over the last eight years through their conspiracy to thwart
13 RDRAM -- they now can deprive Rambus of all redress for that wrong because they also
14 have spent the last decade infringing Rambus's patents, and Rambus therefore might
15 someday prove that and collect patent infringement damages (notwithstanding
16 Defendants' best efforts to escape all liability for that misconduct as well).

17 Not surprisingly, the law does not permit such an inequitable result.

18 *First*, California law squarely places the burden upon Defendants to prove at trial
19 the value of any benefits their wrongful conduct allegedly conferred upon Rambus.
20 Defendants have not demonstrated, and cannot demonstrate, that collection of patent
21 damages by Rambus is anything more than speculative as this point (even if it could be
22 said to be a "benefit" that Defendants' conspiracy "conferred" upon Rambus). Summary
23 judgment therefore is improper.

24 *Second*, even if Rambus had the burden to prove the scope of the "benefits" (if any)
25 it received from Defendants' conspiracy to thwart RDRAM, Defendants' own evidence
26 shows that Rambus has met that burden. Whether or not it legally qualifies as an
27 offsetting "benefit" that Defendants "conferred" by their conspiracy, Mr. Tucker has
28 identified and offset in his calculation the royalties and lump sum payments Rambus has

1 received, and reasonably estimates it will receive, that relate to sales of DDR and DDR2
2 by Rambus licensees. Rambus's right to continue to pursue Defendants for patent
3 infringement, on the other hand, clearly does not constitute the basis for a proper offset.
4 The ultimate outcome of the long-running and hard fought patent litigation between the
5 parties is simply too speculative at present to furnish the basis for an offset against
6 damages properly awarded in this action. And, because the right to offset any benefits
7 conferred is an equitable one, application of such an offset is foreclosed here: It simply is
8 inequitable to deny Rambus all relief (or to impose a long, indefinite stay) based on the
9 speculative possibility that Rambus someday will succeed both in showing that
10 Defendants also infringed Rambus's patents and in obtaining redress from them.

11 **II. DEFENDANTS HAVE NOT DEMONSTRATED THAT RAMBUS'S**
12 **CARTWRIGHT ACT CLAIMS FAIL FOR LACK OF PROOF OF INJURY**

13 **A. Defendants' Initial Burden Under *Aguilar* Depends Upon Which Party**
14 **Has The Burden Of Proof At Trial On The "Benefits Conferred" Issue**

15 A party moving for summary adjudication or summary judgment must "make a
16 *prima facie* showing of the nonexistence of any triable issue of material fact"
17 *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850 (2001). If the moving party makes this
18 showing, the burden of production (but not the burden of persuasion) shifts to the
19 opposing party. *Id.*

20 The precise nature of the moving party's initial burden "depends on *which* [party]
21 would bear *what* burden of proof at trial." *Id.* at 851 (italics in original). If the moving
22 party would bear the burden of proof on the material fact at trial, it "must present with its
23 moving papers evidence that would *require* a reasonable trier of fact to find [the]
24 underlying material fact" by the applicable standard of proof. *Id.* (italics in original). If
25 the party opposing the motion would bear the burden of proof on the material fact at trial,
26 then the moving party either (1) must "present *evidence* that the plaintiff does not possess
27 and cannot reasonably obtain, [the] needed evidence" to establish the underlying material
28 fact, *id.* at 855 (emphasis added), or (2) must present affirmative evidence negating the
material fact. *Id.* at 853-54.

1 Therefore, if, as Rambus contends, the Defendants bear the burden at trial of
2 proving that their wrongful conduct also conferred a benefit upon Rambus, then
3 Defendants' initial burden in this motion is to present evidence sufficient to establish both
4 that such a benefit exists, and that it is sufficiently large to wholly offset Rambus's
5 claimed damages. By contrast, if, as Defendants contend, Rambus bears the burden of
6 proving that it has not received a benefit from Defendants' wrongful conduct sufficient to
7 offset Rambus's claimed damages, the Defendants need only offer evidence showing that
8 Rambus lacks the evidence to meet this burden of proof at trial. Given that Defendants
9 fail to satisfy either burden, their motion is properly denied before even considering
10 additional evidence presented by Rambus.

11 **B. Defendants Will Bear The Burden At Trial Of Proving That Their**
12 **Wrongful Conduct Also Conferred Some Benefit On Rambus That**
13 **Properly Is Offset Against Rambus's Damages**

14 California law long has recognized the principle upon which Defendants purport to
15 rely; namely, that "[w]hen the defendant's tortious conduct has caused harm to the
16 plaintiff or to his property and in so doing has conferred a special benefit to the interest of
17 the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation
18 of damages, to the extent that this is equitable." *Heckert v. MacDonald*, 208 Cal. App. 3d
19 832, 839 (1989). "The reason [behind the rule] is clear, if tautological: to the extent a
20 plaintiff's interest benefits from [tortious conduct], it is not damaged.' Further, the
21 'special benefit' doctrine reflects the basic compensatory theory underlying tort damages
22 by restricting recovery to the harm actually incurred." *Id.* (citations omitted). *Accord In*
23 *re De Laveaga's Estate*, 50 Cal. 2d 480, 488-89 (1958) ("If the wrongful act of the
24 defendant at once confers a benefit and inflicts an injury, the loss actually caused will be
25 the net result of the act to the plaintiff; and this net result will be the measure of damages.'
26 . . . 'An allowance for such benefits is not in the nature of recoupment or set-off, but a
27 method of determining the actual damages sustained'" (citations omitted).

28 California law also long has recognized that a defendant seeking to invoke this
"benefits" rule bears the burden of proof. *See, e.g., Stills v. Gratton*, 55 Cal. App. 3d 698,

1 708-09 (1976) (“under ordinary tort principles . . . the defendants may prove any offsets
2 for benefits conferred”). Indeed, this allocation of the burden of proof to the defendant is
3 confirmed by the authorities upon which the California Supreme Court relied when it first
4 adopted the “benefits” rule in *Hicks v. Drew*, 117 Cal. 305 (1897). *See id.* at 314-15
5 (citing as authority “Field on Damages, sec. 744; Sutherland on Damages, sec. 1056”);
6 George W. Field, A Treatise on The Law of Damages (1876) § 744, at p. 599 (“When the
7 wrongful act of a defendant produces some benefit, as well as injury, to the plaintiff *the*
8 *defendant may claim the benefits conferred in reduction or mitigation of damages*”)
9 (italics added); J.G. Sutherland & John R. Berryman, A Treatise on The Law of Damages
10 (2d ed. 1893) § 1056, at pp. 2304-06 (“If some incidental advantage accrues to the
11 plaintiff from the act of the defendant which causes the nuisance that circumstance *may be*
12 *considered in mitigation. . . . To entitle the defendant to show any incidental benefit to*
13 *the plaintiff* it must accrue directly from the act or business which causes or constitutes the
14 nuisance and confers the benefit in the same manner as it operates to produce the injury”)
15 (italics added).

16 This allocation of the burden of proof also is consistent with the general California
17 rule in both contract and tort actions that the defendant bears the burden of proving that
18 damages actually were (or should have been) reduced through acts of mitigation,
19 including through the plaintiff’s pursuit of alternative business opportunities in place of
20 the one denied to it by defendant’s wrongdoing. *See, e.g., Steelduct Co. v. Henger-Seltzer*
21 *Co.*, 26 Cal. 2d 634, 654 (1945) (plaintiff *not* required to prove the amount of the profits it
22 earned through an alternative contract secured after defendant’s breach, because “[t]he
23 burden of proof is on the party whose breach caused damage, to establish matters relied on
24 to mitigate damage”); *Utter v. Chapman*, 43 Cal. 279, 284 (1872) (“The burden of proof
25 was on the defendant [who breached contract to charter] to show that the boat and barge
26 had, or might have realized a profit” through an alternative contract); *Stillwell v. R.C.A.*
27 *Mfg. Co.*, 62 Cal. App. 2d 347, 352 (1944) (“The burden was upon the appellants, in their
28 attempt to minimize this damage [caused by their negligent destruction of the plaintiff’s

1 old business], to show that the loss had been diminished by the operation of the new
2 business”). Indeed, under California law, at all times “the burden of showing matters in
3 reduction or mitigation of damages rest[s] upon the defendant.” *Pfingsten v.*
4 *Westenhaver*, 39 Cal. 2d 12, 24 (1952).

5 Defendants simply ignore this body of California law, and instead purport to find
6 support in three federal cases for imposing upon Rambus the duty to prove the amount of
7 the “benefit” it has received or will receive from Defendants’ destruction of Rambus’s
8 RDRAM business. Defendants err.

9 *First*, the federal cases cited by Defendants provide no persuasive support for
10 Defendants’ position. Neither of the two federal Court of Appeals decisions cited by
11 Defendants places the burden on the plaintiff to prove the value of a “benefit” conferred
12 by the defendant’s wrongdoing. On the contrary, in both cases the *defendant* raised the
13 “benefits” offset issue in the trial court. *See Los Angeles Memorial Coliseum Comm’n v.*
14 *Nat’l Football League*, 791 F.2d 1366, (9th Cir. 1986) (“we conclude that the district
15 court erred in limiting the NFL’s damage offset defense”); *Burlington Indust. v. Milliken*
16 *& Co.*, 690 F.2d 380, 387-88 (4th Cir. 1982) (describing offer of proof in trial court by
17 defendant). And, while Defendants do cite a lone federal district court case that placed
18 the burden on the plaintiff to prove the value of a benefit it received as a result of the
19 defendant’s misconduct, *see Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp.
20 486, 490 (S.D.N.Y. 1987), that court’s reasoning is not persuasive.²

21 *Second*, if this Court were to deem it proper to look outside California law, the
22 proper place to look would be to the law of Michigan and Texas as it stood prior to
23 adoption of the Cartwright Act. This is because, as the California Supreme Court has

24 ² The District Court in *Minpeco* simply cited two cases that, in fact, stand for no more
25 than the unremarkable proposition that a plaintiff must demonstrate the *net* profit it would
26 have received in the “but for” world, not the gross profit. *See Deaktor v. Fox Grocery*
27 *Co.*, 475 F.2d 1112, 1116-17 (3d Cir. 1973); *Filmline (Cross-Country) Prods., Inc. v.*
28 *United Artists Corp.*, 662 F. Supp. 798, 813 (S.D.N.Y. 1987). This proposition is part of
California law as well, *see, e.g., Gerwin v. Se. Cal. Ass’n of Seventh Day Adventists*, 14
Cal. App. 3d 209, 222-23 (1971), and simply has no bearing on the burden of proof with
respect to the value of a “benefit” allegedly conferred by wrongdoing.

1 determined, the Cartwright Act is patterned on the antitrust statutes of Michigan and
2 Texas, and not on the federal antitrust statutes. *See State of California ex rel. Van de*
3 *Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1160-62 (1988). By 1907, both of these states --
4 consistent with the overwhelming national consensus -- took the view that the defendant
5 bears the burden of proving facts showing that damages actually were or should have been
6 mitigated. *See, e.g., Porter & McMillan v. Burkett, Murphy & Burns*, 65 Tex. 383, (1886)
7 (“A plaintiff is not bound to negative everything that might defeat his action. If the
8 damages he shows he has incurred are to be reduced from any cause not necessarily
9 occurring, in all such cases this must be shown by the opposite party in defense”); *Farrell*
10 *v. School Dist.*, 98 Mich. 43, 47 (1893) (“The defense that [the wrongfully discharged
11 employee] was engaged in other profitable employment, or might have had other similar
12 employment, is an affirmative one, and the burden of proof is upon the defendant”). *See*
13 *generally* “Presumption and burden of proof regarding mitigation of damages,” 134
14 A.L.R. 242 (“The overwhelming weight of authority is to the effect that in actions for
15 damages arising out of either breach of contract or tort the burden is upon the party whose
16 wrongful act caused the damages complained of to prove anything in diminution of the
17 damages, or, in other words, that the damages were lessened or might have been lessened
18 by reasonable diligence on the part of the aggrieved party”).

19 *Third*, and most importantly, there simply is no reason to look outside of California
20 common law to determine the burden of proof on this routine principle of damages. *See*
21 *Speegle v. Bd. of Fire Underwriters*, 29 Cal. 2d 34, 46 (1946) (“elementary” common law
22 damages rule that wrongdoer bears uncertainty of damages created by wrongdoing
23 properly applies under Cartwright Act); *cf. Associated Gen. Contractors of Cal., Inc. v.*
24 *Cal. State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) (“The repeated references
25 to the common law in the debates that preceded the enactment of the Sherman Act make it
26 clear that Congress intended the Act to be construed in the light of its common-law
27 background. . . . Although particular common-law limitations were not debated in
28 Congress, the frequent references to common-law principles imply that Congress simply

1 assumed that antitrust damages litigation would be subject to constraints comparable to
2 well-accepted common-law rules applied in comparable litigation.”). Indeed, both the
3 *Minpeco* and *Los Angeles Memorial Coliseum Comm'n* cases upon which defendants rely,
4 expressly acknowledge that the “non-fault based offset theory [which they apply] is
5 simply a corollary of the general principle, *applicable outside the antitrust context*, that an
6 award of damages should put a plaintiff forward into the position it would have been “but
7 for” the defendant's violation of the law.” *Minpeco*, 676 F. Supp. at 489 (quoting *Los*
8 *Angeles Memorial Coliseum Comm'n*, 791 F.2d at 1367) (italics and bracketed material
9 added).

10 In short, in accordance with longstanding California law, Defendants will bear the
11 burden at trial to show any “benefits” they contend their conspiracy to thwart RDRAM
12 conferred upon Rambus.

13 C. **Defendants Have Not Carried Their Initial *Aguilar* Burden In Light Of**
14 **Their Burden At Trial To Prove Their Wrongdoing Conferred**
“Benefits” On Rambus

15 Because of their trial burden, Defendants bear the initial *Aguilar* burden of
16 presenting evidence sufficient to require a trier of fact -- if the evidence went unrebutted --
17 to conclude that Rambus more likely than not has suffered no actual injury. Defendants
18 have failed to carry that burden through their speculation about the possible eventual
19 positive outcome of the very patent infringement litigation with Rambus they are fighting
20 so hard to defeat. California law is clear that Rambus could not *increase* its claim for
21 actual damages even by showing that it is likely in the future to be subject to a liability
22 and to pay it, or that it is already subject to such a liability and is likely to pay it in the
23 future. Rather, “reasonable certainty” of payment is the minimum requirement. *See*
24 *Green Wood Indus. Co. v. Forceman Int’l Dev. Group, Inc.*, 156 Cal. App. 4th 766, 776-
25 78 (2007). It therefore is equally true that Defendants cannot *decrease* Rambus’s claim of
26 actual damages based on the speculative possibility that Defendants may some day be
27 liable to and pay Rambus patent infringement damages.

1 **D. Defendants Also Failed To Carry Their Initial *Aguilar* Burden Even**
2 **Assuming That Rambus Somehow Bears The Burden At Trial Of**
3 **Proving The Scope Of Any “Benefits” Conferred By Defendants**

4 Even if Rambus somehow would bear the burden of proof at trial regarding
5 “benefits” conferred by Defendants’ wrongdoing, Defendants still failed to meet their
6 *Aguilar* burden here to provide evidence that Rambus cannot meet its trial burden.

7 There is no material dispute between the parties that Rambus is prepared to present
8 evidence of \$4 billion in damages even after deduction of all potentially relevant royalties
9 and lump sum payments that it *actually* has received that relate to DRAM sales that would
10 not have taken place but for Defendants thwarting RDRAM.³ Defendants’ motion
11 therefore hinges entirely on the proposition that the inability of Rambus to prove what
12 patent infringement damages, if any, it ultimately will collect from the Defendants
13 constitutes a fatal failure of proof of actual injury.

14 However, assuming solely *arguendo* that damages paid in compensation for
15 Defendants’ separate wrong of patent infringement somehow constitutes a “benefit” that
16 Defendants “conferred” through their conspiracy to thwart RDRAM so as to constitute a
17 proper offset if received,⁴ the fact that any such payment remains speculative shows that
18 Rambus has met any burden it might have to prove that such potential future payments are
19 *not* properly considered in reduction of actual damages. *Cf. Green Wood Indus. Co.*, 156
20 Cal. App. 4th at 776-78.

21 Furthermore, “benefits” conferred are only properly subject to offset “to the extent
22 that this is equitable.” *Heckert v. MacDonald*, 208 Cal. App. 3d at 839; *accord Dakota*

23 ³ Defendants have asserted as a material fact that Mr. Tucker does not deduct any royalties
24 Rambus actually received on SDRAM. This is not a material fact, however, as (1) in Mr.
25 Tucker’s damages calculations, it is assumed that RDRAM does not displace SDRAM
26 sales in the “but for” world, (2) Defendants have presented no evidence that Rambus
27 could not calculate such a deduction at trial if it had the burden of doing so, and (3) doing
28 so could not possibly establish a lack of injury because RDRAM royalties generally were
29 higher than SDRAM royalties, and because even the maximum 1% royalty charged
30 against the entirety of SDRAM sales reported by Mr. Tucker does not begin to approach
31 Rambus’s \$4 billion in damages.

32 ⁴ Although unnecessary to defeat this motion, Rambus asserts that Defendants’ theft
33 through infringement of Rambus’s intellectual property does not constitute a “benefit”
34 conferred by Defendants’ conspiracy to destroy Rambus’s RDRAM business.

1 *Gardens Apartment Investors "B" v. Pudwill*, 75 Cal. App. 3d 346, 352 (1977)
2 ("Mitigation of damages in tort cases is restricted by principles of equity, and in
3 conversion cases, a defendant generally cannot diminish the amount of damages by
4 paying a debt of the injured party without the latter's consent"). It plainly is not equitable
5 to deprive Rambus altogether of its \$4 billion conspiracy claim as Defendants ask this
6 Court to do -- or to impose an interminable stay while every last infringement action is
7 resolved through appeal -- simply because Rambus cannot prove that it will finally prevail
8 against Defendants in its federal actions and actually recover the amount of patent
9 infringement damages it seeks. Rather, as this Court pointed out when rejecting Micron's
10 request for a stay of proceedings (which was based on the same arguments as Defendants
11 present in this motion), if it ever turns out that truly overlapping damages are awarded in
12 this proceeding and the patent infringement proceedings, then adjustments to assure a
13 single satisfaction properly can be made even post-judgment to the extent authorized by
14 law. And in any event, the damages awarded in this case to compensate for destruction of
15 Rambus's RDRAM business and the damages awarded in patent litigation to compensate
16 for theft of Rambus's intellectual property do not truly overlap. *See, e.g., Nintendo of*
17 *Am., Inc. v. Dragon Pac. Int'l.*, 40 F.3d 1007, 1011 (9th Cir. 1994); *see also* Opposition to
18 Micron's Motion to Stay, filed 12/1/2008, at 6:9-7:16.

19 **III. CONCLUSION**

20 For all of the foregoing reasons, Defendants' motion should be denied.

21 DATED: January 26, 2009

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22
23
24 By: _____


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25
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