UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public

In the Matter of RAMBUS INCORPORATED, a corporation.	Docket No. 9302

RESPONSE TO RAMBUS'S APPLICATION FOR REVIEW OF FEBRUARY 26, 2003, ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR COLLATERAL ESTOPPEL OR, IN THE ALTERNATIVE, REQUEST FOR RECONSIDERATION

INTRODUCTION

With millions of dollars in potential post-trial sanctions hanging in the balance, Respondent Rambus Inc. ("Rambus") previously litigated, and lost, on a factual issue directly relevant to this case — namely, whether the company acted in bad faith when, starting in mid-1998, it launched a massive document destruction campaign resulting in the elimination of many JEDEC-related documents and other materials relevant to the claims at issue here.[1] After an opportunity for presentation of evidence,

[1] The quantity of what Rambus destroyed cannot be known for sure, because, as Judge Timony recently found, Rambus kept no record of what it destroyed. *See* Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument at 7 (Feb. 26, 2003) (referring to "Rambus's utter failure to maintain an inventory of the documents its employees detroyed"). Nevetheless, newly discovered evidence — not known to Complaint Counsel when its filings in support of the default judgment motion were made — shows that the destruction was on a truly monumental scale. In fact, one newly discovered document explains that on a **single day**, in the space of **five hours**, Rambus destroyed **20,000 pounds** of its own internal business records. *See* September 3, 1998, E-mail from Karp to staff@rambus.com (Rf0684604) ("It took about 5 hours to completely fill

briefing, and oral argument, a federal district judge concluded that Rambus's document destruction was done, "in part, for the purpose of getting rid of documents that might be harmful" in future anticipated litigation involving Rambus's previously undisclosed "JEDEC-related patents." *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 682 (E.D. Va. 2001) ("*Infineon II*"). On this and other grounds, the *Infineon* trial court imposed a monetary sanction against Rambus in excess of $7 million. Rambus later appealed this attorneys' fees award, but on grounds unrelated to the trial court's findings of improper document destruction. In that appeal, Rambus did succeed in having the award of fees vacated; however, the appellate court majority opinion plainly states that the trial court's unappealed findings of litigation misconduct, including bad-faith document destruction, remained undisturbed. *See Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1106-07 (Fed. Cir. 2003) ("*Infineon III*") (noting that "Rambus does not contest the district court's holding of litigation misconduct" and "that Rambus's misconduct alone supported the determination" that sanctions were warranted).

It is clear beyond dispute that on remand in the *Infineon* suit Rambus will not be permitted to relitigate the trial court's prior determination that the company destroyed material evidence, in part, because it feared the adverse consequences that could flow from production of those documents in future JEDEC-related litigation. Applying basic principles of collateral estoppel, Judge Timony ruled that Rambus should be precluded from relitigating that issue here as well. *See* Order Granting Complaint Counsel's Motion for Collateral Estoppel at 1, 5 (Feb. 26, 2003) (ruling that the *Infineon*

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the shredding truck (capacity is 20,000 lbs.). . . . They feel they can finish the job tomorrow. Worst case is that they may have to come back Tuesday to pick up anything that still remains after tomorrow's session.").

trial court's findings of bad-faith document destruction should be accorded "full collateral estoppel effect" in this case, thus barring "Rambus from relitigating the same factual issues" here) ("Order"). Judge Timony's collateral-estoppel ruling reflects a sensible application of well-established law. There is simply no good reason why Rambus, having had a prior opportunity to litigate fully and fairly this factual question, should be permitted to relitigate the same question again in this proceeding, hoping for a better outcome.

Consistent with its penchant for wanting to relitigate issues that have already been conclusively resolved against it, Rambus is now seeking to revisit Judge Timony's conclusion that collateral estoppel should apply in these circumstances. Rambus specifically requests two things. In the first instance, Rambus requests that Your Honor certify for interlocutory appeal to the Commission the question, already now decided by Judge Timony, of whether Rambus should be allowed to relitigate here the same issue that was conclusively resolved against it in the *Infineon* case — that is, the issue of bad-faith document destruction. In the alternative, Rambus has asked that Your Honor reconsider Judge Timony's ruling directly. As we explain herein, neither of these alternatives requests has a sound basis. Just as Rambus has no meritorious basis for relitigating here the bad-faith document destruction issues already resolved against it in the *Infineon* suit, Rambus has no meritorious basis to seek reconsideration or interlocutory appeal of Judge Timony's February 26 Order recognizing the collateral esteppel effect of the *Infineon* court's prior rulings.[2]

SUMMARY OF ARGUMENT

[2] Complaint Counsel hereinafter refers to Rambus's Application for Review of the February 26, 2003, Order Granting Complaint Counsel's Motion for Collateral Estoppel Pursuant to Rule 3.23(b), or, in the Alternative Request for Reconsideration of That Order (filed Mar. 5, 2003), as "Application" or "Rambus App."

Rambus here seeks reconsideration, and applies for interlocutory review, on the same grounds on which it initially opposed Complaint Counsel's motion. Once again, Rambus argues that the general rule that "vacated judgments" have no collateral estoppel effect forecloses the application of collateral estoppel in this case. *See* Opposition to Complaint Counsel's (1) Motion for Leave to File Supplemental Memorandum in Support of Motion for Default Judgment, and (2) Motion Seeking Recognition of the Collateral Estoppel Effect of Prior Factual Findings Underlying Portions of the Judgment in *Infineon* Now Vacated by the Federal Circuit (filed Feb. 24, 2003) ("Rambus Opp."). Rambus argues its Application as if Judge Timony had never considered the argument before. Yet as Judge Timony's order itself makes clear, he did consider, but nonetheless rejected, Rambus's arguments, and for good reason. *See* Order at 1 (acknowledging that "Rambus filed its opposition on February 24, 2003."). Furthermore, Rambus fails to show that any of the criteria for interlocutory review of this evidentiary ruling are met here, nor could it possibly do so, considering that this simply is not a "controlling question of law," but rather a subsidiary evidentiary issue. Likewise, Rambus has made no showing of new facts or changes in law that would warrant altering Judge Timony's Order in any way.

The reason why Judge Timony's collateral estoppel ruling was appropriate and should not be disturbed is quite straightforward. Despite Rambus's attempts to convince Your Honor of the contrary, the relevant judgment of the *Infineon* trial court was not wholly vacated by the Federal Circuit majority. The lower court's judgment was only "VACATED-IN-PART," *Infineon III*, 318 F.3d at 1107, and the "part" that matters here was left undisturbed by the appeals court. Specifically, the Federal Circuit's majority opinion in *Infineon* left undisturbed the district court's findings of litigation misconduct, and vacated only the award of attorneys' fees. *See id.* at 1106 (noting that "Rambus does

not contest the district court's holding of litigation misconduct" and that "[l]itigation misconduct and unprofessional behavior may suffice, by themselves," to support sanctions under § 285). The majority opinion thus directs that Rambus will not be permitted to relitigate the issue of litigation misconduct on remand. That aspect of the district court's ruling is final and continues to be binding against Rambus. Hence, if on remand Infineon ultimately is judged to be a "prevailing party" under the relevant statute (*e.g.*, if Rambus's patents are deemed invalid, unenforceable, or not infringed), the prior determination of litigation misconduct will "alone" support the imposition of sanctions. *Id.* at 1106.

In these circumstances, the arguments and case law contained in Rambus's Application are simple inapposite. Rambus cannot relitigate the findings of litigation misconduct, including bad-faith document destruction, before the district court on remand in the *Infineon* suit. Nor, consistent with the most basic principles of collateral estoppel, should Rambus be permitted to relitigate that issue here. Judge Timony resolved the issue in a fully appropriate manner. For this and other reasons, we respectfully submit that Your Honor should deny Rambus's requests for reconsideration and interlocutory review.

FACTUAL AND PROCEDURAL BACKGROUND

In late December of last year, Complaint Counsel filed a motion for default judgment in this action. The motion was predicated upon facts showing that Rambus, beginning in mid-1998, willfully, and in bad faith, destroyed massive quantities of its own internal business records with the purpose of reducing or eliminating serious legal risks that the company and its lawyers then knew to exist. Specifically, the facts show that, in this time period, Rambus anticipated that its future plans to enforce previously undisclosed JEDEC-related patents would likely precipitate legal attacks on the enforceability of those patents. Rambus's lawyers had advised the company of the risk that alleged

infringers could defeat the enforceability of Rambus's patents by asserting "equitable estoppel" defenses rooted in claims that Rambus, while participating as a member of JEDEC, engaged in "misleading conduct."[3] Rambus's lawyers also repeatedly advised the company that similar allegations of misleading conduct could lead to patents being held unenforceable on antitrust grounds.[4] Indeed, it appears that the FTC's announcement of an antitrust consent decree against Dell Computer Corporation in late 1995, in an action challenging Dell's allegedly misleading concealment of relevant patents from a standard-setting organization, was one of the principal factors leading to Rambus's decision to withdraw from JEDEC several months later.[5]

In opposing the Default Judgment Motion, Rambus failed to contest the vast bulk of Complaint Counsel's factual contentions.[6] Instead, Rambus hinged virtually its entire opposition to default

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[3] *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 16 (filed Dec. 20, 2002); *see also* Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument at 3 (Feb. 26, 2003) ("While particpating in JEDEC's development of RAM standards, Rambus was advised by its counsel that this partcipation, combined with its failure to disclose the existence of the patents that ould be infringed by the proposed JEDEC standard, could create an equitable estoppel that would make it difficult, if not impossible, for Rambus to enforce its atents and, most importantly, to collect royalties or damages from patent infringements resulting from the proposed JEDEC standards.").

[4] *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 15-21 (filed Dec. 20, 2002).

[5] *See id.* at 18-21; *see also* Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument at 6 (Feb. 26, 2003) ("prior to Rambus's decision to cease participating in JEDEC, its counsel indicated that its participation could hamper its potential claims for patent infringement").

[6] *See* Complaint Counsel's Corrected Reply to Rambus Inc.'s Memorandum in Opposition to Motion for Default Judgment at 4-7 (filed Jan. 27, 2003) (summarizing the factual contentions that Rambus, in opposing the default judgment motion, failed to contest).

judgment on the argument that "Complaint Counsel do not and cannot make the required showing" that Rambus destroyed discoverable evidence "in bad faith."[7] In support of this defense, Rambus's opposition relied largely on its own self-serving denials of wrongdoing, while at the same time essentially ignoring all of the evidence that had been cited by Complaint Counsel as proof of bad faith.[8] Thus, based on the parties' briefing, the outcome of Complaint Counsel's default judgment motion appeared to turn on a single issue – bad faith. Complaint Counsel, citing to various record facts, contended that Rambus's document destruction efforts were undertaken in bad faith, with the purpose, at least in part, of eliminating evidence that might be helpful to Rambus's opponents (including the FTC itself) in anticipated JEDEC-related litigation. Meanwhile, Rambus, largely ignoring Complaint Counsel's proof of bad faith, cited to other evidence in an effort to persuade Judge Timony that the company's document destruction activities were not motivated by any improper purpose.

It was in this context — *i.e.*, a dispute over the bad-faith nature of Rambus's document destruction — that Complaint Counsel's motion for collateral estoppel arose. As Complaint Counsel explained in the opening pages of the memorandum supporting its Default Judgment Motion, Rambus's destruction of JEDEC-related documents, and the motivations therefor, were previously litigated and

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[7] Memorandum by Rambus Inc. in Opposition to Complaint Counsel's Motion for Default Judgment at 1 (filed Jan. 15, 2003) (emphasis added). Rambus's opposition memorandum did not dispute (nor could it) that much of the evidence that was destroyed would have been discoverable in this proceeding.

[8] *See* Complaint Counsel's Corrected Reply to Rambus Inc.'s Memorandum in Opposition to Motion for Default Judgment at 11 n.5 (filed Jan. 27, 2003) (cataloguing the evidence cited by Complaint Counsel's initial motion as evidence of bad faith that Rambus's opposition entirely ignored).

resolved in the *Infineon* case.[9] Ruling upon a post-trial motion for sanctions, the *Infineon* trial court entered an order on August 9, 2001, finding (1) that Rambus's patent suit against Infineon was frivolous; (2) that Rambus's misleading conduct before JEDEC constituted fraud; and (3) that Rambus, before and during the *Infineon* suit, had engaged in a "series of litigation misconducts directed at masking its fraud," including but not limited to wrongful document destruction. *Infineon II*, 155 F. Supp. 2d at 683.[10] As pertained to Rambus's improper document destruction, Judge Payne made the following express findings:

> [T]he record in this case shows that Rambus implemented a "document retention policy," in part, for the purpose of getting rid of documents that might be harmful in litigation. Rambus instituted its document retention policy in 1998. Clearly, Rambus contemplated that it might be bringing patent infringement suits during this timeframe if its licensing efforts were not successful – its Business Plan unequivocally states that the issuance of its JEDEC-related patents would put it in a position to demand royalties from semi-conductor manufacturers.

Id. at 682.

Although Complaint Counsel did draw these findings to Judge Timony's attention in its original default judgment filings, and argued that Judge Payne was right to conclude that Rambus's document destruction was done at least "in part, for the purpose of getting rid of documents that might be harmful

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[9] *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 3-4 (filed Dec. 20, 2002).

[10] In addition to document destruction, Judge Payne's "litigation misconduct" ruling was also predicated in part on his conclusions that (1) Rambus failed to list numerous documents on its privilege log, which . . . documented its fraudulent activity at JEDEC"; (2) "Rambus representatives . . . hindered discovery efforts by providing false or misleading testimony," only later to change their testimony when "confronted with documents obtained after the piercing of the attorney-client privilege"; and (3) "Rambus also obstructed discovery in its written responses to Infineon's interrogatories and [requests for admission]." *Id.* at 676, 679, 681-82.

in litigation," *id.*,[11] Complaint Counsel did not — in its initial default judgment filings — further argue that Judge Payne's findings should have binding collateral-estoppel effect in this litigation. Complaint Counsel's reason for not, initially, making such an argument related to the fact that the findings cited above were part of a larger order through which Judge Payne imposed a $7 million post-trial sanction against Rambus, which Rambus then appealed to the Federal Circuit. Given the pendency of Rambus's appeal, and the uncertainty of how it could affect Judge Payne's findings of improper document destruction, Complaint Counsel believed that a collateral-estoppel argument would not likely be given serious consideration. All of this changed, however, when the Federal Circuit — on January 29, 2003 — ruled on the *Infineon* appeal. Although the Federal Circuit majority ruled that "neither the claim construction nor the fraud provides a basis" for the award of attorneys fees to Infineon, the majority went on to note that "Rambus does not contest the district court's holding of litigation misconduct," and "that Rambus's misconduct alone supported the determination" that a sanction was warranted, under the relevant legal provision, 35 U.S.C. § 285, assuming that, when the litigation is finally resolved on remand, Infineon is deemed to be a "prevailing party." *Infineon III*, 318 F.3d at 1106.

In Complaint Counsel's view, this ruling cleared the way for it to assert equitable estoppel against Rambus based on Judge Payne's prior, fully litigated determination that Rambus indeed did destroy documents in bad faith. Specifically, Rambus eliminated a massive volume of business records, "in part, for the purpose of getting rid of documents that might be harmful in litigation" involving its previously undisclosed "JEDEC-related patents." *Infineon II*, 155 F. Supp. 2d at 683. Thus,

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[11] *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 52-55 (filed Dec. 20, 2002).

Complaint Counsel followed the Federal Circuit decision by filing a motion requesting Judge Timony to accord full collateral-estoppel effect to the following express findings by Judge Payne:

(1) when "Rambus instituted its document retention policy in 1998," it did so, "in part, for the purpose of getting rid of documents that might be harmful in litigation";

(2) Rambus at that time "[c]learly . . . contemplated that it might be bringing patent infringement suits during this timeframe" if its efforts to persuade semi-conductor manufacturers to license "its JEDEC-related patents" "were not successful"; and

(3) Rambus's "document destruction" was therefore done "in anticipation of litigation."

Id. at 682-83.[12]

On February 26, Judge Timony granted Complaint Counsel's motion and ordered that the above findings be given "full collateral estoppel effect." Order at 5. In explaining his ruling, Judge Timony stated:

> Here, all of the bases for collateral estoppel warrant a conclusion that Rambus should be barred from relitigating the question of whether its admitted destruction of very large volumes of business records starting in mid-1998 was done "in part, for the purpose of getting rid of documents that might be harmful" in future, anticipated litigation. . . .
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> [E]ach of the elements supporting collateral estoppel weighs in favor of applying it to bar Rambus from relitigating its motives for document destruction and the fact that the document destruction was done at a time when the company anticipated future JEDEC-related litigation. First, the issue was actually litigated in the *Infineon* case; second, it was actually and necessarily determined in that proceeding; and, third,

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[12] *See* Motion Seeking Recognition of the Collateral Estoppel Effect of Prior Factual Findings That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith (filed Feb. 12, 2003); *see also* Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment Relating to Collateral Estoppel Effect of Prior Factual Finding That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith (filed Feb. 12, 2003).

> applying collateral estoppel against Rambus would not "work an unfairness."

Order at 2-3 (citations omitted). For the reasons that follow, we respectfully submit that Your Honor should leave Judge Timony's Order intact and decline to certify it for interlocutory review.

ARGUMENT

Complaint Counsel explained in its Supplemental Memorandum that the district court in *Infineon II* concluded that Rambus had engaged in litigation misconduct, and that Rambus's misconduct justified the award of attorneys' fees. *See* Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment, Relating to Collateral Estoppel Effect of Prior Factual Finding That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith (filed Feb. 12, 2003) ("Supplemental Mem.") (citing *Infineon II*, 155 F. Supp. 2d at 682-83). The Supplemental Memorandum also explained that the district court's ruling was not challenged on appeal by Rambus. *See id.* at 2; *see also* Rambus Opp. at 15 (noting Rambus did not appeal finding on document destruction). Moreover, the court of appeals not only acknowledged that Rambus did not challenge the findings, it held that Rambus had not shown the court's conclusion that the misconduct made the case exceptional was erroneous. *Infineon III*, 318 F.3d at 1106 ("Rambus has not shown that this holding is clearly erroneous."). Accordingly, the Federal Circuit vacated the award of attorneys' fees and remanded this aspect of the case solely for a determination of whether Infineon was still a prevailing party and whether the amount the court previously awarded "bear[s] some relation to the extent of the misconduct." *Id.*

Because the basis for the fee award was affirmed in all respects relevant to Complaint Counsel's argument for collateral estoppel presented in its Supplemental Memorandum, Rambus has

misconstrued the effect of the vacatur of the award of attorneys' fees. The vacatur related only to the actual award of fees, not the litigation-misconduct holding underlying it. Rambus therefore should not be permitted to escape the district court's ruling on the ground that the award of fees itself was vacated and remanded for reconsideration. Indeed, in each of the cases Rambus cites for the "general rule" that vacated judgments have no effect, the vacatur at issue was general and thereby undermined not only the judgment but also (at least implicitly) many of the underlying aspects of the lower court's holding. Here, in contrast, the Federal Circuit's ruling is best understood as a partial vacatur, which leaves intact the findings Complaint Counsel contend Rambus is collaterally estopped from relitigating here. Indeed, such an understanding of the ruling comports with practice in analogous situations in which cases are remanded for reconsideration on only some issues. It is plain that Rambus will not be permitted to challenge the findings relating to litigation misconduct on remand of the *Infineon* case. They likewise should not be permitted to challenge them here.

I. Rambus's Motion for Reconsideration Should Be Denied.

Rambus "invite[s]" Your Honor to reconsider Judge Timony's order, suggesting that Judge Timony was hastily trying to "clear the decks," and in the process made "grievous errors." Rambus App. 1. Rambus now seeks to have Your Honor consider the same issue, hoping for a more desirable result.[13] Such a use of a motion for reconsideration is entirely inappropriate, as other judges have recognized. Rambus's motion "performs no function at all, other than to reargue contentions already considered by this court and to waste valuable judicial resources. A motion for reconsideration is not a

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[13] Rambus does not appear seriously to press for reconsideration. While it notes that Your Honor has the power to reconsider Judge Timony's ruling, *see* Rambus App. 2 n.3, nowhere does it explain why that ruling warrants reconsideration as a "manifest" injustice, rather than simply being a ruling with which it disagrees.

license for a losing party's attorney to get a 'second bite at the apple' by using a word processor to move around the paragraphs from a previously submitted brief, and file a retread of the old brief disguised as a motion for reconsideration." *Shields v. Shelter*, 120 F.R.D. 123, 126 (D. Colo. 1988). "Perhaps [Rambus's] new brief [is] better than its former brief, but that is not significant. [Rambus] improperly [is using] the motion to reconsider to ask the court to rethink what the court had already thought through — rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). Indeed, "[h]indsight being perfect, any lawyer can construct a new argument to support a position previously rejected by the court, especially once the court has spelled out its reasoning in an order." *Potter v. Potter*, 199 F.R.D. 550, 553 (D. Md. 2001). Here, Rambus is simply rearguing a motion that was considered by Judge Timony and that it lost.[14] There is nothing new justifying reconsideration by Your Honor.

Indeed, to reconsider Judge Timony's ruling would be inefficient, and likely encourage Rambus to seek reconsideration of *every* order Judge Timony issued. "It is hard to imagine a less efficient means to expedite the resolution of cases than to allow the parties unlimited opportunities to seek the same relief simply by conjuring up a new reason to ask for it." *Potter*, 199 F.R.D. at 553. Should Your Honor grant Rambus's Application, "there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties," as well as the time and "patience" of Your Honor. *Id.*

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[14] A judge is granted considerable discretion in determining whether collateral estoppel should apply. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). It is therefore not enough for Rambus to argue simply that Judge Timony got it wrong; rather, Rambus must show that Judge Timony abused his discretion in holding that Rambus was collaterally estopped. As explained below, while we submit Judge Timony's ruling was correct, it was certainly not an abuse of discretion.

Rambus fails to address any of the three bases on which a motion for reconsideration may be entertained. First, there has been no "intervening change in controlling law." *Kern-Tulare Water District v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part, rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 145 (1988). Rambus has reargued the same cases, and has not pointed to a new decision that should alter Judge Timony's holding. Second, Rambus's Application does not rely upon "new evidence or an expanded factual record." *Id.* All relevant factual evidence was available once the Federal Circuit ruled, which occured before Rambus filed its Opposition. Finally, Rambus cannot show that Judge Timony made a "clear error" or that reconsideration of his ruling is necessary to "prevent manifest injustice." *Id.* As this last factor relates to the merits of Rambus's Application, it is more fully addressed in Section II.A, below. It is clear, however, that Judge Timony's Order reached the correct result, and certainly does not work a "manifest injustice." In short, Rambus has presented nothing new here that justifies reconsideration of Judge Timony's Order.

II. Rambus's Application for Interlocutory Review Should Be Rejected.

Rambus's Application for Interlocutory Review falls well short of making the minimal showing that is required to justify such a request. To obtain such review, Rambus must show "that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." Commission Rule 3.23(b), 16 C.F.R. § 3.23(b). "Interlocutory appeals in general are disfavored," because they are "intrusions on the orderly and expeditious conduct of the adjudicative process." *In the Matter of Bristol-Meyers Co.*, 90 F.T.C. 273, 273 (1977); *In the Matter of International Association of Conference*

Interpreters, FTC Dkt. No. 9270, Order Denying Motion to Certify Interlocutory Appeal, 1995 WL 17003147, 1995 FTC LEXIS 452, at *1 (Feb. 15, 1995) ("Appeals of intermediate rulings are disfavored by the Commission."). Accordingly, the "overwhelming majority of decisions by Administrative Law Judges deny requests for certification." *In the Matter of Schering-Plough Corp.*, FTC Dkt. No. 9297, Order Denying Motion of American Home Products Corporation to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review, 2002 WL 31433937 (Feb. 12, 2002) (citation omitted).

Here, beyond the obvious disruption to these proceedings, consideration of each of the factors necessary to justify interlocutory review points to the rejection of Rambus's Application. The applicability of collateral estoppel is not a "controlling question of law"; rather, it relates only to whether Your Honor should allow relitigation of certain facts.[15] An appeal will not "materially advance the ultimate termination of the litigation," because an appeal will cause delay in the remainder of the proceedings, and, if reversed, would require the taking of *more*, not less, evidence. Moreover, post-trial review is an entirely adequate remedy because if Rambus's position were ultimately held to be correct, a remand can fully remedy the error.

Finally, there is not a "substantial ground for difference of opinion," because Judge Timony correctly ruled that collateral estoppel bars Rambus from relitigating the issue of its document

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[15] Rambus contends that certification for interlocutory appeal is particularly appropriate here because the "Commission can resolve each of [the] controlling questions as abstract issues of law without reference to a trial record." Rambus App. 6 n.4. Yet Rambus's Application belies this claim: Rambus now contends that it did not have an opportunity to litigate the factual issues "fully and fairly." Furthermore, an appeal now would not serve the purpose of avoiding "protracted, costly litigation," *id.* (citing *Ahrenholtz v. University of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000), for were the Commission to reverse Judge Timony's order, *more*, not less, litigation would ensue, because Rambus would be given the opportunity to relitigate facts on which it has previously been heard and lost.

destruction and its reasons therefor. In particular, establishing a substantial ground for difference of opinion under Rule 3.23(b), requires "a party seeking certification [to] make a showing of a likelihood of success on the merits." *Conference Interpreters*, 1995 WL 17003147 (citing *In the Matter of Detroit Auto Dealers Association*, FTC Dkt. 9189, Order Denying Interlocutory Appeal at 1-2 (Oct. 16, 1985)); *accord Schering-Plough*, 2002 WL 31433927. This means that Rambus "must show a probability of success on appeal of the issue." *In the Matter of BASF Wyandotte Corp*., FTC Docket No. 9125, Order Denying Interlocutory Appeal, 1979 FTC LEXIS 77, at *3 (Nov. 20, 1979). We address this last factor first, as it concerns the correctness of the underlying ruling; the other factors, which confirm that the Application should be denied, are addressed subsequently.

A. Judge Timony's Order Was Correct and Does Not Create an Issue For Which There Is Substantial Ground for a Difference of Opinion.

Judge Timony's ruling correctly held that Rambus is collaterally estopped from relitigating the findings in *Infineon II* that it had engaged in litigation misconduct by destroying documents. Rambus contends that these findings do not subject it to collateral estoppel for two reasons, neither of which has merit. First, the Federal Circuit vacated *only* the award of attorneys' fees, but specifically left intact the *Infineon* district court's ruling that Rambus had engaged in litigation misconduct. The cases Rambus presents setting out the "general rule" that vacated decisions do not have collateral estoppel effect are therefore inapposite, because they address circumstances in which the entire judgment — including the underlying findings — were vacated. Second, because Rambus had the opportunity to litigate the issue of its litigation misconduct fully and fairly, and had the opportunity to appeal the adverse ruling, the concerns motivating the "necessarily decided" prong of the collateral estoppel test have been fully satisfied. As we explain below, Judge Timony's Order was correct on both points.

1. The Federal Circuit's Vacatur of the Award of Attorneys' Fees Specifically Left Intact the District Court's Findings on Litigation Misconduct.

Rambus's description of the Federal Circuit's holding greatly overstates the scope of that court's vacatur. The court of appeals not only acknowledged that Rambus did not challenge the findings at issue here, but also proceeded to hold expressly that Rambus had not shown the court's conclusion that the misconduct made the case exceptional was erroneous. *Infineon III*, 318 F.3d at 1106 ("Rambus has not shown that this holding is clearly erroneous."). As a result, the Federal Circuit vacated the award of attorneys' fees and remanded this aspect of the case solely for a determination of whether Infineon was still a prevailing party and whether the amount the court previously awarded "bear[s] some relation to the extent of the misconduct." *Id.*

In these circumstances, it is amply clear that Rambus will not be permitted to relitigate the question of its litigation misconduct on remand. It is therefore entirely appropriate to bar Rambus from relitigating them in this forum. Rambus has been given a full and fair opportunity to litigate the issue of its document destruction once, in the *Infineon* trial, and it is not entitled to an opportunity to relitigate here issues that have already been resolved against it.

It is well established that "a trial court must proceed in accordance with the mandate and law of the case as established on appeal." *Stevens v. F/V Bonny Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984). "The law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality, and obedience within the judicial system." *United States v. Tamayo*, 80 F.3d 1514, 1520 (11th Cir. 1996); *see also United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993) ("The 'law of the case' doctrine mandates . . . that where issues have been explicitly or implicitly decided on appeal, the district court is obliged to follow the decision of the appellate court."). Similarly, the "general rule is clearly that

parties may not renew issues on remand which they failed to pursue on appeal." *Ward v. Succession of Freeman*, 735 F. Supp. 692, 696 (E.D. La. 1990); *see United States v. Stanley*, 54 F.3d 103, 107 (2d Cir.) (where defendant did not appeal sentence enhancement, "the mandate rule prohibited the district court from reopening the issue"), *cert. denied*, 516 U.S. 891 (1995); *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) ("the [mandate] rule forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived."). As a result, all that is left upon a remand is for a district court "to decide matters left open only insofar as they reflect proceedings consistent with the appellate court's mandate." *Molinary v. Powell Mountain Coal Co.*, 173 F.3d 920, 923 (4th Cir. 1999). Therefore, it is clear that in this case, Rambus will not be able to challenge on the remand of the *Infineon* litigation misconduct in which it was found to have engaged.

Rambus may not rely upon the Federal Circuit's vacatur of the attorneys' fees award to seize an opportunity to relitigate its litigation misconduct. It is amply clear that a court may vacate a judgment, while limiting the issues to be considered on remand. *See, e.g.*, *Molinary*, 173 F.3d at 923 (vacating district court decision on some claims did not reopen for litigation other claims not appealed and thus waived). Accordingly, "[w]hen a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, *the unreversed determinations of the trial court normally continue to work an estoppel*." *Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798, 802 (3d Cir. 1987) (emphasis added). Thus, for example, when a court vacates a decision for reconsideration in light of new decision, that does not reopen the entire litigation upon remand. *See, e.g., United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) ("A vacation which merely requires further consideration in light of a new Supreme Court decision, however, is of a much more limited nature. The effect of a vacation such as

the one at issue was not to nullify all prior proceedings. . . . [It] did not entitle [defendant] to retrial on all issues"). Likewise, judgments vacated in part for other reasons do not vacate underlying findings. *PRC, Inc. v. Widnall*, 64 F.3d 644, 647 (Fed. Cir. 1995) (holding vacatur on ground of mootness did not nullify underlying decision that was relevant to application for bid-protest costs); *Tamayo*, 80 F.3d at 1520 (vacatur of sentence for reconsideration of one basis for enhancement did not entitle defendant to reconsideration of entire sentence); *Waldorf v. Borough of Kenilworth*, 878 F. Supp. 686, 695-96 (D.N.J. 1995) (holding that judgment vacated and remanded "for a new trial on damages" foreclosed defendant "from contesting . . . its liability"), *aff'd sub nom. Waldorf v. Shuta*, 142 F.3d 601 (3d Cir. 1998). Such a procedure is well established. *See Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (vacating fee award in order not to limit district court's discretion on remand); *see also Demarest v. Price*, 130 F.3d 922, 942 & n.9 (10th Cir. 1997) (where state failed to appeal ruling on merits of ineffective-assistance-of-counsel claim, if district court found, after vacatur and remand, that petitioner's claim was not procedurally barred, then court would be required to grant habeas petition on basis of previous, binding determination). Certainly it will be applied on remand of *Infineon*.

Indeed, a Federal Circuit vacatur has been held specifically not to have vacated a district court's decision "in its 'entirety.'" *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 105 F. Supp. 2d 1164, 1172 (D. Colo. 2000). In that case, the Federal Circuit affirmed in part and vacated in part the district court's decision. Specifically, it vacated an award of damages for fraud and unjust enrichment on the ground that the district court had applied the wrong legal standard. *Id.* at 1173. The Federal Circuit concluded, however, that the factual findings were correct and it remanded "for application of the correct legal standard to the facts elicited at trial." *Id.* Accordingly, the court "did not expunge the facts elicited at trial or remand the case for a new trial. In fact, it left entire

categories of factual findings intact because no appeal from them was taken." *Id.* As the court explained, the mandate "does not 'extinguish' the underlying trial or deprive the proceedings of their 'standing' for purposes of *res judicata*." *Id.*[16] The circumstances here are nearly identical: The Federal Circuit specifically left intact the findings of Rambus's litigation misconduct, meaning those findings cannot be relitigated by Rambus upon remand.

Because Rambus is barred from relitigating the issue of its document destruction on remand of *Infineon*, it should likewise be barred here. The purpose of the law of the case doctrine is "to prevent relitigation of issues that have been decided." *Suel v. Secretary of Health & Human Services*, 192 F.3d 981, 984 (Fed. Cir. 1999). Law of the case thereby "ensures judicial efficiency and prevents endless litigation. Its elementary logic is matched by elementary fairness — a litigant given one good bite at the apple should not have a second." *Id.* at 984-85. Similarly, "[c]ollateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971)); *see also Blonder-Tongue*, 402 U.S. at 324-25 ("[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merit of that claim a second time."). Indeed, "law of the case and *res judicata* are closely related legal concepts both resting on policy considerations favoring putting an end to litigation, saving judicial time,

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[16] Notably, here the Federal Circuit "vacated-in-part" the lower court's decision. *See Infineon III*, 318 F.3d at 1107. Any ambiguity about the scope of the appellate court's mandate should be resolved by consideration of the court's opinion. *See, e.g., Ward*, 735 F. Supp. at 696

and bringing certainty to legal relations." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000); *see also Montana v. United States*, 440 U.S. 147, 153 (1979) (The purpose of *res judicata* is to "protect[] adversaries from, the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and, foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions."). Thus, the "doctrine of law of the case is similar to the issue preclusion prong of *res judicata* in that it limits relitigation of an issue once it has been decided." *Rezzonico*, 182 F.3d at 148. Given that Rambus is barred from relitigating the issue of its document destruction in the *Infineon* litigation, it would advance none of the goals of efficiency, certainty, and consistency to permit it to relitigate that issue in this proceeding.

The cases Rambus presents in its Application, particularly in light of the authority cited above, are fundamentally inapposite. None of those cases presents facts as here, as either the court was discussing a judgment that had been vacated in its *entirety*, including its factual underpinnings, or in some other respect was discussing an entirely different factual scenario. In several of the cases cited by Rambus, the courts were considering judgments vacated pursuant to settlement. *See Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1355 (4th Cir. 1987) (order vacated all findings of special master after settlement of entire case), *cert. denied*, 484 U.S. 1008 (1988); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 340-41 (7th Cir. 1991) (judgment vacated in its entirety pursuant to settlement); *United States Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 598 (Fed. Cir.) (entire judgment vacated pursuant to settlement), *cert. denied*, 516 U.S. 1010 (1995).[17] In other instances, the court issuing the vacated ruling was determined to have been without

[17] Moreover, there are exceptions even to the general rule that cases vacated pursuant to settlement have no binding effect. *See Bates v. Union Oil Co. of Cal.*, 944 F.2d 647 (9th Cir. 1991),

authority to consider the case. *See Savidge v. Fincannon*, 836 F.2d 898, 906 (5th Cir. 1988) (entire matter vacated for lack of jurisdiction); *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985) (criminal conviction upon which estoppel was based had been vacated in entirety because criminal statute was constitutionally infirm). In a third group of cases cited by Rambus, the vacated judgment was expressly vacated in its entirety, including factual findings (if any had been made). *See No East-West Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) (order relinquishing jurisdiction of case and specifically rescinding effect of prior orders did not have collateral estoppel effect); *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 641 F.2d 90, 93-94 (3d Cir. 1981) (denying collateral estoppel effect to determination of legal issue that was vacated in another case); *Ornellas v. Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980) (entire summary judgment had been reversed); *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (entire order regarding forfeiture of appearance bond had been vacated). Finally, in two of the cases cited by Rambus, the court applied collateral estoppel, despite the fact that the predicate issues were vacated or reversed. *See Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) (holding liability determination could collaterally estop party even though damages had been remanded for further proceedings), *cert. denied*, 508 U.S. 906 (1998); *Jaffree v. Wallace*, 837 F.2d 1461, 1466-67 (11th Cir. 1988) (holding collateral estoppel applied in case where predicate case, upon which collateral estoppel was based, was subsequently reversed).

Here, only one aspect of the judgment — the award of fees — was vacated. The remainder of the findings, relating to Rambus's litigation misconduct including document destruction, as the Federal Circuit made crystal clear, were upheld in all respects. The fact that, as Rambus claims, "every circuit

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cert. denied, 503 U.S. 1005 (1992).

that has reached the issue . . . ha[s] held that in civil cases a judgment vacated on appeal loses whatever preclusive effect it previously possessed," Rambus App. 7-8, is irrelevant to the case at hand, because that "general rule" simply does not apply here.

Finally, Rambus puts much rhetorical emphasis on its contention, unsupported by case law, that applying collateral estoppel in these circumstances "will force litigants to appeal every adverse factual finding." Rambus App. 10; *see also id.* at 13 n.9. Yet such a result would not arise from Judge Timony's Order.[18] Indeed, Rambus's own decisions as to what issues to appeal demonstrate the weakness in their argument. The district court in *Infineon II* held that three independent grounds supported the award of attorneys' fees. Rambus chose to appeal two of those grounds. Rambus claims that reversal of any of the those grounds would suffice to reverse the award of fees. If that is true, then Rambus appealed more issues than were necessary to overturn the award of fees, which is particularly surprising in light of its contention that it was forced to limit the number of arguments it made on appeal. In short, Rambus is now attempting to evade the usual and predictable effect of its own strategic decision to narrow the issues on appeal to those it believed had the greatest chances of success by claiming that this rule would have required it to appeal an issue it believed, at the time, was without sufficient merit to warrant an appeal.

Rambus's contention on this point may allude, incorrectly, to the usual rule that a judgment supported by two (or more) independent grounds does not have preclusive effect with respect to either of those grounds. Invocation of that rationale in these circumstances would be misplaced. First, that

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[18] *Dodrill*, 764 F.2d at 444-45, is not to the contrary. That case was addressing circumstances where the decision was "entirely vacated." As explained, the Federal Circuit vacated the award of attorneys' fees only in part, leaving intact the findings of litigation misconduct by Rambus.

doctrine applies to unappealed rulings, because of the concern that a "rule which gives *res judicata* effect to both grounds leaves the losing party who concedes the adequacy of one no appellate remedy for the patent invalidity of the other except a frivolous appeal." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983). Here, of course, Rambus appealed two of the three independent grounds supporting the award of attorneys' fees — Rambus clearly was not deterred from an appeal. Second, that doctrine is designed to prevent the perceived injustice of giving collateral estoppel effect to a possibly incorrect ruling when another ruling is plainly correct, making an appeal therefrom frivolous. Those are not the circumstances here. Rambus here actually appealed two of the three grounds, despite not appealing the document destruction ground. It therefore took the very appeal that this doctrine helps ensure need not be taken.

2. Rambus Had a Full and Fair Opportunity to Litigate Its Litigation Misconduct, Thereby Fully Satisfying the "Necessary to the Judgment" Prong of the Collateral Estoppel Test.

Because Rambus had the opportunity to litigate fully whether it engaged in litigation misconduct by destroying documents, it should not be heard to complain that the district court's holding in *Infineon II* is not "essential" to the judgment and therefore has no preclusive effect. Rambus contends that because the district court's award of attorneys' fees was vacated, any finding regarding litigation misconduct is no longer "necessary to the judgment." Rambus App. 11. Rambus's argument elevates form over substance, and in so doing completely ignores the reasons justifying the rule upon which they place complete reliance in the first place. As Judge Timony clearly explained in his Order, Rambus had the opportunity to litigate the question of its document destruction fully, and therefore the *Infineon II* court's holding warrants preclusive effect.

As Complaint Counsel explained in its Supplemental Memorandum, collateral estoppel may be used to bar a party from relitigating an issue on which it has been fully heard and lost. "[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merit of that claim a second time." *Blonder-Tongue*, 402 U.S. at 324-25. The purpose of the doctrine is to "protect[] adversaries from, the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and, foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153; *accord Blonder-Tongue*, 402 U.S. at 324-25 ("Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of the particular case."). Here, all of the bases for collateral estoppel warrant a conclusion that Rambus should be barred from relitigating the question of whether its admitted destruction of very large volumes of business records starting in mid-1998 was done "in part, for the purpose of getting rid of documents that might be harmful" in future anticipated litigation.

In order to advance the efficient administration of justice, "once a court has decided an issue of fact or law necessary to its judgments, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis omitted); *accord Montana*, 440 U.S. at 153.[19] Here, each of the elements supporting collateral estoppel weighs in favor of applying it to bar Rambus from relitigating its motives for its document destruction and the fact that the document destruction was done at a time when the company anticipated future JEDEC-related litigation. First, the issue was actually litigated in the

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[19] The availability of "offensive non-mutual collateral estoppel," as Complaint Counsel is asserting here, is well recognized. *See Parklane Hosiery*, 439 U.S. 322 (1979).

Infineon case; second, it was actually and necessarily determined in that proceeding; and, third, applying estoppel against Rambus would not "work an unfairness." *E.g.*, *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986); *Montana*, 440 U.S. at 153; *accord Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983); *United States v. Weems*, 49 F.3d 528, 531-32 (9th Cir. 1995).

The issues relating to Rambus's document destruction were fully litigated in the district court. As explained above, the ruling subjected Rambus to over $7 million in fees. Not only did Rambus have the opportunity to put on evidence, it also had an opportunity for oral argument. The district court issued a comprehensive opinion in conjunction with its order awarding attorneys' fees to Infineon — indeed, the question was a principal subject of an order separate from the merits of the patent case. Rambus had the opportunity to appeal the court's ruling, but chose not to. Instead, it appealed only the other two alternative bases upon which the court awarded attorneys' fees. *See Infineon III*, 318 F.3d at 1106. Rambus, now contends, having not previously contended in its response to Complaint Counsel's motion, that it did not have a full and fair opportunity to litigate the issues of its document destruction in the *Infineon* district court. *See* Rambus App. 13. Rambus's arguments should be rejected.

First of all, we respectfully submit that Your Honor should not reward Rambus's sandbagging. Rambus could have made this argument in its response to Complaint Counsel's motion on this issue, and has had numerous other opportunities to challenge the adequacy of the *Infineon* district court's fact finding on this point. Rambus has not, however, until now, claimed that the proceedings were inadequate: not in its initial Opposition and not in its response to Complaint Counsel's Motion for

Default Judgment.[20] Indeed, Rambus has not contested any of the facts of its document destruction that Complaint Counsel have presented in its numerous pleadings. Moreover, Judge Timony, in his Order on Complaint Counsel's Motion for Default Judgment, reached many of the same factual conclusions as Judge Payne in the *Infineon* litigation with respect to Rambus's document destruction, supporting the conclusion that Judge Payne's findings are worthy of deference.

Second, Rambus has *still* failed to bring forward facts that contradict Judge Payne's findings. It maintains here that these findings were wrong, yet it has not proffered any evidence to contradict those findings. Without a showing of other evidence that it was not able to present at the *Infineon* hearing, there is no prejudice. *See Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 347 (4th Cir. 1992), *vacated by consent of parties*, No. 91-1873, 1993 WL 524680 (4th Cir., Apr. 7, 1993). Here, as in *Sandberg*, Rambus has "offered no challenge to fairness other than the exclusion of evidence. Because they make no proffer of what this evidence might be, . . . issue preclusion is fair." *Id.* at 348. In short, Rambus's "inability to present additional evidence" to Judge Payne (if, in fact, there was any such evidence that it was foreclosed from presenting), "worked no prejudice." *Id.* On a motion for reconsideration, Rambus's failure in this regard is particularly grievous — they make an abstract argument unsupported with proof of actual prejudicial consequences.

As Complaint Counsel explained it its Supplemental Memorandum, the motivation for Rambus's document destruction was carefully considered by the district court and therefore also meets

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[20] Moreover, Rambus makes no argument that its opportunity to litigate the question of its litigation misconduct was *legally* insufficient. It asserts that the issue was not the central focus of full-blown litigation. But that is no moment, so long as the hearing was provided Rambus with an adequate opportunity to present its case. *Cf. Thournir v. Meyer*, 803 F.2d 1093 (10th Cir. 1986) (denying preclusive effect where previous hearing was held on one day's notice).

the second part of the test: the question was actually and necessarily determined. The purpose of this general rule "is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Mother's Restaurant Inc.*, 723 F.2d at 1571. This means that a court need determine only that "the disposition in the first suit was the basis for the holding with respect to the issue and not 'mere dictum' . . . [or] merely incidental to the first judgment." *McLaughlin*, 803 F.2d at 1204 (internal citations omitted). Put differently, although "[d]iscussion of the necessity prong of collateral estoppel analysis is usually framed in terms of determinations that were necessary to the 'judgment' or the 'verdict,'" "[t]he primary purpose of the rule . . . is to ensure that the finder of fact in the first case took sufficient care in determining the issue." *Pettaway v. Plummer*, 943 F.2d 1041, 1044 (9th Cir. 1991) (internal citations omitted), *cert. denied*, 506 U.S. 904 (1992), *overruled on other grounds Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir.) (en banc), *modified*, 138 F.3d 1280 (9th Cir.), *cert. denied*, 525 U.S. 823 (1998); *see also Weems*, 49 F.3d at 534 (because party had fully litigated issue and had opportunity to challenge ruling on appeal, case warranted an "exception to general rule that preclusive effect should be given only to determinations that are . . . necessary to a previous judgment") (Norris, J., concurring).

Here, the objectives of the "necessity" rule have been fully met. Rambus had a full opportunity to litigate the finding that its document destruction was intended to avoid discovery in anticipated litigation, and had an opportunity to appeal the adverse finding. *See Weems*, 49 F.3d at 533 (rejecting argument that lack of appealability precluded application of collateral estoppel because ruling could have been appealed). In other words, this "is not a case where the court reached out to make determinations as to issues which were not before it." *Mother's Restaurant*, 723 F.2d at 1571; *see also Home Owners Federal Savings & Loan Ass'n v. Northwestern Fire & Marine Insurance*

Co., 238 N.E.2d 55, 59 (Mass. 1968) ("Such findings may be relied upon if it is clear that the issues underlying them were treated as essential to the prior case by the court and the party to be bound. Stated another way, it is necessary that such findings be the product of full litigation and careful decision."); *see also* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4421, at 556 (2002) ("Preclusion could be made available so long as it can be made to appear that real care was in fact taken in litigating and deciding the unnecessary issue."). It is thus irrelevant that the trial court might, on remand, conclude that Infineon is not entitled to attorneys' fees because it was not a prevailing party as required for the award of fees pursuant to 35 U.S.C. § 285. Here the trial court, and, as importantly, Rambus, both treated the issue carefully and fully. Rambus should therefore not be able to escape these fully adjudicated adverse factual determinations on the ground that a subsequent remand may provide a different reason to vacate the fees awarded to Infineon for Rambus's litigation misconduct.

Rambus, however, ignores all of this authority except for *Home Owners*, which, it asserts, contained *dicta* on the relevant issue. *See* Rambus App. 12. Whether the relevant portion of *Home Owners* is *dicta* is irrelevant here, however. Complaint Counsel did not assert the case was binding precedent (which it is not); rather, Complaint Counsel submitted that the reasoning of the case supported its argument, which it does.[21] Judge Timony appears to have agreed with that reasoning, and rejected the very argument Rambus is now attempting again with Your Honor. Meanwhile, Rambus

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[21] Notably, it appears that *Rudow v. Fogel*, 382 N.E.2d 1046 (Mass. 1978), which Rambus contends holds that *Home Owners* contained only *dicta*, itself constitutes *dicta* (at least in this regard). The decision explains that were "the [*Home Owners*] proposition to be accepted, we would still have no particular assurance that the indicated condition was met in [this] case." *Rudow*, 382 N.E.2d at 1049. Thus the *Rudow* decision itself explains that *Homeowners*, even if valid, has no application under the facts presented in *Rudow*.

ignores the other cases supporting the heart of Complaint Counsel's argument, citing again cases standing only for a "general rule." Rambus therefore has failed to show that Judge Timony's ruling is wrong, let alone deserving of reconsideration by Your Honor.

There is no unfairness here to estopping Rambus from relitigating the fact issues in question. "Preclusion is sometimes unfair if the party to be bound lacks an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Otherson v. Department of Justice, Immigration & Naturalization Service*, 711 F.2d 267, 273 (D.C. Cir. 1983). No such unfairness exists here, as Rambus had full incentive to litigate its position. The $7 million award of fees amply confirms that Rambus had a full incentive to litigate. Moreover, its pending litigation with Micron and Hynix, as well as the pre-complaint investigation by the Federal Trade Commission, made Rambus fully aware that the outcome of the *Infineon* case could have significant repercussions in subsequent litigation. Finally, as explained above, Rambus *still* has not shown how the facts would turn out differently if it were give the opportunity to relitigate issues relating to its document destruction. (Indeed, if the fact findings were so egregiously wrong and the procedures so woefully adequate as Rambus appears to suggest, an appeal should have obtained an easy reversal.) Without such a presentation, their arguments of unfairness simply lack any credibility.

Contrary to the claims of unfairness advanced by Rambus, permitting it to relitigate those issues in this proceeding would be unjust. As explained above, the law of the case in *Infineon* will bar Rambus from relitigating its litigation misconduct. There is no reason why it should be permitted to do so here, when it is barred from doing so in the underlying litigation. It hopes now for a different result, but that is plainly why the doctrine of offensive collateral estoppel exists: to prevent inconsistent results.

Finally, application of collateral estoppel in these circumstances does not create a requirement

that parties appeal everything. As Rambus acknowledges, it "was forced to choose its battles selectively." Rambus App. 13. Yet that is a fundamental purpose of appellate practice: a narrowing of the issues to those deemed most important by the parties. *See Beverly California Corp. v. National Labor Relations Board*, 227 F.3d 817, 829 (7th Cir. 2000) (page limits precluding party's specific listing of all issues it was challenging "'forced' party to offer what it gave [the court]: the concise and helpful statement" of the basis for its appeal), *cert. denied*, 533 U.S. 950 (2001). If Rambus believed it had meritorious grounds for reversal of Judge Payne's ruling, it could have devoted a small portion of its appellate brief to that issue or seek leave for an expansion of the applicable page limits. *Cf. Weeks v. Angelone*, 176 F.3d 249, 272 (4th Cir. 1999) ("While the page limitation may have led . . . counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable."), *aff'd on other grounds*, 528 U.S. 225 (2000). Rambus chose to focus its appeal on other issues that it deemed more important; that does not mean that this ruling would now force it, and future appellants, to appeal lower-court rulings they deem unimportant. In short, Rambus should not be permitted to extricate itself from the consequences of its failure to appeal on the basis of vague and hypothetical policy arguments.

B. Whether Collateral Estoppel Properly Bars Rambus from Relitigating Certain Issues Is Not a "Controlling Question of Law."

The determination that Rambus is collaterally estopped from relitigating the question of its document destruction is an ancillary evidentiary issue, not a controlling question of law. The Commission has previously held that a controlling question of law or policy is "not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum

of cases." *In the Matter of Automotive Breakthrough Sciences, Inc*., FTC Dkt. Nos. 9275 & 9277, Order Denying Interlocutory Appeals, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996); *accord Schering-Plough*, 2002 WL 31433937 (same) (quoting *Breakthrough Sciences*); *In the Matter of Hoechst Marion Roussel, Inc.*, FTC Dkt. No. 9293, Order Denying Motion for Interlocutory Appeal, 2000 FTC LEXIS 155, *16, at *18, (Oct. 25, 2000); *see also BASF Wyandotte Corp*., 1979 FTC LEXIS 77, at *2 ("The question is not whether interlocutory review would resolve an 'intellectually intriguing' issue, the early determination of which 'would save . . . considerable trouble and expense.'") (citations omitted). "This standard forecloses interlocutory appeals in situations in which the law is well settled and the dispute arises in the application of the facts attached to that law." *Conference Interpreters*, 1995 WL 17003147. That is precisely the situation here: Rambus is contending that Judge Timony misapplied the law of collateral estoppel to the facts of this case.

To be a controlling question of law, the issue must affect the course of the litigation. *Ahrenholz v. University of Illinois*, 219 F.3d at 677 (certification for intelocutory appeal pursuant to 28 U.S.C. § 1292(b) appropriate only where decision turns on a pure question of law, the resolution of which could head off other litigation).[22] Here the resolution of this question in Rambus's favor would not head off further litigation; to the contrary, it would necessitate more of it. Furthermore, Judge Timony's Order is fundamentally an evidentiary ruling, as it bars Rambus from presenting evidence regarding its litigation misconduct. Interlocutory appeals from such rulings are unwarranted. *See In the Matter of Topps Chewing Gum, Inc.*, 63 F.T.C. 2223 (Nov. 15, 1963) ("An examiner's rulings upon evidentiary or procedurally matters in the course of such proceedings will not be reviewed or disturbed

[22] Commission Rule 3.23(b) is modeled after 28 U.S.C. § 1292(b). *See Conference Interpreters*, 1995 WL 17003147, at n.2.

in the absence of unusual circumstances."). The application of collateral estoppel to Rambus's litigation misconduct, found in *Infineon*, is therefore not a controlling issue of law suitable for interlocutory review.

C. Resolution of the Question Will Not Materially Advance the Ultimate Termination of This Litigation.

As explained above, a reversal of Judge Timony's order will retard the litigation, rather than advance it, by requiring Your Honor to take evidence on a matter already heard and considered fully by a federal court. Rambus has yet to come forward with evidence showing that Judge Payne's findings are unreliable. Instead, they have only advanced legal arguments to show why they should be given that opportunity. Unquestionably, however, if given that opportunity, consideration of the issue will expand significantly the amount of evidence that Rambus is likely to present Your Honor. Not only does Rambus's request waste time during the interim decisional period, it will expand the time required to try this case. Interlocutory appeal will therefore retard, not advance, the termination of this litigation.[23]

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For the reasons set forth above, Complaint Counsel respectfully submits that Your Honor should deny Rambus's Request for Reconsideration and deny its Application for Interlocutory Review.

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[23] Rambus does not appear to contend that it cannot obtain adequate review upon appeal at the conclusion of the hearing. It could not make that showing. If Judge Timony's ruling is incorrect, the Commission will be able to reverse it, as it can for any other erroneous ruling. *See Topps*, 63 F.T.C. 2223 ("[A]ny procedural ruling may ultimately constitute reversible error if it is later determined to be incorrect . . . ."). Rambus would suffer no prejudice from a delay in securing that reversal. In contrast, an erroneous ruling *denying* collateral estoppel would prejudice Complaint Counsel, who would be forced to put on proof that ultimately was unnecessary, and, of course, would waste the Commission's resources by unnecessarily extending the duration of the hearing in this matter.

Judge Timony's initial ruling was correct, and Rambus has failed to provide sufficient reason why Your Honor should reconsider that ruling or interrupt this hearing to permit an interlocutory appeal of that issue to the Commission.

Respectfully submitted,

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Dated: March 11, 2003