UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

REPLY BRIEF IN SUPPORT OF RESPONDENT'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

In their 34-page response to Rambus's opening brief (which was limited to 15 pages in accordance with Rule 3.23(b)), Complaint Counsel succeed mainly in establishing three points, which separately or together, demonstrate quite clearly that Rambus's Application should be granted.

First, Complaint Counsel effectively concede that the "issue" for which they sought collateral estoppel is not now, and may never be, "*necessary* to the judgment" in the *Infineon* case. *United States v. Alaska*, 521 U.S. 1, 13 (1997) ("nonmutual collateral estopped can "only preclude relitigation of issues of fact and law *necessary* to a court's judgment') (emphasis in original); *Gandy Nursery Inc. v. United States*, 318 F.3d 631, 638 (5th Cir. 2003) (for collateral estoppel to apply, "issue must have been necessary to support the judgment in the prior case"); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) ("once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation in a suit on a different cause of action involving a party to the first case"). The Federal Circuit's actual holding is pivotal: "this court vacates the attorney fees award and remands to the district court. On remand, the district court ***may*** consider whether Infineon remains a prevailing party, and if so, ***whether*** an award is warranted. ***If*** the court determines that an award is warranted, it will have the opportunity to set the amount of the award to redress the litigation misconduct." *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1106 (Fed. Cir. 2003) (emphasis added).[1]

[1] Complaint Counsel's characterization of the Federal Circuit's ruling – in no fewer than two places in their brief – as merely having remanded for consideration of "whether Infineon was still a prevailing party

By leaving the question of fees open for future proceedings on remand, the Federal Circuit contemplated that the district court might conclude that Infineon was *not* a prevailing party, in which case Judge Payne's finding of litigation misconduct would not even be relevant, let alone necessary, to any ultimate judgment in the *Infineon* case. Moreover, as Complaint Counsel concede, even if Infineon were deemed to be the prevailing party at the end of the *Infineon* litigation, the trial court's findings of 'litigation misconduct simply "**may** suffice, by themselves,' to support sanctions under § 285." Response at 4-5 (emphasis added).[2] ***"May" does not mean "must."*** The Federal Circuit explicitly instructed the *Infineon* court to reconsider the propriety of its fee award in light of the Court's reversal of its fraud and frivolous litigation rulings. Were the trial court, in undertaking such reconsideration at the conclusion of the case, to determine that, while Infineon remained the prevailing party, it was not entitled to attorney's fees under the changed circumstances of the case, its findings of misconduct would be "unnecessary" to the judgment denying an award of fees.

In short, and contrary to Complaint Counsel's rewrite of the Federal Circuit's decision,[3] the entire judgment regarding fees was vacated and that judgment (together

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and whether the amount *previously* awarded "bear[s] some relation to the extent of the misconduct," Opposition at 11 and 17 (emphasis added), flatly misstates the Court's actual holding. As reflected above, the Federal Circuit directed the trial court to *reconsider* the issue of Infineon's entitlement to fees even if it remained a prevailing party.

[2] Complaint Counsel do not explain, and it is inexplicable why, in other places in their Response where they purport to cite the Federal Circuit's decision, "may" has either expressly or implicitly been turned into "will."

[3] Complaint Counsel also seek to rewrite the *Infineon* trial court's ruling in a way that is grossly misleading. In their opening sentence, Complaint Counsel say, "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

with the findings that supported it) may, or may not, ever be reinstated. Where, as here, a party succeeds in having an adverse judgment set aside on appeal, adverse findings underlying the former judgment are not accorded preclusive effect in other actions. *See* 18 Wright, Miller & Cooper, § 4421, at 561 ("Appellate reversal of a judgment on one ground may leave without review findings that, by virtue of the reversal, have become unnecessary and indeed contrary to the judgment dictated by the reversal. Denial of preclusion in this situation is appropriate [*inter alia*,] . . . because the findings are unnecessary. . . ."), *id*., at ___ ("preclusion does not arise from findings adverse to the prevailing party"). In short, the law does not accord preclusive effect to unnecessary findings unconnected to binding judgments. Yet that could be precisely the result if Judge Payne's litigation misconduct finding is allowed to be snatched from the limbo it now occupies in the *Infineon* case and dropped with full preclusive force into this proceeding.

The first point Complaint Counsel establish, then, is that the fee award was vacated; it may or may not be reinstated; and it may never be *necessary* to the *Infineon* judgment.

Second, Complaint Counsel succeed in demonstrating the rule that collateral estoppel requires the existence of a valid, not a vacated, judgment.

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many JEDEC-related documents and other materials relevant to the claims at issue here." In fact, what Judge Payne found was that the purpose of Rambus's document retention policy was, "in part, for the purpose of getting rid of documents that *might* be harmful in litigation." *Rambus, Inc. v. Infineon Technologies AG*, 155 F.Supp. 668, 682 (D. Va. 2001) (emphasis added). He did not find "bad faith" and he did not find that relevant documents had been destroyed. Further, to the extent there was any evidence on this point offered at trial in the *Infineon* case, that evidence showed, in fact, that the document retention program was not directed at eliminating "harmful" documents, but at reducing an unwieldy volume of often irrelevant, redundant or unnecessary documents.

Although Complaint Counsel admit that "Rambus did succeed in having the award of fees vacated," Opposition Brief at 2, they fail to acknowledge the inevitable consequences of this ruling upon their third-party collateral estoppel claim:

> Once . . . the judgment is vacated, preclusion is of course defeated *as to any matter that is left open for further proceedings*. . . . There is no preclusion as to the matters vacated or reversed, unless further proceedings on remand *lead to a new judgment that expands the scope of preclusion*. . . . If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all.

18 Wright, Miller & Cooper, § 4432, at 60-67 (emphasis added). The basic principle is that, in order to be accorded collateral estoppel effect in a separate lawsuit, a finding must be necessary to a *final* judgment, and remand eliminates the requisite finality. *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995) ("[A] remand deprives the judgment of preclusive effect until a new judgment has been entered."); *Smith Machinery Co. v. Hesston Corp*., 1987 WL 14498, * 3 (D.N.M. 1987)("When a judgment has been reversed and the case has been remanded for further proceedings, there can be no preclusion until a new final judgment is entered. If the matter is dropped after remand without proceeding to a new final judgment, *res judicata* does not apply. A remand from an appellate court is not considered final, since the proceedings are still pending.")[4]

Judge Payne's judgment regarding attorney's fees is not final. In fact, it is not even tentative – it no longer exists, having been vacated. Thus, there presently is *no judgment* in the *Infineon* case regarding attorney's fees. Judge Timony's collateral

[4] Although *Smith Machinery* refers to "*res judicata*," it relies on cases involving both *res judicata* and collateral estopped.

estoppel order thus gave preclusive effect to a "free-floating" finding of litigation misconduct untethered to any valid judgment, which may, under a variety of scenarios, such as pre-trial resolution of the *Infineon* case prior to retrial or Rambus's prevailing at such a retrial, be converted into meaningless *dictum*. The collateral estoppel doctrine was never intended to allow a third-party litigant to rely on findings having such uncertain significance and finality in the litigation in which they were made, and Complaint Counsel still fail to cite a *single* case applying collateral estoppel under such circumstances.

Instead, Complaint Counsel try to support application of collateral estoppel through some creative sleight-of-hand. Unable to cite a *single* case in which a third-party was permitted offensively to assert collateral estoppel for findings underlying a vacated judgment, they retreat to a different doctrine entirely: law of the case, which concerns the continuing vitality of earlier decisions made in the *same* litigation. Using law of the case as their starting point, Complaint Counsel cobble together a collateral estoppel argument from the following series of assumptions:

- The Federal Circuit ruled on the trial court's litigation misconduct findings;
- Based on the Federal Circuit's ruling, Judge Payne's litigation misconduct finding can no longer be challenged in the *Infineon* litigation pursuant to law of the case;
- If it is appropriate for law of the case to be applied to Judge Payne's litigation misconduct finding in *Infineon*, there is no reason not to accord

that finding preclusive effect here.[5]

As noted below, each of these assumptions is wrong.

Complaint Counsel assert that the Federal Circuit "h[e]ld expressly that Rambus had not shown the court's conclusion that the [litigation] misconduct made the case exceptional was erroneous." Opposition at 17; *id*. at 20 ("The Federal Circuit specifically left intact the findings of Rambus's litigation misconduct. . . ."). To the extent Complaint Counsel mean to imply that the Federal Circuit *reviewed* the trial court's litigation misconduct findings, they are wrong. As Complaint Counsel state repeatedly in their Opposition, Rambus did not appeal the particular findings of litigation misconduct. Thus, there was nothing for the Federal Circuit to review.

As a general matter, where an appellate court does not expressly *review* the findings at issue, such findings do not become "law of the case" pursuant to the court's mandate: "The reach of the mandate is generally limited to matters actually decided. A mere recital of matters assumed for purposes of decision and dicta are not part of the mandate." 18B Wright, Miller & Cooper, § 4478.3, at 757; *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991)(passage in court of appeals opinion simply stating position taken by district court prior to appeal was not ruling on that issue and did not establish law of the case); *Jones v. Lewis*, 957 F.2d 260, 262-63 (6th Cir. 1992)(recital of facts gleaned from record below did not constitute actual disposition of issues binding on

[5] Notably, Complaint Counsel did not make this "collateral estoppel by analogy to law of the case" argument to Judge Timony, and thus Rambus has not previously had an opportunity to address it. Nor did Judge Timony suggest that he was making this leap. Complaint Counsel has had to resort to this in an attempt to defend Judge Timony's Order.

remand); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982) ("observations, commentary, or mere dicta touching upon issues not formally before the Court do not constitute binding determinations."). Thus, the continued vitality of Judge Payne's findings of litigation misconduct does not result from the appellate court's mandate, which is necessarily limited to matters *decided* by the appellate court.

Equally misguided is Complaint Counsel's assumption that law of the case would bar Rambus from contesting Judge Payne's litigation misconduct ruling on remand. Opposition at 19 ("Certainly [law of the case] will be applied on remand of *Infineon*."). The typical rule is that adherence to the law of the case is discretionary, and a district court may reconsider *any* of its prior decisions at any point in the litigation prior to entry of final judgment. *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"); Fed. R. Civ. P. 54(b) ("any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). Here, an entire infringement trial must be conducted before the *Infineon* case is ready for final judgment. Thus, under true "law of the case" analysis, Judge Payne could revisit his litigation misconduct finding at any time prior to entry of final judgment.

Complaint Counsel cite cases holding that an unappealed finding cannot be challenged in later proceedings in the *same* case, even where the finding related to a vacated judgment. While some cases do so hold, these holdings derive *not* from

collateral estoppel doctrine, nor from law of the case doctrine, but from the doctrine of waiver. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (principle that a matter not raised on a first appeal may not be resurrected on a second appeal involves "an analytically distinct principle [from] law-of-the-case doctrine proper . . . best understood as a species of waiver doctrine"); 18B Wright, Miller & Cooper, § 4478.6 at 821-825 (rule against challenging unappealed findings is "a function of efficient relationships between appellate courts and trial courts, not law of the case. . . . [T]here is no point in pretending that the trial court owes fealty to a nonexistent appellate ruling").

Like any other application of waiver law, this rule is subject to exceptions where circumstances so warrant. "[T]he concerns for judicial economy underlying this waiver rule are plainly weaker than for core law-of-the-case doctrine," and "bases for exceptions are broader than for conventional issue or claim preclusion." *Crocker*, 49 F.3d at 740 (emphasis added); 18B Wright, Miller & Cooper, § 4478.6 at 827 ("[s]uitably persuasive reasons justify relief from [rule against challenging unappealed rulings]. . . .").

At this point in time, it simply cannot be determined whether Judge Payne would permit Rambus to revisit the issue of its purported litigation misconduct in the *Infineon* case, or would find the issue to have been waived or forfeited. Most importantly, that issue *may never need to be addressed*, because, unless Infineon prevails on the remand trial, the litigation misconduct finding will have no relevance to the future judgment in that case. The justification for according collateral estoppel to the litigation misconduct finding in *this* case cannot rest on speculation as to whether that issue may, at some

unknown future time, be deemed to be foreclosed in the *Infineon* proceeding, particularly given that the waiver forfeiture issue may never even need to be adjudicated in *Infineon*.

Finally, even if the litigation misconduct finding were ultimately foreclosed in the *Infineon* case, that would *not* be basis for according that same finding preclusive effect here. *See* Opposition at 20 ("Because Rambus is barred from relitigating the issue of its document destruction on remand of *Infineon*, it should likewise be barred here"). A significant difference between law of the case or waiver doctrine, on the one hand, and collateral estoppel, on the other, is that the latter, unlike the former, requires a judgment. The law of the case doctrine has a built-in protection against hasty or ill-advised decisions to accord preclusive effect to non-final decisions – the rule that any non-final decision may be changed prior to entry of final judgment. In recognition of this fact – that a decision in ongoing litigation may be modified, reversed, or rendered irrelevant by subsequent events – collateral estoppel doctrine allows such determinations to be excised from the cases in which they were made and accorded preclusive effect in *other* litigation only when they can be shown to have been "necessary to the judgment" in the earlier suit. As shown above, this is clearly *not* the situation here, in that the litigation misconduct finding remains a free-floating finding that at present is neither tied to any issue that necessarily will have to be adjudicated in the *Infineon* case nor part of a valid judgment.

Moreover, Complaint Counsel simply gloss over the fairness concern which is central to any collateral estoppel inquiry. The finding regarding document destruction in *Infineon* was merely one of four separate grounds asserted as a basis for a finding of litigation misconduct, which itself was only one of three grounds upon which Infineon

based its claim to fees. Even if Rambus ultimately were determined to have waived its ability to contest the document destruction finding in further proceedings in the *Infineon* litigation by its failure to appeal that specific finding, that would not justify a ruling that Rambus also waived its right to contest that issue in this proceeding, where Complaint Counsel seek to use that finding for a far more damaging purpose than merely to support an award of attorney's fees. The whole notion of waiver suggests an intentional relinquishment of a known right. Rambus certainly had no idea that its failure to contest the district court's document destruction finding in the *Infineon* litigation could lead to a claim by a party in another litigation that it should have default judgment entered against it, or result in adverse evidentiary presumptions on a number of issues. *Cf. Westerbeke Corp. v. Daihatsu Motor Co.*, 2002 WL 1978908 (2d Cir. 2002) (in refusing to find that law of the case required arbitrator to adhere to earlier liability ruling concerning nature of contract, Court noted that party did not have "full and fair" opportunity to litigate question at earlier stage of arbitration, because the "pleadings and decision were directed toward another issue entirely").

Finally, Complaint Counsel demand: Why hasn't Rambus shown you that the district court's finding was erroneous? The answer: Given a chance to do so, Rambus will. It will elicit testimony of Mr. Karp and others to demonstrate the following: That Rambus developed a document retention program for completely legitimate reasons; that the purpose of the program was to ensure that documents that might be needed in the future, or that might be relevant to issues that might arise in the future, would be retained, and that unnecessary, redundant or irrelevant documents would be discarded; that when

in doubt, documents were to be retained; that no documents that in fact have any relevance to this action were destroyed; that the document retention program Rambus implemented is consistent with the programs of other companies in the semiconductor and other industries, if not even more focused on document retention; that Rambus's document retention program requires more documents to be retained, than the policies of at least some of branches of the federal government, and that Rambus did not implement its document retention program with either the intent or the effect of not retaining documents that could reasonably have been determined to be relevant to any future litigation that was then contemplated might occur. Rambus did not have the chance to put on this evidence before the district court in *Infineon* and Complaint Counsel want to deny it the opportunity to do so here. Complaint Counsel throw down the gauntlet; all Rambus asks is the chance to pick it up and present its evidence.

In conclusion, Rambus requests that Your Honor either reconsider Judge Timony's ruling, and we submit that if you do, you should reverse it, or that Your Honor certify this question to the Commission for interlocutory review.

DATED: March 13, 2003 Respectfully submitted,

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