PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

PAGE

STATE CASES

TABLE OF AUTHORITIES
(continued)

PAGE

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

In his last three days with responsibility for this matter, Judge Timony issued eight orders. It seems apparent that Judge Timony was trying hard to "clear the decks" of all the last-minute filings made by Complaint Counsel before signing his last order reassigning this matter to Your Honor. This is understandable. Unfortunately, in his effort to issue all these orders before leaving the bench, Judge Timony made grievous errors.[1] For instance, in ruling on Complaint Counsel's motion for default judgment, Judge Timony made factual findings that are indisputably incorrect; in ruling on Complaint Counsel's motion to compel discovery, he granted the motion on a ground on which Complaint Counsel expressly said they were not moving;[2] and, in each of these orders, he ignored the recent, critically important holdings of the Federal Circuit in the *Rambus v. Infineon* case (attached at Tab A) – holdings that arise out of the very same facts at issue here and that will have a significant impact on the outcome of three pending and related private litigations. In ruling on the collateral estoppel motion addressed here, Judge Timony's Order stakes out new theories of collateral estoppel in complete disregard of every federal circuit that has considered the force of a civil judgment vacated on appeal. Further, without explanation but upon the express invitation of Complaint Counsel, the Order also elevates disapproved *dicta* in a 1968 Massachusetts case above the settled rulings of the United States Supreme Court and the prevailing common law that "necessary," in the context of collateral estoppel, means *essential to a judgment*.

[1] Although Complaint Counsel, on balance, probably think Judge Timony's orders favor them, they could not resist their perceived need to file a "motion for clarification" within less than a day of receiving one of those orders. Indeed, it would be hard for Complaint Counsel sincerely to contend that Judge Timony's orders are not in serious need of review and revision, but time will reveal the position Complaint Counsel will choose to take.

[2] This order likely will be the subject of a subsequent application for interlocutory review.

This case cannot and should not proceed under the cloud of these clearly erroneous rulings when they are both contrary to well-established law and easily corrected. Either Your Honor should reconsider these orders, which we invite,[3] or Your Honor should certify the most egregiously erroneous of these rulings to the Commission, pursuant to Rule 3.23(b), so that it can correct Judge Timony's errors now. No one – not the Commission, not Complaint Counsel, and certainly not Rambus – benefits if this case proceeds under the cloud of clearly erroneous rulings. Indeed, proceeding under such a cloud would ensure that if there ultimately were a ruling adverse to Rambus, which there should not be, that ruling would be reversed and this matter would come back to Your Honor, wasting further resources and causing further delay in the just resolution of this matter on the merits. It surely is in everyone's interest to try this case correctly, under correct legal rulings and consistent with controlling legal precedent, the first time.

II. SUMMARY OF ARGUMENT

The February 26, 2003, order granting Complaint Counsel's motion for collateral estoppel ("Order") flies in the face of every federal circuit court that has considered whether a civil judgment vacated on appeal retains any preclusive effect. The ten circuits that have considered this issue all hold that a judgment vacated on appeal loses whatever preclusive effect it previously possessed. Judge Timony did not so much as mention any of this authority (cited prominently in Rambus's opposition brief) in ruling to the contrary.

[3] Your Honor has the inherent power to reconsider any ruling that reflects a manifest failure to consider material facts or controlling legal principles. *See, e.g., In re Intel*, 1998 FTC LEXIS 188, *1 (Jul. 31, 1998); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 126, *1 (Apr. 12, 1996); Order re Motions for Reconsideration, *Champion Spark Plug Co.*, 1981 FTC LEXIS 119 at *1 (Nov. 13, 1981). As the federal courts recognize, a tribunal also has the inherent power to reconsider orders, such as the Order at issue here, that reflect clear error or are "manifestly unjust." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995).

The Order also rejects, without discussion or explanation, a long line of United States Supreme Court cases and well-settled common law principles holding that a determination is only "necessary" for purposes of collateral estoppel if the determination is *essential to a judgment*. Relying on a disapproved holding in a 1968 Massachusetts case, as invited to do by Complaint Counsel, Judge Timony concluded that a determination may be "necessary" if the first court and the party charged with estoppel "treated the issue carefully and fully" – even if the determination is *not* essential to a judgment, and even if there is *no longer* any judgment the determination can support.

Finally, there are two other reasons that the collateral estoppel Order issued by Judge Timony cannot stand. First, even the disapproved Massachusetts standard adopted by Judge Timony is not satisfied here. The issue of document destruction was not treated "carefully and fully" by the *Infineon* district court; the subject was merely one of a litany of factual contentions made to support a post-trial motion for attorney's fees that had limited briefing and has now itself been reversed. Second, the document destruction issue was not a topic as to which there was a full and fair opportunity to litigate – a critical and independent element of collateral estoppel law that even Judge Timony and Complaint Counsel concede must be satisfied here.

III. FACTUAL BACKGROUND

Following trial in *Rambus v. Infineon*, Infineon moved for attorney's fees pursuant to 35 U.S.C. § 285. Under section 285, a party seeking recovery of its fees must prove that (i) it is a prevailing party; and (ii) the case is "exceptional." On August 9, 2001, Judge Robert E. Payne of the Eastern District of Virginia granted Infineon's motion, finding that Infineon was the prevailing party and that the case qualified as "exceptional" because of three factors: (i) Rambus's pursuit of "frivolous" infringement claims; (ii) Rambus's "inequitable conduct" in not disclosing the existence of patent applications to JEDEC while it was a member of that

organization; and (iii) "in connection with" these first two factors, Rambus's "litigation misconduct." *Rambus, Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 674-83 (E.D. Va. 2001).

One of the acts that Judge Payne found to constitute litigation misconduct in his "exceptional case" ruling was Rambus's adoption of its document retention policy in 1998. Judge Payne concluded (erroneously and without foundation, as Rambus previously has demonstrated), that this policy was adopted "for the purpose of getting rid of documents that might be harmful in litigation." *Id.* at 682. Judge Payne found that Rambus's destruction of documents and other purported litigation misconduct "considered as a whole, *and in connection with* the other factors [*i.e.*, the now-reversed findings of "frivolous litigation" and "inequitable conduct"], warrant a finding that this is an exceptional case." *Id.* at 683 (emphasis added).

The Court entered final judgment on August 21, 2001, incorporating its fee award. Rambus filed a notice of appeal the next day.

Almost a year later, on June 18, 2002, Complaint Counsel filed the complaint in this action. On December 20, 2002 – while the *Infineon* appeal remained pending – Complaint Counsel filed a motion for default judgment asking the Court to impose wide-ranging antitrust liability as a sanction for Rambus's purported spoliation of evidence. Nowhere in their motion for default judgment did Complaint Counsel argue that any factual determination underlying the *Infineon* judgment was entitled to preclusive force in this action.

On January 29, 2003, the Federal Circuit decided the *Infineon* appeal. *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081 (Fed. Cir. 2003). In its decision, the Federal Circuit reversed both the district court's award of JMOL to Infineon on Rambus's claims of patent infringement and the jury's finding of fraud against Rambus. Based on these rulings, the Federal Circuit also found that the findings of frivolous litigation and inequitable conduct underlying the

court's "exceptional case" determination were erroneous. Accordingly, the Court vacated Judge Payne's attorney's fees award and remanded the issue of attorney's fees for further proceedings. The Court expressly instructed that the district court "may consider whether Infineon remains a prevailing party, *and if so*, whether an award is warranted." *Id.* at 1106 (emphasis added).

On February 12, 2003, Complaint Counsel filed the two motions that gave rise to the Order at issue here. Those motions asked the Court to accord preclusive effect in this case to Judge Payne's findings regarding Rambus's document retention policy, and for leave to file a supplemental memorandum in support of their motion for default judgment addressing the purported preclusive effect of those findings. *See* Tabs B, C & D. Rambus opposed both motions in a single brief filed on February 24, 2003. *See* Tab E.

On February 26, 2003, Judge Timony granted Complaint Counsel's motion for collateral estoppel. *See* Tab F. Remarkably, although Judge Timony's Order accorded collateral estoppel effect to the findings underlying the *Infineon* court's fee award, the Order does not explicitly acknowledge that the Federal Circuit's decision *vacated* the judgment in that case (and specifically vacated the fee award) and remanded the case for further proceedings. This glaring omission from the Order is particularly remarkable because, as a result of the Federal Circuit's decision, there is no longer *any judgment* relating to the factual findings that the Order purports to recognize as conclusive.

IV. ARGUMENT

Commission Rule of Practice 3.23(b) provides in pertinent part that application for interlocutory review of an Administrative Law Judge's determinations may be made if "the ruling involves a controlling question of law 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." 16

C.F.R. § 3.23(b). As explained below, both of these requirements are plainly met here with respect to Judge Timony's Order granting Complaint Counsel's motion for collateral estoppel. Your Honor should therefore certify the order for immediate interlocutory review by the full Commission or, in the alternative, reconsider that order.

A. Judge Timony's Order Incorrectly Resolves Two Controlling Questions of Law as to Which There Is Substantial Ground for Difference of Opinion.

The Order raises, but erroneously resolves, two questions of law: (1) whether a civil judgment vacated on appeal retains any preclusive effect; and (2) whether a determination can be deemed "necessary" to the judgment for collateral estoppel purposes merely because the issue was allegedly treated "carefully and fully," even though there is no longer a valid judgment that the determination can support. The Order answers each question affirmatively, but overwhelming authority dictates precisely the opposite conclusion. Reversal on either one of these issues requires reversal of the result.[4]

Both of these questions are "controlling" within the meaning of Rule 3.23(b). That Rule borrows the language of 28 U.S.C. § 1292(b), and "court interpretation of that statute is material." *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77 at *2 n.1 (Nov. 20, 1979). Federal courts of appeals deem a question of law "controlling" under section 1292(b) if resolution of the question could materially affect the outcome of litigation in the trial court. *See, e.g.*, *Sokaogon Gaming Enter. v. Tushnie-Montgomery Ass'n*, 86 F.3d 656, 659 (7th Cir. 1996) (Posner, J.) ("A question of law may be deemed controlling if its resolution is quite likely to affect the further course of litigation, even if not certain to do so."). An interlocutory resolution

[4] The Commission can resolve each of these controlling questions as abstract issues of law without reference to a trial record. These are exactly the kinds of questions that interlocutory appeal exists to resolve. *See Ahrenholtz v. University of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000) (Posner, J.) (distinguishing "a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record" from a question of law requiring fact intensive review of a record, and holding that interlocutory appeal is provided to resolve these abstract issues of law in order to avoid "protracted, costly litigation").

"materially affects the outcome" of litigation if it saves time for the trial court and time and expense for the litigants, avoiding unnecessary protracted and expensive litigation. *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). As the Third Circuit stated in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974), identification of a controlling question under section 1292(b) requires a practical application of the policies underlying interlocutory appeal – namely, avoidance of harm to a party from "a possibly erroneous interlocutory order and avoidance of possibly wasted trial time and litigation expense." *Id.* at 756.

Immediate review of Judge Timony's Order will avoid the extraordinary waste of resources resulting from a trial of this matter under erroneous legal rulings that inevitably will be reversed on appeal. Further, as explained below (*infra* at 10, 13-14), immediate review will avoid the tremendous waste of judicial resources that otherwise would result if other parties involved in private litigation, and facing or involved in litigation with the FTC, find it necessary, because of Judge Timony's Order, to appeal from every adverse ruling in that private litigation for fear that a new rule of collateral estoppel, applicable only in FTC proceedings, may be applied to deny them a chance to litigate issues before the FTC on which they ultimately prevail in the private litigation.[5]

1. The vacated attorney's fees judgment in *Infineon* cannot be accorded collateral estoppel effect.

As to the first question raised here, the case law is clear and uniform. Ten federal circuit courts – every circuit that has reached the issue – have held that in civil cases a judgment vacated

[5] The two questions presented here also meet the definition of "controlling" articulated by the Commission recently in *In re Schering-Plough Corp.*, No. 9297, Slip. Op. at 4 (Feb. 12, 2002) ("a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases"). As Complaint Counsel has noted, there are often private proceedings that parallel an FTC action. *See* Complaint Counsel's Opposition to Rambus's Motion to Stay (July 15, 2002), at 3, n.5. Thus, the risk that a party prevailing in private litigation may be bound in an FTC proceeding by findings that are later reversed on appeal is one that may arise in many cases, and certainly is not limited just to this case.

on appeal loses whatever preclusive effect it previously possessed. As the Eleventh Circuit has stated:

> When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as *res judicata* and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as *res judicata* and as collateral estoppel.

Jaffree v. Wallace, 837 F.2d 1461, 1466 (11th Cir. 1988). The remaining circuit courts are in accord on this point, uniformly holding that in civil cases a judgment vacated on appeal has no preclusive effect. *No East-West Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case."); *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) ("A judgment vacated or set aside has no preclusive effect."); *Consolidated Express, Inc. v. New York Shipping Ass'n., Inc.*, 641 F.2d 90, 93-94 (3d Cir. 1981) (vacated judgment cannot have any effect as collateral estoppel); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1355 (4th Cir. 1987) (vacated order adopting findings of special master not entitled to preclusive effect); *Savidge v. Fincannon*, 836 F.2d 898, 906 (5th Cir. 1988) (decree vacated or nullified by an appellate court cannot be given issue preclusive effect); *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985) ("[T]he general rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel."); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 340-41 (7th Cir. 1991) (vacating judgment deprived it of any future effect); *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (judgment that has been vacated or set aside has no preclusive effect); *U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 598 (Fed. Cir. 1995) (vacated judgment has no effect as collateral estoppel); *cf.*

Ornellas v. Oakley, 618 F.2d 1351, 1356 (9th Cir. 1980) ("A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel.").[6]

Under this controlling authority, Judge Timony plainly erred. As noted above, the Federal Circuit vacated Judge Payne's fee award in *Infineon*. Remarkably, Judge Timony's Order barely alludes to this fact, even though, as the cases above reflect, it is dispositive of the issue presented here. Instead, Judge Timony's Order cites numerous civil cases involving situations where collateral estoppel was applied to findings that were part of a *valid final judgment*. *See* Order at 3 (citing *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986); *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)). These cases are wholly inapposite here, where there has been no final ruling on the attorney's fees issue, which the district court will need to consider afresh after remand and additional proceedings in *Infineon*.

Nor is Judge Timony's Order supportable on the ground that the *Infineon* district court's finding of litigation misconduct can somehow be extracted from the vacated attorney's fees judgment and accorded preclusive effect separate and apart from the overturned judgment. With issue preclusion, "it is the prior judgment that matters, not the court's opinion explaining the judgment." *Moore's Federal Practice* ¶ 132.03[4][a], at 132-106. Findings in support of a vacated judgment thus lose their preclusive effect together with the vacated judgment. *Dodrill*, 764 F.2d at 444-45 ("When [the plaintiff] won his appeal [in the first action] and the judgment was vacated, all such factual determinations were vacated with it, and their preclusive effect surrendered."); *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854-55 (7th Cir. 1974) (where

[6] Commentators are in accord as well. *See Moore's Federal Practice* ¶ 30.76, at 3-30 (2002) ("A judgment loses its issue-preclusive effect when it is reversed and remanded on appeal."); 18A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4432, at 63-65 (2d ed. 2002) ("If the appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved by the appellate court. . . . There is no preclusion as to the matters vacated or reversed . . . .").

judgment in insurance coverage case was remanded by court of appeals with orders to dismiss on jurisdictional grounds, it became a "nullity" and had no preclusive effect in second action).

By ruling that factual findings underlying a vacated judgment may be accorded preclusive effect, the Order entirely rewrites the well-established law of collateral estoppel in a way that will force litigants to appeal *every* adverse factual finding on pain of suffering a later finding of preclusion. As the court stated in *Dodrill*: "If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants generally would feel compelled to appeal every contrary factual determination. Such inefficiency neither lawyers nor judges ought to court." 764 F.2d at 444-45. Moreover, the Order imposes this result regardless of whether the party seeking to avoid preclusion ultimately prevails on appeal, as Rambus did in the *Infineon* litigation. Because well-settled precedent from ten circuit courts compels a contrary result, there is obviously substantial ground for differing with the opinion of Judge Timony on the first question presented here. *See White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994) (identification of a sufficient number of conflicting opinions provides substantial ground for disagreement).

2. At this stage of the *Infineon* litigation, Judge Payne's findings of litigation misconduct cannot be deemed "necessary to the judgment" in that case.

As to the second controlling question raised by the Order, the law is equally clear. Contrary to Judge Timony's conclusion, the *Infineon* district court's findings of litigation misconduct were not "necessary" to the ultimate determination of that action. This is an inevitable consequence of the fact that, without a final judgment in *Infineon*, the significance of, and necessity for, Judge Payne's litigation misconduct findings cannot yet be determined.

As noted above, Judge Payne's litigation misconduct findings were relevant solely to his determination of whether Infineon was entitled to recover its attorney's fees as a "prevailing

party" in an "exceptional case." At the time Judge Payne made this determination, Infineon had been granted JMOL on all of Rambus's infringement claims, and had obtained a jury verdict on fraud. Not surprisingly, given these rulings, Judge Payne found Infineon to qualify as a prevailing party.

As a result of the Federal Circuit decision, however, the JMOL ruling and the fraud verdict have been reversed, and Rambus will now proceed to trial against Infineon on its infringement claims. Accordingly, at this time it is not possible to determine conclusively who will be the prevailing party at the conclusion of the *Infineon* case. For that reason, the Federal Circuit instructed the district court to "consider whether Infineon remains a prevailing party" at the conclusion of the case.

Should the district court conclude at the end of the *Infineon* case that Infineon is not a prevailing party, the court's findings concerning Rambus's supposed litigation misconduct would be unnecessary to the judgment in that case, and thus not eligible to be accorded preclusive effect. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001) ("Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved *in a valid court determination essential to the prior judgment*, whether or not the issue arises on the same or a different claim.") (emphasis added); *Arizona v. California*, 530 U.S. 392, 414 (2000) ("It is the general rule that issue preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment*'") (emphasis added); RESTATEMENT (SECOND) OF JUDGMENTS, § 27 & cmt. h (1982) ("[n]ecessarily determined" means "essential to the judgment"; "[i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action . . . is not precluded"). The doctrine of collateral estoppel is not intended to afford preclusive effect to

interlocutory rulings still subject to change, but only to resolutions necessary to final judgments. *In re 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 541 (7th Cir. 1987) (collateral estoppel does not apply "to an interlocutory order, which may be changed by the district court at any time prior to final judgment"). Accordingly, the uncertainty as to the necessity of Judge Payne's findings regarding Rambus's purported litigation misconduct provides a further reason for denying those findings collateral estoppel effect.

Judge Timony's Order ignores this controlling Supreme Court authority and instead erroneously holds that a determination can have preclusive effect if it was treated "carefully and fully" by a court and the party charged with estoppel, even if that determination is not essential to a judgment. Order at 4. That Judge Timony erred in so holding is highlighted by the fact that the Order relies on bad law for its position. At the express invitation of Complaint Counsel, Judge Timony relied on *Home Owners Fed. Sav. & Loan Ass'n Northwestern Fire & Marine Ins. Co.*, 238 N.E.2d 55 (Mass. 1968), for the proposition that a finding can have preclusive effect if it was simply "'the product of full litigation and careful decision.'" Order at 4 (quoting *Home Owners*, 238 N.E.2d at 59).[7] As subsequent cases have made clear, that proposition is no longer the law even in Massachusetts. Ten years after the decision in *Home Owners*, the Supreme Judicial Court rejected the holding of that case and recharacterized it as *dicta*.[8] And even if this

[7] The Order also quotes 18 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4421, at 556 (2d ed. 2002), in support of this extension of the "necessary to a judgment" requirement under collateral estoppel law. But the quoted passage from Wright & Miller relies on *Home Owners*. *See* 18 Wright & Miller § 4421 n.17, at 556-57.

[8] *See Rudow v. Fogel*, 382 N.E.2d 1046, 1049 (Mass. 1978) ("[*Home Owners*] suggested that it might be enough for issue preclusion that the determination, though not essential, shall have been well litigated. Were that proposition to be accepted, we would still have no particular assurance that the indicated condition was met in the present case. But the proposition is itself doubtful, and in any case the *Home Owner's* decision seems explicable on grounds that leave [the rule that a determination must be essential to a judgment] intact for the generality of cases."). The very same portion of Wright and Miller cited in the Order recognizes that the cited portion of *Home Owners* is questionable. *See* 18 Wright & Miller § 4421 n.17, at 557 ("The continued vitality of

proposition were good law, and even if it applied outside Massachusetts, it would still be inapplicable here. In *Home Owners* there *was* a valid first judgment, but here the only first judgment has been vacated.

Moreover, it is simply not the case that issues surrounding the adoption of Rambus's document retention policy were fully and fairly litigated in the *Infineon* litigation. Such issues were first meaningfully addressed only in post-trial briefing on Infineon's motion for attorney's fees. In that briefing, Infineon devoted a total of two and a half pages of its opening brief to the subject, citing cases involving the willful destruction of documents after litigation was commenced; Rambus devoted two pages of its opposition brief to the subject, distinguishing the cases cited by Infineon and demonstrating that no documents were ever destroyed during litigation; and Infineon devoted a mere page and a half of its reply brief to reiterating its unsupported claim that Rambus had destroyed documents to avoid discovery in litigation. This briefing occurred post-trial, after the close of discovery, when neither party had an opportunity to supplement the record in any meaningful way. The matter was not fully examined by the many witnesses who had relevant information on the subject, as Infineon's counsel acknowledged at the hearing on the attorney's fees motion, when he conceded that the "evidence is not completely developed because this is just something which came up, I don't know, maybe a couple weeks before trial." *Infineon* Hearing Tr., July 16, 2001, at 261.[9]

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this approach in Massachusetts is open to serious doubt in view of the later suggestion that the proposition advanced 'is itself doubtful.'") (discussing *Home Owners* and quoting *Rudow*).

[9] Judge Timony also erred in suggesting that Rambus had a full and fair opportunity to litigate the correctness of Judge Payne's erroneous factual findings on appeal. *See* Order at 3. Faced with adverse opinions issued by Judge Payne totaling more than 160 pages, Rambus was forced to chose its battles selectively, attacking only those portions of Judge Payne's rulings necessary to obtain reversal of the judgment, as Rambus did with respect to the attorney's fees award. In so doing, Rambus was entitled to rely on the prevailing law in ten circuits holding that a reversed or vacated judgment will not give rise to collateral estoppel as to factual findings underlying the judgment, even if those findings were not appealed.

In sum, by holding that a factual finding can have preclusive force if the court and the party charged with estoppel treated the issue "carefully and fully" – even if that finding is not essential to a judgment, and even if no judgment exists that the finding can support – Judge Timony's Order again radically rewrites the law of collateral estoppel with the same consequences described earlier. By abandoning the long and well-settled rule embraced by both the Supreme Court and the common law that a finding is "necessary" only if it is essential to a judgment, the Order forces parties to appeal a vastly enlarged set of findings on pain of future preclusion rulings. Without any ready definition of "carefully and fully" decided, the threat of preclusion will force every party to resolve the uncertainty surrounding the status of a determination in favor of appeal. As with the Order's first disregard of the settled law of collateral estoppel, this redefinition of "necessary to the judgment" will prolong litigation and appeal, at great expense to both the court and the parties. Interlocutory review is warranted to correct this error.

B. Immediate Review of Judge Timony's Order Will Materially Advance the Ultimate Termination of This Litigation.

Immediate review will materially advance the ultimate termination of this litigation within the meaning of Rule 3.23(b). This element means exactly what it says – a reversal on a controlling question through immediate review will advance the resolution of the action as a whole, and will result in an "appreciable savings of time" in this proceeding. *See Isra Fruit Ltd. v. Agrexco Agricultural Export Co., Ltd.*, 804 F.2d 24, 26 (2d Cir. 1986); *see also Genentech, Inc. v. Novo Nordisk A/S*, 907 F. Supp. 97, 100 (S.D.N.Y. 1995); *In re Times Mirror Co.*, 1978 FTC LEXIS 490 at *2-3 (Mar. 7, 1978) (interlocutory review is proper where a ruling presents a substantial risk that a later remand on appeal from an initial decision would lead to extensive further litigation and recall of witnesses). Both rulings in the Order are clearly in error and must be reversed. Remand for further proceedings following reversal on appeal would force the

parties to expend considerable resources relitigating issues that could have been resolved in accordance with the law the first time. Immediate review is essential to avoid this waste of resources.

V. CONCLUSION

Judge Timony's Order stakes out new theories of collateral estoppel in complete disregard of every federal circuit that has considered the force of a civil judgment vacated on appeal. Without explanation, the Order elevates disapproved *dicta* in a 1968 Massachusetts case above the settled rulings of the Supreme Court and the prevailing common law definition of "necessary" as *essential to a judgment*. Each of the two controlling questions in the Order presents substantial ground for difference of opinion, and reversal of either ruling on interlocutory review will materially advance the termination of this litigation. For these reasons, Your Honor should certify Judge Timony's Order for interlocutory review under Rule 3.23(b) or, in the alternative, reconsider and reverse that Order.

DATED: March __, 2003 Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on March 5, 2003, I caused a true and correct copy of the *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* to be served on the following persons by hand delivery:

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