UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

OPPOSITION BY RESPONDENT RAMBUS INC. TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO BAR PRESENTATION, ON COLLATERAL ESTOPPEL GROUNDS, OF TESTIMONY AND ARGUMENTS REGARDING ISSUES THAT RAMBUS HAS PREVIOUSLY LITIGATED AND LOST.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Just before his retirement, Judge Timony issued an order according collateral estoppel effect to findings that the judge presiding over the *Infineon* litigation made in connection with his attorney's fees award. Now, seeking dramatically to expand upon that ruling, Complaint Counsel ask Your Honor to accord preclusive effect to supposed findings on five additional issues that they contend the *Infineon* jury made as part of its fraud verdicts. Complaint Counsel's motion is fundamentally misguided.

Judge Timony's earlier estoppel ruling stretched – and, in Rambus's view, exceeded – the limits of preclusion doctrine, by allowing Complaint Counsel to claim offensive non-mutual collateral estoppel for a finding that at present is not even final or necessary in the proceeding in which it was made. But for all their shortcomings as candidates for collateral estoppel treatment, the litigation misconduct findings at least were: (a) explicit findings; (b) underlying a portion of the judgment that was set aside for reasons other than irrationality; (c) which potentially could have continued relevance in further proceedings in the *Infineon* case. None of these circumstances is present here, where Complaint Counsel seek to accord preclusive effect to speculative "findings" underlying fraud verdicts that have been rejected as the decision of an *irrational* jury, and which can have no further relevance in *Infineon*.

Rambus continues to maintain that Judge Timony's earlier estoppel ruling was legally erroneous, and in declining to disturb that earlier estoppel ruling, Your Honor merely concluded that it was not so "clearly" erroneous or such "a manifest injustice" as to satisfy the demanding standard for reconsideration. Order Denying Respondent's Applications For Review Of February 26, 2003 Order (Granting Complaint Counsel's Motion To Compel Discovery Relating To Subject Matters As To Which Respondent's Privilege Claims Were Invalidated On Crime-Fraud Grounds And Subsequently Waived); Denying Respondent's Request For Reconsideration

Of The February 26, Order; And Granting Respondent's Request For Reconsideration Of The February 28 Order ("Reconsideration Order") at 7, 11. But even assuming *arguendo* that the prior ruling was correct, Complaint Counsel's aggressive effort to extend that ruling violates bedrock principles of collateral estoppel law limiting the preclusive effect of reversed judgments:

First, it ignores the well-established principle that portions of a judgment that are conclusively *reversed*, and which are thereby no longer at issue in the case in which the judgment was rendered, have no preclusive effect;

Second, it ignores the related, equally well-established principle that collateral estoppel applies only to findings actually and validly made in another litigation, and not to speculative findings "read into" an invalid verdict; and

Third, it ignores the well-established principle that findings adverse to the judgment **winner** have no preclusive effect.

Your Honor should reject Complaint Counsel's effort to depart from those principles and further impede Rambus's ability to defend itself against Complaint Counsel's antitrust charges.

II. FACTUAL BACKGROUND

In *Rambus Inc. v. Infineon Technologies AG*, the jury found Rambus liable for fraud in connection with JEDEC's efforts to develop standards for two computer memory technologies, SDRAM and DDR-SDRAM. Specifically, the jury returned a verdict on Infineon's claims for actual fraud finding "in favor of Infineon against Rambus . . . in Rambus's conduct related to the JEDEC SDRAM [and] in Rambus's conduct related to the JEDEC DDR SDRAM." Verdict Form, at 1 **[Tab 1]**.[1] The jury's verdict did not contain any particularized findings concerning

[1] The jury also returned a verdict for Infineon on its claim of constructive fraud, but this verdict was set aside by the trial court. *Rambus Inc. v. Infineon Technology AG*, 164 F.Supp.2d 743, 750 (E.D. Va. 2001)

any of the facts underlying its fraud verdict.[2] Following trial, the trial court set aside the jury's fraud verdict with regard to the DDR-SDRAM standard as unsupported by the evidence, but left undisturbed the verdict with regard to the SDRAM standard. *Rambus Inc. v. Infineon Technology AG*, 164 F.Supp.2d 743, 764 (E.D. Va. 2001). On appeal, the Federal Circuit affirmed the trial court's order setting aside the jury's DDR-SDRAM fraud verdict. The Federal Circuit additionally concluded that "no reasonable jury could find" fraud with regard to SDRAM, reversed the trial court's denial of Rambus's JMOL motion as to that verdict, and set aside that verdict aside as well. *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1084 (Fed. Cir. 2003); *see* Reconsideration Order, at 4 (noting that Federal Circuit "reversed the district court's denial of the respondent's post-trial JMOL on the SDRAM fraud verdict[, and] affirmed the post-trial JMOL grant on the DDRAM claims.").

The Federal Circuit's rulings fully and finally resolved all of Infineon's fraud claims in Rambus's favor. Accordingly, the Federal Circuit reversed the trial court's $2,382,782.87 fee award to Infineon for prevailing on its fraud counterclaim, noting that the fraud verdict "no longer forms a basis for the award of fees." 318 F.3d at 1106. The Court also noted that its reversal of the fraud verdict rendered moot Rambus's objections to the scope of the injunction issued on the basis of that verdict. *Id*. at 1084. Just last week, the Federal Circuit denied Infineon's request for rehearing or rehearing en banc. *Rambus Inc. v. Infineon Technology AG* **[Tab 2].**

[2] In contrast, the litigation misconduct findings at issue in Complaint Counsel's earlier collateral estoppel motion were particular findings made by the trial court in its attorney's fees ruling. *Rambus Inc. v. Infineon Technology AG*, 155 F.Supp at 682-83 (E.D. Va. 2001).

III. ARGUMENT

A. Findings Are Not Entitled To Be Accorded Preclusive Effect Unless They Are Necessary To A Valid Judgment.

As the Fifth Circuit has noted:

> Federal common law permits the use of collateral estoppel upon the showing of three necessary criteria:
>
> (1) that the issue at stake be identical to the one involved in the prior litigation;
>
> (2) that the issue has been actually litigated in the prior litigation; and
>
> (3) that the determination of the issue in the prior litigation has been *a critical and necessary part of the judgment in that earlier action*.

Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. 1981) (emphasis added).

Because of this "necessity" requirement, factual findings unnecessary to the ultimate outcome are not eligible to be accorded collateral estoppel effect. *See Yates v. United States*, 354 U.S. 298, 336 (1957) (collateral estoppel "makes conclusive in subsequent proceedings only determinations of fact . . . that were essential to the decision"); *In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994)("In order to give preclusive effect to a particular finding in a prior case, that finding must have been necessary to the judgment rendered in the previous action."); Moore's *Federal Practice*, ¶ 132.03 [4][a], at 132-103 (3d ed. 2003) ("Issue preclusion operates to preclude the relitigation of only those issues necessary to support the judgment entered in the first action.").

Moreover, the judgment in the prior action must be a *valid* judgment. *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. . . ."); *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.") (*quoting* Restatement (Second) Judgments, § 27).

As shown below, the requirement that findings must be *necessary* to a *valid* judgment in order to be eligible for collateral estoppel treatment dooms Complaint Counsel's motion.

B. Parts Of Judgments That Are Conclusively Reversed Have No Preclusive Effect.

One outgrowth of the necessity element of collateral estoppel is the rule that any portion of a judgment that has been conclusively set aside or reversed has no preclusive effect, because any findings related to such portion of the judgment become "unnecessary" (and technically moot) once the judgment is reversed. Thus, "[w]here the prior judgment, *or any part thereof*, relied upon by a subsequent court has been reversed, the defense of collateral estoppel evaporates." *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989) (emphasis added); 18A C.Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4432 (2d ed. 2003), at 64-66 ("There is no preclusion as to . . . *matters* vacated or reversed, unless further proceedings on remand lead to a new judgment that expands the scope of preclusion.") (emphasis added).

Numerous cases acknowledge this principle that portions of a judgment that are conclusively reversed or set aside have no preclusive effect. *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992)(refusing to accord collateral estoppel effect to 1967 and 1968 judgments that had been set aside "*insofar* as they operated to preclude [plaintiff] from sharing in [defendant's] estate") (emphasis added); *South Carolina National Bank v. Atlantic States Bancard Ass'n, Inc.*, 896 F.2d 1421, 1430, 1435 (4th Cir. 1990)(refusing to accord preclusive effect to portion of

judgment reversed on appeal, although judgment as a whole was affirmed as modified); *Tavery v. United States*, 897 F.2d 1032, 1033 (10th Cir. 1990) ("[b]ecause the Tax Court decision has been vacated *as to the issues for which Tavery seeks relief from the district court*, the decision of the Tax Court does not support the doctrine of collateral estoppel . . . .") (emphasis added); *Savidge v. Fincannon*, 836 F.2d 898, 906 & 902 n.8 (5th Cir. 1988) (refusing to accord collateral estoppel to portions of consent decree found on appeal to be invalid, even though some "life remain[ed] in the decree."); *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1382 (Fed. Cir. 1999) (observing that party could seek to reconsider collateral estoppel ruling should "*one* or more" of the jury verdicts granted preclusive effect be reversed).

Similarly, *findings* underlying the portion of a judgment that has been set aside "cannot be deemed necessary to the judgment, and . . . can have no preclusive effect. . . . It makes no difference that the specific findings and rulings at issue were not themselves discussed or disturbed on appeal. The ruling on appeal rendered them moot and unnecessary to the judgment as modified on appeal." *In re Gorchev*, 275 B.R. 154, 166 (B.D. Mass 2002) (refusing to accord collateral estoppel effect to district court rulings underlying judgment on count reversed on appeal, even though other portions of judgment were affirmed).

In their earlier motion directed to the litigation misconduct findings, Complaint Counsel argued that "[t]he reason why Judge Timony's collateral estoppel ruling was appropriate and should not be disturbed" was that "the *relevant judgment* of the *Infineon* trial was not wholly vacated by the Federal Circuit majority." 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, at 11-12 (emphasis added); *id.* at 12 ("Here . . . the Federal Circuit's ruling is best understood as a partial *vacatur*, which leaves intact the

[litigation misconduct] findings Complaint Counsel contend Rambus is collaterally estopped from relitigating here.").

In denying Rambus's motion for reconsideration of the collateral estoppel ruling, Your Honor concluded that the Federal Circuit's disposition of the attorney's fees judgment could be viewed "as less than a full *vacatur of the district court's findings as to litigation misconduct*." Reconsideration Order at 11 (emphasis added). Accordingly, Your Honor ruled that Judge Timony's earlier collateral estoppel ruling could be justified under the principle that "where an order is not fully vacated by a circuit court's mandate, those portions that are not specifically vacated are not extinguished and remain valid." Reconsideration Order at 11. As support for this principle, Your Honor cited partial *vacatur* cases in which factual findings *unaffected* by the *vacatur* or reversal of the judgment were accorded continued vitality. *Id.*

Rambus respectfully maintains that Judge Timony's earlier collateral estoppel ruling was clearly erroneous.[3] For purposes of the present motion, however, the important point is that the

[3] In according preclusive effect to the litigation misconduct findings in *Infineon*, Judge Timony and Your Honor relied primarily on cases according findings underlying partially reversed or vacated judgments continued vitality *in the same proceeding in which they were made*. These cases thus did not involve collateral estoppel, but rather the mandate and waiver rules applicable to post-appellate proceedings in an individual case. *Cowgill v. Raymark Industries, Inc.*, 832 F.2d 787, 802 & 802 n.2 (3d Cir. 1987) (acknowledging that preclusion of plaintiff's effort to introduce entirely new theory on remand involved "law of the mandate or law of the case" and waiver doctrine); *Molinary v. Powell Mountain Coal Co.*, 173 F.3d 920, 923 (4th Cir. 1999)(addressing scope of appellate mandate); *Solomon v. Liberty County*, 957 F.Supp. 1522, 1554-55 (N.D. Fla. 1997)(addressing scope of mandate); *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 105 F.Supp.2d 1164, 1172-73 (D. Colo. 2000) (addressing scope of mandate).

Rambus is aware of only *one* case in which a court has ever given preclusive effect in third-party litigation to findings underlying a reversed judgment. In *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981), the court was asked to give collateral estoppel effect to findings underlying liability verdicts from a prior antitrust lawsuit involving Kodak. In addition to according preclusive effect to findings underlying liability verdicts that had been affirmed on appeal (relating to the film and color paper markets), the court also gave preclusive

sole ground on which Complaint Counsel justified Judge Timony's prior ruling is not available to them. The "relevant judgment" here is not the fee decision, as it was for purposes of Complaint Counsel's earlier motion, but rather the portion of the judgment relating to the fraud claims. The jury's DDR-SDRAM verdict on those claims was completely set aside by the trial court, thus depriving that verdict of any collateral estoppel effect. The SDRAM verdict was then completely set aside by the Federal Circuit, depriving it of any preclusive effect as well. The result of the courts' JMOL rulings was that Infineon's fraud claims were finally and conclusively decided in Rambus's favor, and have now been entirely eliminated from the *Infineon* case. Accordingly, as the case law uniformly recognizes, these eviscerated verdicts have no preclusive effect.

Indeed, according preclusive effect to findings underlying verdicts that have been reversed would create a perverse incentive for parties to appeal every single adverse finding that possibly could later be given preclusive effect. Such a rule would thus introduce tremendous inefficiencies into the appellate process, and lead to the expenditure of considerable litigant and judicial time and effort on issues that are unnecessary for reaching the proper appellate result.

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effect to findings underlying a liability verdict that had been reversed on appeal (relating to the camera market). *Id.* at 1211-14.

The *GAF* decision was criticized almost as soon as it was decided. In *Argus, Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 603 (S.D.N.Y. 1982), another party involved in antitrust litigation with Kodak sought to have collateral estoppel accorded the very same findings at issue in *GAF*. In refusing to accord collateral estoppel effect to the findings relating to the reversed verdict, the court "respectfully disagree[d]" with the *GAF* court's analysis that issue preclusion was appropriate. Citing the fundamental principle that "the collateral estoppel doctrine cannot be applied unless 'the determination of the issue in the prior suit [was] necessary and essential *to the judgment* in that action," the court noted that findings adverse to the judgment winner are "clearly not necessary and essential to that judgment." *Argus*, 552 F. Supp. at 603 (emphasis added). Rambus submits that the *Argus* court's analysis, which is fully consistent with the uniform circuit court authority cited above, represents the correct articulation of the law, and demonstrates why the prior collateral estoppel ruling in this proceeding with regard to findings underlying the vacated attorneys' fees judgment was erroneous.

Hicks v. Quaker Oats Co., 662 F.2d 1158, 1171-1172 (5th Cir. 1981)(noting that, as "[a]ppeal is not an inexpensive proposition," application of collateral estoppel is unfair with regard to issues a party understandably would not vigorously contest on appeal).

C. It Cannot Be Determined Whether The Jury Actually Made Any Of The "Findings" Upon Which Complaint Counsel's Motion Is Based.

The *Infineon* jury rendered no particularized findings in support of its unreasonable fraud verdicts. In their attempt to salvage something from the ashes of those verdicts, Complaint Counsel treat the trial court and Federal Circuit JMOL decisions as containing a number of "factual findings" which, notwithstanding the reversal of the jury verdicts, can be extracted and given preclusive effect in this proceeding.

Complaint Counsel's position is specious. In setting aside the jury verdicts, the district court and Federal Circuit did not make their own findings of fact, but merely tried to discern what findings a rational jury *might have made* looking at the evidence most favorably to *Infineon*, the verdict winner.[4] *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1108 (Fed. Cir. 2003) ("Because the jury did not make explicit factual findings, we must *presume* that the jury resolved the underlying factual disputes in [appellee's] favor.")(emphasis added).[5]

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[4] Indeed, it would be a violation of the Seventh Amendment for a trial or appellate court to make findings of fact with regard to claims tried to a jury. *Cf. O'Brien v. Westinghouse Electric Corp.*, 293 F.2d 1, 9 (3d Cir. 1961) (disregarding findings of fact which trial court had purported to make in deciding motion for directed verdict, on ground that accepting such findings would "risk the deprivation of a plaintiff's right to trial by jury under the Seventh Amendment"); *accord Lang v. Cone*, 542 F.2d 751, 754 (8th Cir. 1976).

[5] Contrary to Complaint Counsel's contention, for example, the Federal Circuit never "found" that JEDEC's rules imposed a mandatory disclosure obligation. Indeed, the Court expressly noted that "[t]he language of [JEDEC's] policy statements actually does *not* impose any direct duty on members" 318 F.3d at 1098 (emphasis added), and recognized that "[t]here is no indication that members ever legally agreed to disclose information." *Id.* It was only in fulfilling its responsibility to review the facts in a manner most favorable to the verdict winner that the Court "treat[ed] the language [of JEDEC's policy] as imposing a disclosure duty." *Rambus Inc v. Infineon Technologies AG*, 318 F.3d at 1110 (Fed. Cir. 2003). Similarly, the

Trying to glean the findings underlying a general verdict from a JMOL decision is often problematic because "[t]he general rule is that in order to justify invoking collateral estoppel, a factual determination must have been 'necessarily' (and *not* 'presumably'*)* decided in the first proceeding." *United States v. Weems*, 49 F.3d at 532 (emphasis added); *United States v. Branch*, 850 F.2d 1080, 1081-82 (5th Cir. 1988) ("when a 'fact is not necessarily determined in a former trial, the possibility that it *may have been* does not prevent reexamination of that issue.'") (emphasis added).

Thus, even under the best of circumstances, general verdicts often are not conducive to being given collateral estoppel effect. *Board of County Supervisors v. Scottish & York Ins. Services, Inc.*, 763 F.2d 176, 179 (4th Cir. 1985) (refusing to accord jury verdict preclusive effect

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Federal Circuit never specifically "found" that JEDEC's disclosure rules applied to Rambus. It simply assumed as much for purposes of its opinion. *Id*. at 1100-01 (referring without any discussion to "Rambus's duty").

Complaint Counsel's suggestion that the Federal Circuit "found" that JEDEC's rules "require disclosure of all patents or application that 'relate to' JEDEC's work" is misleading even apart from the fact the Federal Circuit actually made no findings at all. The Federal Circuit did not refer to the "relating to" standard in isolation – it explained more fully what the evidence suggested such a standard to mean:

> On this record, a reasonable jury could find only that *the duty to disclose a patent or application arises when a license under its claims reasonably might be required to practice the standard*. . . . the disclosure duty does not arise for a claim that recites individual limitations directed to a feature of the JEDEC standard as long as that claim also includes limitations not needed to practice the standard. . . . To hold otherwise would contradict the record evidence and render the JEDEC disclosure duty unbounded. Under such an amorphous duty, any patent or application having a vague relationship to the standard would have to be disclosed.

Id. at 1100-01 (emphasis added). This fuller explication of the evidence of the JEDEC disclosure duty is an inseparable and necessary part of the Federal Circuit's discussion of the evidence concerning the "relating to" standard. Complaint Counsel's treatment of the Court's reference to the "relating to" standard as a stand-alone finding thus mischaracterizes the Federal Circuit's opinion.

where existence of six liability theories created an "impossibility of winnowing out the specific grounds upon which the jury based its general verdict"); *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (in determining whether to accord preclusive effect to acquittal, court must determine "whether a *rational jury* could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration") (emphasis added); *United States v. Aguilar-Aranceta*, 957 F.2d 18, 25 (1st Cir. 1992) (collateral estoppel appropriate "[o]nly [based on] an *unequivocal showing* that the issue sought to be foreclosed by the defendant from subsequent reconsideration was definitely, and necessarily decided by a jury in a final judgment") (emphasis added).

Where, as here, a jury's verdict is reversed as a matter of law, the difficulty of extracting binding jury findings from that verdict is exacerbated to impossible lengths. As noted earlier, collateral estoppel applies only to findings that are part of *valid* judgments. The *Infineon* JMOL rulings establish that whatever findings the jury made were not part of a valid judgment. Fed. R. Civ. P. 50(a)(1) (JMOL appropriate where "there is no legally sufficient evidentiary basis for a *reasonable jury* to find for that party on that issue.")(emphasis added); *cf. Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir. 1999) (JMOL appropriate if Court "believes the jury has reached [an] irrational verdict").

Put differently, the Federal Circuit's attempts to reconstruct the jury's reasoning led it to conclude that the verdicts were *unreasonable* and had to be set aside. Once the Court reached this conclusion, its assumptions regarding how a different, rational jury *might have viewed* the evidence necessarily were deprived of any further significance, and certainly did not turn into "factual findings" for which collateral estoppel could be claimed. *Levine v. McLeskey*, 164 F.3d

210 (4th Cir. 1998) ("There being no final judgment based on fact finding favorable to Cohn-Phillips, there is no fact finding which can be given preclusive effect against plaintiffs . . . .").

In sum, because this jury's verdicts were found to have been irrational, by definition, the jury's thought process in reaching those verdicts cannot rationally be deduced. *Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991) ("[T]he mere possibility that the jury acted irrationally, without more, will not negate the collateral estoppel effect of a prior verdict *if a rational interpretation of the verdict as a whole is possible*.") (emphasis added).[6] For Complaint Counsel now to seek to engraft some self-serving order and rationality upon the jury's decision-making, which has been determined to have been unreasonable, is specious, and illustrates precisely why collateral estoppel is not available for findings relating to reversed judgments.

D. The "Findings" At Issue Were Adverse To Rambus, The Judgment Winner, And Thus May Not Be Accorded Preclusive Effect.

Another consequence of the necessity requirement is the rule that findings adverse to the judgment winner are not given preclusive effect in subsequent litigation. This follows from the notion that, in order for a finding to be "necessary" to a judgment, the judgment "must . . . have been *dependent* on the determination made of the issue in question. . . . When the jury or the court makes findings of fact, but the judgment is not dependent on those findings, they are not conclusive between the parties in a subsequent action based on a different cause of action." Moore's *Federal Practice*, ¶ 132.03[4][a], 132-05, 06 (emphasis added).

Where a party obtains a favorable judgment, that judgment obviously is not "dependent" upon any underlying findings that are adverse to the judgment winner, and thus such findings do

[6] Thus the situation here is very different from that where consideration of the facts in the light most favorable to the verdict winner discloses one possible set of findings which the jury rationally could have adopted, which the jury must then be presumed to have made.

not have preclusive effect. *See generally Fireman's Fund Ins. Co. v. International Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985) ("A determination adverse to the winning party does not have preclusive effect."); *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127 (1st Cir. 1986) ("finding has no collateral estoppel effect [where] it was not essential to the favorable judgment"); *Construction Technology, Inc. v. Lockformer Co.*, 704 F. Supp. 1212, 1227 (S.D.N.Y. 1989)("findings contrary to the thrust of the ultimate judgment are deemed suspect and not given preclusive effect"); *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1076 (2d Cir. 1977) (defendant whose conviction was reversed on appeal was "entitled to invoke the general rule that determinations adverse to the winning party do not have preclusive effect."); (*Argus*, 552 F. Supp. at 603)); (quoting 1B Moore's *Federal Practice*, ¶ 0.443[5]; 18A Wright, Miller, & Cooper, § 4421, at 574 (where "the adjudication of an issue does not dictate the judgment, [it] is thereby deprived, to some degree, of the assurances of integrity and correctness that the judicial process affords to genuinely dispositive adjudications.") ("if a judgment is reversed, the party who prevailed on appeal is not bound by adverse trial court rulings on other issues, under the general rule that preclusion does not arise from findings adverse to the prevailing party").

In the portion of their brief discussing the necessity element of collateral estoppel, Complaint Counsel cite only one case, *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995), granting preclusive effect to findings adverse to a judgment winner.[7] *Weems*, however, involved

[7] *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed. Cir. 1983) and *McLaughlin v. Bradlee*, 803 F.2d 1197, 1203 (D.C. Cir. 1986), both involved the typical situation where the findings at issue were necessary to an earlier judgment *against* the party against whom preclusion was sought. *See Mother's Restaurant*, 723 F.2d at 1571 ("We hold that the determination of confusion between MOTHER'S PIZZA PARLOUR and MAMA'S PIZZA was necessary to the state court's final judgment [against the party opposing preclusion] with respect to the counterclaim."); *McLaughlin*, 803 F.2d at 1203 (finding that where plaintiff had

a situation entirely distinguishable from that here. *Weems* was a criminal prosecution for illegal financial transactions. Prior to the trial, the Government had brought a civil forfeiture action against the defendant pursuant to two statutory provisions involving entirely different factual bases. The district court, acting as the finder of fact, made full findings with regard to both statutory grounds, and concluded that the property was subject to forfeiture under only one of two grounds. In the later criminal proceeding, the Ninth Circuit determined that the defendant could invoke collateral estoppel for certain of the district court's findings relating to the rejected statutory ground, even though such findings were adverse to the Government, the overall judgment winner in the forfeiture action. *Id*. at 532. *Weems* thus presented a situation similar to that in which a party prevails on one cause of action, but loses on another. In such a situation, findings relating to the claim that the party lost can be used against it in other litigation, even though findings relating to the claim that it won could not. Here, in contrast, the "findings" at issue in Complaint Counsel's motion pertain only to the fraud verdicts on which Rambus obtained a complete victory. The jury did not issue a separate set of findings, as in *Weems*, that could survive the reversal of their unreasonable fraud verdicts.

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previously litigated claims encompassing the constitutional privacy claim raised in second suit, "previous determinations of those claims in Maryland state court and in the District Court of this circuit, both of which were adverse to McLaughlin, necessarily foreclose the issues raised here."). In *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), the court treated a jury's finding that the defendant had not personally used a gun to commit murder as a separate verdict from the murder conviction, and accorded that finding preclusive effect against the Government, the losing party with regard to that verdict. *See* 943 F.2d at 1046 (holding that verdict that defendant had personally used firearm "as if the jury had issued a special verdict to that effect"); 943 F.2d at 1047 n.4 (comparing jury enhancement finding to acquittal).

In short, Complaint Counsel offer no reason why Your Honor should disregard the basic principle that findings adverse to a judgment winner – which Rambus clearly is for the fraud claims – are not entitled to preclusive effect.[8]

IV. CONCLUSION

For the reasons stated above, Complaint Counsel's motion should be denied.

[8] Although Rambus was the judgment winner with regard to the fee determination, there remains at least the theoretical possibility that the fee award could be reinstated. No such possibility exists with regard to the fraud verdicts.

DATED: April ___, 2003 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on April 11, 2003, I caused a true and correct copy of the *Opposition by Respondent Rambus Inc. to Complaint Counsel's Motion In Limine to Bar Presentation, on Collateral Estoppel Grounds, of Testimony and Arguments Regarding Issues that Rambus Has Previously Litigated and Lost* (and the related *Proposed Order*) to be served on the following persons by hand delivery:

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CERTIFICATION

I, Jacqueline M. Haberer, hereby certify that the electronic copy of the *Opposition by Respondent Rambus Inc. to Complaint Counsel's Motion In Limine to Bar Presentation, on Collateral Estoppel Grounds, of Testimony and Arguments Regarding Issues that Rambus Has Previously Litigated and Lost* (and the related *Proposed Order*) accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 11, 2003 by other means:

Jacqueline M. Haberer
April 11, 2003