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

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-

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 "e

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*

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 questi[illegible] A

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

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

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

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)

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,

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 postInfi1ovdadtria Tjriefe adicyon6Tf TD -0.0887 T480.8422 191(w

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,

Gregory P. Stone
Steven M. Perry
Paul J. Watford
Adam R. Wichman
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100

A. Douglas Melamed
IJay Palansky
Kenneth A. Bamberger
Jacqueline M. Haberer
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Sean C. Cunningham
John M. Guaragna
GRAY, CARY, WARE & FREIDENRICH LLP
(202) 663-

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*