briefing, and oral argument, a federal district judge concluded that Rambus's document destruction was done, "in part, for the purpose of getting rid of documents that might be harmful" in future anticipated litigation involving Rambus's previously undisclosed "JEDEC-related patents." *Rambus Inc. v. Infineon Technologies AG*

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

Rambus here seeks reconsideration, and applies for interlocutory review, on the same grounds on which it initially opposed Complaint Counsel's motion. Once again, Rambus argues that the general rule that "vacated judgments" have no collateral estoppel effect forecloses the application of collateral estoppel in this case. *See*

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not contest the district court's holding of litigation misconduct" and that "[l]itigation misconduct and unprofessional behavior may suffice, by themselves," to support sanctions under § 285). The majority opinion thus directs that Rambus will not be permitted to relitigate the issue of litigation misconduct on remand. That aspect of the district court's ruling is final and continues to be binding against Rambus.

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

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

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

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

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

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

judgment on the argument that "Complaint Counsel do not and cannot make the required showing" that Rambus destroyed discoverable evidence "in bad faith."[7]

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

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

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

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

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

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

[12] *See*

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

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

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

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

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

[14] A judge is granted considerable discretion in determining whether collateral estoppel should apply. *E.g.*

Rambus fails to address any of the three bases on which a motion for reconsideration may be entertained. First, there has been no "intervening change in controlling law." *Kern-Tulare Water*

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

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

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

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

destruction and its reasons therefor. In particular, establishing a substantial ground for difference of opinion under Rule 3.23(b), requires "a party seeking certification [to] make a showing of a likelihood of success on the merits." *Conference Interpreters*, 1995 WL 17003147 (citing ,

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

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

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

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

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

Rambus may not rely upon the Federal Circuit's vacatur of the attorneys' fees award to seize an opportunity to relitigate its litigation misconduct. It is amply clear that a court may vacate a judgment, while limiting the issues to be considered on remand. *See, e.g.*,

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

Indeed, a Federal Circuit vacatur has been held specifically not to have vacated a district court's decision "in its 'entirety.'" *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 105 F. Supp. 2d 1164, 1172 (D. Colo. 2000). In that case, the Federal Circuit affirmed in part and vacated in part the district court's decision. Specifically, it vacated an award of damages for fraud and unjust enrichment on the ground that the district court had applied the wrong legal standard.

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

Because Rambus is barred from relitigating the issue of its document destruction on remand of *Infineon*, it should likewise be barred here. The purpose of the law of the case doctrine is "to prevent relitigation of issues that have been decided." *Suel v. Secretary of Health & Human Services*, 192 F.3d 981, 984 (Fed. Cir. 1999). Law of the case thereby "ensures judicial efficiency and prevents endless litigation. Its elementary logic is matched by elementary fairness — a litigant given one good bite at the apple should not have a second." *Id.* at 984-85. Similarly, "[c]ollateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*

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

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

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

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

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

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

[18] *Dodrill*, 764 F.2d at 444-45, is not to the contrary. That case was addressing circumstances where the decision was "entirely vacated." As explained, the Federal Circuit vacated the

doctrine applies to unappealed rulings, because of the concern that a "rule which gives *res judicata* effect to both grounds leaves the losing party who concedes the adequacy of one no appellate remedy for the patent invalidity of the other except a frivolous appeal." *Dozier v. Ford Motor Co.*

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

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

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

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

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

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

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

Second, Rambus has *still* faine5 -09e5l0 Ttits604rlirv that conreadcat Judge Payne's finding. e

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

the second part of the test: the question was actually and necessarily determined. The purpose of this general rule "is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Mother's Restaurant Inc.*, 723 F.2d at 1571. This means that a court need determine only that "the disposition in the first suit was the basis for the holding with respect to the issue and not 'mere dictum' . . . [or] merely incidental to the first judgment." *McLaughlin*

Co., 238 N.E.2d 55, 59 (Mass. 1968) ("Such findings may be relied upon if it is clear that the issues underlying them were treated as essential to the prior case by the court and the party to be bound.

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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