UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

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

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

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

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

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with the findings that supported it) may, or may not, ever be reinstated. Where, as here, a party succeeds in having an adverse judgment set aside on appeal, adverse findings underlying the former judgment are not accorded preclusive effect in other actions. *See*

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

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

18 Wright, Miller & Cooper, § 4432, at 60-

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

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

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

that finding preclusive effect here.[5]

As noted below, each of these assumptions is wrong.

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

As a general matter, where an appellate court does not expressly *review* the findings at issue, such findings do not become "law of the case" pursuant to the court's mandate: "The reach of the mandate is generally limited to matters actually decided. A mere r

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

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

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

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

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

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

in doubt, documents were to be retained; that no documents that in fact have any relevance to this action were destroyed; that the document retention program Rambus

DATED: March 13, 2003 Respectfully submitted,

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