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.

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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

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. 164 F.Supp.2d 743, 750

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 "

[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

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).

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*

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 . . . .").

not have preclusive effect. *See*

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).

DATED: April ___, 2003 Respectfully submitted,

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Gregory P. Stone
Steven M. Perry
Peter A. Detre
Sean P. Gates
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100
(213) 687-3702 (facsimile)

A. Douglas Melamed
Jay Palansky
Kenneth A. Bamberger
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
401 "B" Street, Suite 2000
San Diego, California 92101
(619) 699-2700

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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:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission

M. Sean Royall, Esq.
Deputy Director, Bureau of Competition
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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