

1 UNITED STATES OF AMERICA
2 BEFORE FEDERAL TRADE COMMISSION
3

4 _____)
5 In the Matter of)

6 RAMBUS INCORPORATED,)

7 a corporation.)
8 _____)

Docket No. 9302

9 NON-PARTY MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.’S
10 INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO QUASH
11 SUBPOENA OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER

12 I. REQUEST FOR COMMISSION REVIEW

13 Pursuant to Rule 3.23(b) of the Rules of Practice for Adjudicative Proceedings
14 before the United States Federal Trade Commission (“FTC Rules of Practice”), non-party
15 Mitsubishi Electronic & Electronics USA, Inc. (“MEUS”) respectfully requests review of the
16 order dated November 12, 2002 , denying MEUS’s motion to quash or in the alternative for
17 protective order regarding a subpoena *duces tecum* served on MEUS by Rambus Incorporated
18 (“Rambus”). Commission reviews are permitted when the ruling “involves a controlling
19 question of law or policy as to which there is substantial ground for difference of opinion and
20 that an immediate appeal from the ruling may materially advance the ultimate termination of the
21 litigation or subsequent review will be an inadequate remedy.” FTC Rule 3.23(b). MEUS seeks
22 review of the order on the limited but important issue of whether MEUS is obligated to attempt
23 to procure and produce documents in the custody, possession and control of Mitsubishi
24 Electronic Corporation (“MELCO”), MEUS’s Japanese parent.

25 MEUS requests this review because the order’s interpretation of the definition of
26 “You” as set forth in the subpoena is unclear. RAMBUS now takes the position that the order

1 indeed requires MEUS to produce documents from MELCO. Although MEUS disagrees, it has
2 filed this interlocutory appeal as a prophylactic measure to protect its rights. To be clear, MEUS
3 does not seek review of the remaining arguments it raised in its original motion which related to
4 burden, relevance, improper service, and confidentiality. The only argument at issue here is
5 whether MEUS controls documents held by MELCO.

6 MEUS's request for review should be granted because the ruling apparently
7 adopts Rambus's definition of "control" as it pertains to documents sought in a non-party
8 subpoena, even though this definition conflicts with interpretative precedent established by
9 federal courts of appeal. MEUS respectfully submits that the ruling implicates a controlling
10 question of policy regarding the reach of subpoenas served on non-parties by allowing Rambus
11 to circumvent the Federal Trade Commission's established procedures for obtaining discovery
12 from a foreign corporation. There are substantial grounds for differences of opinion as to
13 whether Rambus's legal position is correct, and whether the subpoena procedures followed by
14 Rambus were valid as a matter of policy. Subsequent review will be an inadequate remedy for
15 MEUS because of the immediacy of the production demand by Rambus.

16 II. CONTROLLING ISSUE OF LAW

17 The prevailing interpretation of "control" over documents is found in the majority
18 of circuit courts that have addressed this issue. These courts have defined "control" to mean the
19 legal right to control or obtain documents. *See Gerling Int'l Ins. Co. v. Commissioner*, 839 F.2d
20 131, 140-41 (3d Cir. 1988); *Cochran Consulting, Inc. v. Uwatec, USA, Inc.*, 102 F.3d 1224,
21 1229-30; *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993); *In re Citric*
22 *Acid Litigation*, 191 F.3d 1090, 1107 (9th Cir. 1999); *Searock v. Stripling*, 736 F.2d 650, 653
23 (11th Cir. 1984). In its opposition brief, Rambus primarily relied upon the expanded definition
24 of "control" as set forth in *Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462
25 (D. Mass. 1993). In *Addamax*, a Massachusetts district court ordered a non-party to produce
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1 responsive documents held by its foreign parent on the grounds that the non-party controlled
2 these documents because it had “access to the documents” and the “ability to obtain the
3 documents.” *Addamax*, 148 F.R.D. at 467 (citing *Cooper Industries, Inc. v. British Aerospace,*
4 *Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *M.L.C. Inc. v. North American Phillips Corp.*, 109 F.R.D.
5 134 (S.D.N.Y. 1986); and *Camden Iron and Metal, Inc. v. Marubeni American Phillips Corp.*,
6 138 F.R.D. 438 (D.N.J. 1991)).

7 While MEUS concedes that *Addamax* is on point regarding the issue of whether a
8 non-party must produce documents from its foreign parent under a subpoena *duces tecum*,
9 MEUS respectfully points out that Rambus cited no federal circuit court of appeal which adopted
10 the expanded definition of control found in *Addamax*. Nor can MEUS find one. On the
11 contrary, circuit courts have continued to apply the traditional interpretation of control which is
12 the “legal right” to obtain the documents. *See Citric Acid*, 191 F.3d at 1107; *Cochran*
13 *Consulting*, 102 F.3d at 1229-1230; *Bankers Trust*, 61 F.3d at 469.

14 Given the conflict in authorities, -- i.e., the *Addamax* district court on the one
15 hand, and the various federal circuit courts of appeal cited above on the other hand --, regarding
16 the definition of “control” and the resulting impact on the discovery process, the order clearly
17 involves a controlling question of law as to which there is substantial ground for difference of
18 opinion.

19 **III. CONTROLLING ISSUE OF POLICY**

20 Rambus’s attempt to by-pass the FTC’s established Rules of Practice for
21 obtaining discovery from non-party foreign companies creates a substantial difference as to a
22 controlling question of policy. Specifically, Rambus ignored Rule 3.36 of the FTC’s Rules of
23 Practice, which establish a specific process for subpoenaing records in from a foreign
24 corporation, such as MELCO. FTC Rule of Practice 3.36 requires that an application “for the
25 issuance of a subpoena to be served in a foreign country, shall be made in the form of a written
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1 motion filed in accordance with the provisions of § 3.22(a).” 16 C.F.R. § 3.36(a). Under the
2 same rule, the party moving for such a subpoena must make four specific showings, including
3 establishing its “good faith belief that the discovery requested would be permitted by treaty, law,
4 custom or practice in the country from which the discovery is sought and that any additional
5 procedural requirements have been or will be met before the subpoena is served.” 16 C.F.R.
6 § 3.36(b)(4). Here, Rambus has not made this showing vis-à-vis MELCO, a Japanese
7 corporation. Instead, Rambus seeks to circumvent these procedural safeguards by serving a
8 subpoena on MEUS in the United States commanding production of documents not only from
9 MEUS, but also from “its subsidiaries and *parent companies* and each of their officers,
10 employees, directors, predecessors, successors, and assigns.” Subpoena at 1, ¶ 5 (emphasis
11 added).

12 If the order denying relief to MEUS is allowed to stand without clarification as to
13 whether it extends to MELCO, it would eviscerate the purpose of Rule 3.36 by permitting
14 unfettered access to foreign records of a non-party simply by subpoenaing a domestic non-party
15 affiliate or subsidiary. The policy implications for this ruling are considerable; indeed, other
16 courts have rejected subpoenas served on non-party domestic subsidiaries which requested
17 documents from foreign affiliates because the subpoenaing party did not use proper channels of
18 discovery. *See Lakar Airways Ltd. v. Pan American World Airways, et al.*, 607 F. Supp. 324,
19 326 (S.D.N.Y. 1985) (granting motion to quash non-party’s subpoenas *duces tecum* on grounds
20 that subpoenas were transparent attempt to circumvent the Hague Convention on the Taking of
21 Evidence Abroad in Civil or Commercial Matters). The substantial ground for differences of
22 opinion as to the meaning and import of these implications warrants review by the Commission.

23 **IV. SHOULD THE COMMISSION HEAR THIS INTERLOCUTORY**
24 **APPEAL, IT SHOULD FIND THAT MEUS DOES NOT CONTROL**
25 **DOCUMENTS HELD BY MELCO**

26 *Addamax* is the only case upon which Rambus can rest its argument that MEUS

1 “controls” documents held by MELCO. All other cases cited by Rambus in support of this
2 proposition are legally and factually distinguishable. *Hunter Douglas, Inc. v. Comfortex Corp.*,
3 1999 U.S. Dist. LEXIS 101(S.D.N.Y. 1999), is distinguishable because the subpoenaed non-
4 party and defendant shared the same counsel, thereby blurring the control issues. *Id.*, *1.¹ The
5 remaining cases cited by Rambus did not involve discovery requests imposed upon non-parties
6 and, therefore, are inapposite to the instant action. See *Cooper*, 102 F.R.D. at 918 (plaintiff
7 seeking discovery from defendant); *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302
8 (M.D.N.C. 1998) (plaintiff’s motion to compel production from defendant); *Camden*, 138
9 F.R.D. at 438 (same); and *Alcan Int’l v. S.A. Day Mfg. Co.*, 176 F.R.D. 75 (W.D.N.Y. 1996)
10 (defendant’s motion to compel production from plaintiff).

11 MEUS respectfully submits that the holding in *Addamax* is flawed in two
12 respects. First, the district court relied upon the holdings of cases which compelled discovery
13 from parties. See *Camden*, 138 F.R.D. at 438, *M.L.C.*, 109 F.R.D. at 134, *Cooper*, 102 F.R.D. at
14 918. Here, neither MEUS nor MELCO is a party. Even the court in *Addamax* conceded that
15 “discovery permitted to be obtained from non-parties may be more limited in some
16 circumstances than discovery permitted to be obtained from parties.” *Addamax*, 148 F.R.D. 468.
17 As recognized by the Ninth Circuit Court of Appeals, “there appear to be quite strong
18 considerations indicating that discovery would be more limited to protect third parties from
19 harassment, inconvenience, or disclosure of confidential documents.” *Dart Industries Co., Inc.*
20 *v. Westood Chemical Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980).

21 Most tellingly, MEUS cannot find a single federal court of appeal that has
22 adopted the expanded definition of control as set forth in *Addamax* (nor can MEUS locate a
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24 ¹ In any event, *Hunter*’s analysis was based upon *Addamax* and fails for the same reasons
25 explained *infra*. See *Hunter*, 1999 U.S. Dist. LEXIS 101, *8-10.

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1 single case in which a court of appeal adopted the holdings of cases primarily relied upon in
2 *Addamax -- Camden, Cooper, or M.L.C.*). On the contrary, the prevailing meaning of “control”
3 in most courts of appeal remains the “legal right to obtain the documents.” *See Gerling*, 839
4 F.2d at 140-41; *Cochran Consulting*, 102 F.3d at 1229-30; *Chaveriat*, 11 F.3d at 1426; *Citric*
5 *Acid*, 191 F.3d at 1107; *Searock*, 736 F.2d at 653. The reason for this is obvious. If a domestic
6 subsidiary has no legal right to obtain documents from a foreign parent, and that parent refused
7 to provide documents in the face of a subpoena issued to the subsidiary, then the domestic
8 subsidiary could face punitive legal sanctions for failing to obtain documents which it has no
9 legal ability to procure.

10 Rambus bears the burden of demonstrating that MEUS had control over all
11 requested documents. *Addamax*, 148 F.R.D. at 465, n. 3. Rambus has not met this burden.
12 Instead it relies upon allegations that MELCO and MEUS personnel have exchanged documents
13 in the past, attended the same conferences, and participated in negotiations together. These
14 allegations do not demonstrate the existence of a legal right on MEUS’s behalf to obtain
15 documents from MELCO. *See Citric Acid*, 191 F.3d at 1107-1108 (denying motion to compel
16 because subpoenaed entity had no legal mechanism for compelling affiliated entity to produce
17 documents). Rambus’s reliance on *Cooper*, which found it “inconceivable” that a distributor
18 would not have access to its parents documents is unfounded and unsupported. *See Goh v.*
19 *Baldor*, 1999 U.S. Dist. LEXIS 209, *11-12 (denying motion to compel documents of a foreign
20 affiliate, in part because plaintiff failed to prove the assertion that it was “inconceivable” for
21 domestic affiliate not to have access to foreign affiliate’s documents), citing *Cooper*, 102 F.R.D.
22 at 920.

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1 V. CONCLUSION

2 For the foregoing reasons, MEUS respectfully requests that the Administrative
3 Law Judge grant the MEUS's request for review by the Commission of the Administrative Law
4 Judge's order as it pertains to the documents in the possession, custody, and control of MELCO.

5 DATED: November 18, 2002

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1 CERTIFICATE OF SERVICE

2 This is to certify that copies of the foregoing Non-Party Mitsubishi Electric &
3 Electronics USA, Inc.'s Interlocutory Appeal of Order Denying Motion to Quash Subpoena or in
4 the Alternative for Protective Order were served by fax on November 18, 2002 to Sean Gates of
5 Munger, Tolles & Olson, LLP, counsel for Rambus Incorporated, at 355 South Grand Avenue,
6 35th Floor, Los Angeles, California 90017 and by overnight delivery to:

7 The Honorable James P. Timony
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23 Dated: November 18, 2002

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