

1 UNITED STATES OF AMERICA
2 BEFORE FEDERAL TRADE COMMISSION
3

4 _____)
5 In the Matter of)

6 RAMBUS INCORPORATED,)

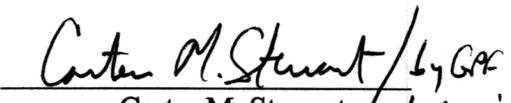
7 a corporation.)
8 _____)

Docket No. 9302

9 CERTIFICATION UNDER RULE 4.2(c)(3) REGARDING ELECTRONIC FILING OF
10 NON-PARTY MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.'S
11 SUPPLEMENTAL BRIEF IN SUPPORT OF ITS INTERLOCUTORY APPEAL OF
12 ORDER DENYING MOTION TO QUASH SUBPOENA OR IN THE ALTERNATIVE
13 FOR PROTECTIVE ORDER

14 In accordance with Rule 4.2(c)(3) of the Rules of Practice for Adjudicative
15 Proceedings before the United States Federal Trade Commission, the non-party filing this appeal,
16 Mitsubishi Electric & Electronics USA, Inc., hereby certifies (1) that the electronic copy of all
17 documents related to its appeal filed in pdf format is a true and correct copy of the paper original,
18 (2) that the electronic copy of all documents related to its appeal filed in Microsoft Word format
19 is a true and correct copy of the paper original (as discussed and agreed prior to the filing with
20 counsel for non-moving party Rambus Incorporated), and (3) that a paper copy with an original
21 signature is being filed with the Secretary of the Commission.

22 Dated: November 25, 2002

23 
24 Carter M. Stewart / by GAF
25 / of Permission
26

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14 I. RESPONSE TO THE OPINION DENYING RELIEF

15 Mitsubishi Electric & Electronics USA, Inc. ("MEUS") hereby responds further
16 to Administrative Law Judge James Timony's order and supporting opinion ("Opinion"), dated
17 November 12 and 18, 2002, respectively, denying MEUS's motion to quash or in the alternative
18 for protective order regarding a subpoena *duces tecum* served on MEUS by Rambus
19 Incorporated ("Rambus"). MEUS did not receive Judge Timony's November 18 Opinion
20 supporting the order until after MEUS had filed its interlocutory appeal within the five day
21 period provided by FTC Rule 3.23(b). Further to the letter of David T. Burse to Judge Timony
22 dated November 20, 2002, MEUS respectfully requests consideration of this supplemental brief,
23 which specifically addresses the points made in the November 18 Opinion.

24 II. THE LEGAL STANDARD APPLIED TO MEUS IS
25 INCONSISTENT WITH THE CASE LAW APPLYING A MORE
26 RIGOROUS STANDARD TO FIND "CONTROL" FOR NON-
PARTY SUBSIDIARIES OF NON-PARTY FOREIGN
CORPORATIONS

The Opinion accepts the legal standard regarding "control" as set forth in

1 *Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462 (D. Mass. 1993) and *Hunter*
2 *Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 (S.D.N.Y. 1999). See Opinion, p.
3 7 (citing *Hunter*, which in turn, cites *Addamax*). As discussed in MEUS’s initial appeal brief,
4 this standard conflicts with interpretations by most federal courts of appeal, thereby raising
5 substantial ground for differences regarding this controlling question of law. See FTC Rule of
6 Practice 3.32(b); *Gerling Int’l Ins. Co. v. Commissioner*, 839 F.2d 131, 140-41 (3d Cir. 1988);
7 *Cochran Consulting, Inc. v. Uwatec, USA, Inc.*, 102 F.3d 1224, 1229-30; *Chaveriat v. Williams*
8 *Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993); *In re Citric Acid Litigation*, 191 F.3d 1090,
9 1107 (9th Cir. 1999); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

10 **III. RAMBUS HAS NOT MET ITS BURDEN OF PROOF EVEN**
11 **UNDER THE TEST ARTICULATED IN *ADDAMAX***

12 Even if the “control” standard set forth in *Addamax* does apply to the instant
13 action, Rambus has not met its burden of satisfying this standard. *Addamax* explicitly held that
14 determining whether a transactional relationship between a parent and subsidiary establishes
15 “control” depends upon a factual analysis of that relationship. *Addamax*, 148 F.R.D. at 467.
16 Factors to consider in making such a determination, include: “(a) commonality of ownership;
17 (b) exchange or intermingling of directors, officers or employees of the two corporations, (c)
18 exchange of documents between the corporations in the ordinary course of business, (d) any
19 benefit or involvement by the non-party corporation in the transaction, and (e) involvement of
20 the non-party corporation in the litigation.” Opinion, p. 8, citing *Uniden America Corp. v.*

21
22 ¹ Rambus, as the party seeking production, has the burden of proving the materiality of the
23 documents it seeks as well as MEUS’s control of those documents. *Von Der Heydt v. Rogers*,
24 251 F.2d 17, 18 (D.C. Cir. 1958); *U.S. v. The George Washington University*, 2000 WL 1763679
25 (D.D.C. 2000); *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 472 (S.D.N.Y. 2000). Therefore,
as discussed below, Rambus’s failure to provide adequate evidence of MEUS’s “control” of the
requested MELCO documents compels the conclusion that MEUS has no ability, or obligation,
to produce such MELCO documents.

1 *Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998). Applying these factors, the court in
2 *Addamax* concluded, based on a number of undisputed facts, that Nixdorf, the German parent,
3 and its U.S. subsidiary “acted as one” with respect to activities relevant to the action. *Addamax*,
4 148 F.R.D. at 467. This conclusion was based on the facts that: (1) both were listed as financial
5 “sponsors” of the defendant in the litigation, (2) the first Nixdorf representative on the
6 defendant’s Board was both counsel for Nixdorf U.S. and a Vice President of Nixdorf Germany,
7 and (3) Nixdorf Germany appointed and removed the defendant’s board members. *Id.* It was
8 readily apparent, therefore, that Nixdorf was not only intimately involved with the defendant and
9 the matters at issue, but that Nixdorf U.S. and Nixdorf Germany personnel were completely
10 intertwined as they related to the matters at issue.

11 In sharp contrast, there is no factual basis to conclude that MEUS and MELCO
12 “acted as one” with respect to the subject matter of this litigation (or any other matter). All that
13 the Declaration of Sean F. Gates, dated November 7, 2002 (the only “evidence” Rambus
14 proffers), demonstrates is: 1) MELCO signed two nondisclosure agreements with Rambus; 2)
15 MELCO and MEUS personnel attended the same SLDRAM consortium and JEDEC meetings;
16 and 3) MEUS personnel copied MELCO personnel on emails regarding a SLDRAM presentation
17 and JEDEC matters. Gates Decl., ¶¶ 6-10. These factual allegations do not begin to prove
18 “control” by MEUS of the myriad types of MELCO documents sought in the subpoena, e.g.,
19 patent applications, engineering specifications, or sensitive product pricing information. In
20 particular, the nondisclosure agreements do not mention or otherwise involve MEUS; the fact
21 that personnel from both entities attended the same meetings does not prove that MELCO and
22 MEUS coordinated their efforts with respect to RAMBUS or that MELCO directed MEUS in
23 any way. Moreover, the two cited emails in which MELCO personnel are copied prove nothing
24 about MEUS’s ability to obtain documents from MELCO. Indeed, accepting as true every “fact”
25 Rambus put into this record, the evidence is completely consistent with the behavior of two
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1 arms-length, entirely distinct corporations that share a concern about certain standards-setting
2 proposals.

3 The other decisions referred to in the Opinion, *Camden Iron and Metal, Inc. v.*
4 *Marubeni America Corp.*, 138 F.R.D. 438 (D.N.J. 1991) and *Alcan Int'l Ltd. v. S.A. Day Mfg.*
5 *Co.*, 176 F.R.D. 75, 79 (W.D.N.Y. 1996), are even further removed from the circumstances at
6 issue here. In those cases, the courts compelled a party to produce documents held by an
7 affiliated entity in circumstances where there was reason to infer that the party was using the
8 separate legal entities as a cover to hide important evidence about a contested matter. Moreover,
9 in *Camden*, there was evidence that the parent played a “significant role in the transaction [at
10 issue] through its continued participation in the negotiation process.” 138 F.R.D. at 442. There
11 was also evidence that the parent controlled the decisions about the disputed transaction and that
12 the subsidiary had obtained documents related to the transaction from the parent. *Id.* This led to
13 the court’s conclusion that the parent and subsidiary “acted as one” regarding the very matter at
14 issue. *Id.*

15 In *Alcan*, the court compelled a plaintiff to produce documents held by a foreign
16 affiliate because both companies were under common control of a third entity, both companies
17 used the same corporate logo on their professional materials, and officers of the first company
18 testified that they had regular contact with the foreign affiliate regarding product sales and
19 marketing. 176 F.R.D. at 79. Perhaps most important, the requested documents were directly
20 relevant to defendant’s defenses and counterclaims and concerned the very products which the
21 plaintiff sold exclusively for the foreign affiliate in the United States. For that reason, the Court
22 concluded that it was “inconceivable” that the plaintiff could not obtain the requested
23 information about the very products it was selling in the U.S. and that any inability to do so
24 would unfairly prejudice the defendant. *Id.*

25 The facts here are not remotely similar to those in *Camden* or *Alcan*. Neither
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1 MEUS nor MELCO is a party to the action and or has any motive to hide evidence in support of
2 some claim it makes. Rambus does not claim, let alone prove, that MEUS and MELCO share
3 board members, legal counsel, executive management, or headquarters. There is no evidence
4 that MELCO received any benefit “in the transaction” since there is no transaction for which
5 MELCO and MEUS are involved that is under scrutiny in this litigation. Nor is there evidence
6 of exchange of documents from MELCO to MEUS; two e-mails of which MELCO employees
7 received copies is hardly evidence of direct and material exchange of information on any subject,
8 let alone proof that MELCO regularly transmitted any documents to MEUS.

9 More generally, *Addamax* and the other cases relied on in the Opinion establish
10 “control” because there was some evidence in those cases that the subsidiary had obtained and
11 can obtain documents from the parent when it wanted to serve its own interests, particularly
12 where those interests relate to the subsidiary as a party to the case. Here, no competent
13 declaration testimony was submitted by Rambus to support a conclusion that MEUS would be
14 able to secure any documents from MELCO, let alone those responsive to the subpoena. Nor did
15 Rambus submit any competent declaration testimony to establish that MEUS is using the parent-
16 subsidiary relationship with MELCO as a subterfuge to hide documents from scrutiny which
17 evidence a transaction or arrangement in which it is otherwise trying to obtain an advantage as a
18 litigating party, or even as a non-party. In sum, no evidence has been submitted by Rambus that
19 demonstrates (1) MEUS meets the “control” standard under *Addamax* (let alone the higher legal
20 standard set by the majority of decisions), or (2) any reason in law or equity to infer that MEUS
21 could in fact obtain these documents even if it were forced to do so.

22 IV. CONTROLLING ISSUE OF POLICY

23 The Opinion does not address the policy question of whether Rambus should be
24 permitted to use the presence of a non-party company to obtain documents located in a foreign
25 country without substantial evidence that the documents are readily available to the U.S.
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1 company and a serious need for such documents to determine a material issue. Instead, the
2 Opinion ignores all the issues of comity with foreign jurisdictions that are embodied in FTC Rule
3 3.36 and simply compels production of documents based on the flimsiest of proof. There is
4 surely a substantial ground for difference of opinion about such treatment of an important issue
5 of comity and fairness to a non-party foreign corporation.

6 **V. CONCLUSION**

7 For the additional reasons set forth above and as stated in its initial appeal, MEUS
8 respectfully requests that the Administrative Law Judge grant MEUS's request for review by the
9 Commission of the order as it pertains to the documents in the possession, custody, and control
10 of MELCO.

11 DATED: November 25, 2002

12
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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 Supplemental Brief in Support of Its Interlocutory Appeal of Order
4 Denying Motion to Quash Subpoena or in the Alternative for Protective Order were served by
5 fax and overnight delivery on November 25, 2002 to Sean Gates of Munger, Tolles & Olson,
6 LLP, counsel for Rambus Incorporated, at 355 South Grand Avenue, 35th Floor, Los Angeles,
7 California 90017 and by overnight delivery to:

8 The Honorable James P. Timony
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