

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

MOTION BY RESPONDENT RAMBUS INC. TO COMPEL
NEC ELECTRONICS, INC. TO PRODUCE DOCUMENTS IN ITS
PARENT COMPANY'S POSSESSION RESPONSIVE TO THE
SUBPOENA SERVED BY RAMBUS INC.

I. INTRODUCTION

Pursuant to Rule 3.38(a)(2) of the Federal Trade Commission Rules of Practice, respondent Rambus Inc. ("Rambus") respectfully submits this motion to compel NEC Electronics, Inc. ("NEC USA") to produce relevant documents in the possession of its parent company, NEC Corporation ("NEC Corp.") and related foreign affiliates. NEC USA's objections have no merit, for the evidence shows that NEC USA and NEC Corp. have closely cooperated in matters at the heart of the case, including the discussion and adoption of memory technology at JEDEC meetings. Indeed, the available evidence on this issue is far stronger than the evidence Rambus had been able to locate in connection with Mitsubishi's previous, unsuccessful attempt to limit the production of the files of its own corporate parent.

Rambus has attempted to resolve this dispute without Your Honor's intervention. After Your Honor issued the November 18, 2002 opinion regarding Mitsubishi's motion to

quash, Rambus's counsel forwarded the opinion to NEC USA's counsel and requested a meet and confer to discuss the objections that NEC USA had raised. NEC USA has declined even to discuss its objections. Accordingly, Your Honor should order NEC USA to produce the responsive documents forthwith.

II. ARGUMENT

A. NEC USA Has Greater Coordination With And Control Over Documents Possessed By Its Japanese Parent Than The Coordination And Control Which Your Honor Found Sufficient To Compel Production Of Documents Possessed By The Japanese Parent Of Mitsubishi Electric & Electronics USA, Inc.

On September 9, 2002, Rambus served a subpoena on NEC USA that requested documents on the same subject matters as those propounded in the October 3, 2002 subpoena *duces tecum* to Mitsubishi that Your Honor has previously enforced. See Perry Decl., ¶ 2. On September 23, 2002, NEC USA objected to the production of responsive documents possessed by its foreign affiliates, as called for in the subpoena. Id. At approximately the same time, counsel for Rambus and counsel for Mitsubishi were discussing the same issues. Mitsubishi subsequently filed a motion to quash Rambus's subpoena, which motion explicitly addressed the issue of a domestic corporation's obligation to produce documents in the possession of an overseas corporate parent. On November 12, 2002, Your Honor denied Mitsubishi's motion to quash and ordered Mitsubishi to produce responsive document in its parent company's possession. In Your Honor's November 18, 2002 Opinion supporting the November 12, 2002 Order denying Mitsubishi's motion to quash, Your Honor observed that

“The test to determine whether a corporation has custody and control over documents located with an overseas affiliate is not limited to whether

the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has ‘access to the documents’ and ‘ability to obtain the documents.’” *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, *9 (S.D.N.Y. Jan. 11, 1999). The test, therefore, looks to the “nature of the relationship” between the subsidiary and the parent. *Gerling Int’l Ins. Co. v. Commissioner of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988); *Camden Iron & Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 441-42 (D.N.J. 1991).

To determine whether a subsidiary has “control” over a foreign parent’s documents, the courts have looked to factors, including “(a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation.” *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998); *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984).

November 18, 2002 Opinion at 7-8.

These tests are clearly met here. Indeed, the evidence is even stronger than that available in connection with the Mitsubishi motion. It is clear that NEC USA and NEC Corp. employees have held regular and numerous exchanges, in the ordinary course of business, on a wide variety of subjects relevant to this action and covered by Rambus’s document requests. These subjects include highly detailed engineering design matters as well as basic coordination of NEC USA and NEC Corp. industry standard setting activities at JEDEC. Employees of the two companies discussed upcoming and past JEDEC presentations, analyses of competitor positions taken at JEDEC meetings and engineering concerns and design choices. See Perry Decl., ¶ 5 and ex. A.¹ In addition, as was true of Mitsubishi and its foreign parent, both NEC USA and NEC Corp. sent representatives to

¹ These documents were very recently produced in response to a Rambus subpoena to Howard Sussman, formerly NEC USA’s JEDEC representative. *Id.*

JEDEC meetings. Id. In short, the evidence that NEC USA and NEC Corp. representatives worked together and regularly exchanged documents is clear and convincing. Under the case law, as accurately described by Your Honor in your November 18, 2002 Opinion, NEC USA thus has access to the relevant responsive documents possessed by NEC Corp., as well as “control” and the ability to obtain and produce those documents in this matter.

The exchanges between NEC USA and NEC Corp. go to more than just JEDEC-related documents. As set forth in Rambus’s pending motion challenging Samsung’s claims of a “joint defense privilege”, NEC Corp. is a founding member of Advanced DRAM Technology (“ADT”), an industry consortium whose goal is to design future generations of DRAM. The log indicates that some of the NEC Corp. employees who participated in the ADT discussions of alternative technologies were the very same NEC Corp. employees who had been communicating on a regular basis with NEC USA’s JEDEC representative, Howard Sussman. Id., ¶ 6. The evidence thus clearly indicates that NEC USA has the “ability to obtain” JEDEC and ADT-related documents from NEC Corp. in the ordinary course of business². Accordingly, as was true of Mitsubishi USA, NEC USA cannot claim that it does not have “control” over the highly relevant documents held by NEC Corp.

² In addition, there has been substantial “exchange or intermingling” of officers between NEC USA and NEC Corp., another factor cited in Your Honor’s November 18, 2002 opinion. See id., ¶ 7 and ex. B.

B. NEC USA Has Refused To Meet And Confer Regarding The Issues Raised By This Motion.

As noted above, Rambus's counsel has attempted to resolve this dispute by forwarding Your Honor's past opinions and order on the issue to counsel for NEC USA and by requesting a meet-and-confer. Id., ¶ 4. Counsel for NEC USA has so far declined to discuss the matter. Id.

If counsel for NEC USA had participated in a meet-and-confer, Rambus would have offered to ease any possible burden on its corporate parent by limiting the production from the parent to the following documents (all of which are encompassed within the numerous specifications in Rambus's September 9, 2002 subpoena and all of which Your Honor ordered Mitsubishi to produce):

(1) all documents relating to participation by NEC USA or NEC Corp. in JEDEC, and those documents relating to their understandings of the JEDEC patent policies;

(2) all documents relating to the evaluation by NEC Corp. or NEC USA of the scope of Rambus's intellectual property rights, and alternatives to the technologies embodied in those rights;

(3) all documents relating to the technology disclosed to NEC Corp. or NEC USA by Rambus pursuant to a non-disclosure agreement;

(4) all documents relating to the potential costs of switching to a DRAM technology different from those incorporated in a JEDEC standard, including efforts by ADT, SLDRAM or others to promulgate alternative standards; and

(5) the factors driving DRAM pricing.

See November 18, 2002 Opinion at pp. 3-4. Rambus is also willing to meet and confer to discuss additional limitations if NEC USA will agree to move forward with production on an expedited basis.

III. CONCLUSION

For the reasons set forth herein, Your Honor should order NEC USA to produce forthwith all documents held by NEC Corp. that are responsive to the categories set out above.

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Respectfully submitted,

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

A. Douglas Melamed
IJay 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