

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of  RAMBUS INCORPORATED, a corporation.	) ) ) ) ) ) )	Docket No. 9302
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**RAMBUS, INC.'S OPPOSITION TO MOTION OF  
MITSUBISHI ELECTRIC & ELECTRONICS USA, INC. TO QUASH  
SUBPOENA OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER**

**I.  
INTRODUCTION**

Mitsubishi Electric & Electronics USA, Inc. (“Mitsubishi”) seeks to quash or limit a subpoena served on it by Rambus, Inc. (“Rambus”) that seeks documents that go to the central issues raised by the Complaint in this matter. The Complaint asserts that Rambus has monopolized or attempted to monopolize certain markets for technology related to dynamic random access memory (“DRAM”). It further alleges that Rambus participated in an industry standard-setting body called “JEDEC,” and that it violated certain purported JEDEC rules that were “commonly known” by failing to disclose to JEDEC’s members that it had filed, or might in the future file, patent applications that “might be involved in” JEDEC’s standard-setting work. Complaint, ¶¶ 21,24,47-55,70-80. The Complaint also alleges that several years *after* Rambus left JEDEC, it obtained patents that read on products that are compliant with several JEDEC standards, including standards enacted and voted on after Rambus left JEDEC. *Id.*, ¶¶ 82,91.

According to the Complaint, JEDEC members were entirely unaware of the possibility that Rambus might obtain patents on technologies being incorporated in the JEDEC

standard. *Id.*, ¶ 2. The Complaint further states that if members had been aware of this possibility, they would have incorporated alternative technologies into the relevant standards. *Id.*, ¶¶ 62,65,69. Finally, the Complaint alleges that DRAM manufacturers are now locked into producing JEDEC-compliant DRAM products and that this has given Rambus the ability to demand excessive royalties from DRAM manufacturers. *Id.*, ¶ 93.

Rambus's subpoena is tailored to seek documents pertinent to the issues raised by these allegations. That Mitsubishi has such documents cannot be doubted; Mitsubishi is both a member of JEDEC (the standard-setting organization that lies at the heart of the Complaint), and it is the U.S. subsidiary of and distributor for one of the largest DRAM manufacturers that is allegedly being affected by Rambus's conduct – Mitsubishi Electric Company ("MELCO"). Moreover, both Mitsubishi and MELCO representatives regularly attended JEDEC meetings, attended related standard-setting meetings that involved certain JEDEC members, and exchanged documents related to those meeting. Both Mitsubishi and MELCO were involved in licensing negotiations with Rambus. And both stand to potentially benefit if – as the Complaint Counsel now seeks – Rambus patents are, in effect, nullified with respect to parts made and sold by Mitsubishi and MELCO under existing and future JEDEC standards.

Despite its close involvement with the facts that underlie the Complaint's allegations, Mitsubishi seeks to quash or limit the subpoena, claiming that: (1) the subpoena was not properly served; (2) the subpoena does not seek relevant documents; (3) compliance would be overly burdensome; (4) it need not obtain relevant documents from its foreign parent company; and (5) it should be reimbursed for the costs of compliance. None of these arguments has any merit, and Mitsubishi's motion should be denied.

## **II.** **ARGUMENT**

### **A. The Subpoena Was Properly Served**

Mitsubishi's first argument is that Rambus's subpoena should be quashed for improper service. This argument fails for two reasons. First, Mitsubishi misapprehends both the case law upon which it relies and the reach of the Commission's subpoena power. Second, Mitsubishi failed to raise this issue with counsel for Rambus prior to filing the motion to quash.

The subpoena was served on Mitsubishi's statutory agent for process, CT Corporation, located in Chicago, Illinois. CT Corporation promptly notified Mitsubishi of this subpoena. *See* Mitsubishi Motion, Ex. A (indicating that notice was given to Mitsubishi one day after service was effected). These facts alone are enough to deny Mitsubishi's motion. *See Doula v. United Technologies Corp.*, 759 F. Supp. 1377, 1383 (D. Minn. 1991) (denying motion to quash where subpoena served on CT Corporation as agent for related corporation where subpoenaed party "received prompt and actual notice" of the subpoena). But Mitsubishi persists nonetheless. While not denying that CT Corporation is in fact its statutory agent for process, Mitsubishi asserts that proper service was not effected because "CT does not have control of the [Mitsubishi] documents requested in the Rambus subpoena," and because CT resides in a different judicial district than Mitsubishi. Mitsubishi Motion at 6.

In support of its position, Mitsubishi relies solely on case law construing Federal Rule of Civil Procedure 45. But none of these cases are relevant because they stem from territorial limitations under the Federal Rules that do not have any counterpart in the Commission's Rules of Practice. Each of the cases upon which Mitsubishi relies stand for nothing more than the proposition that a subpoena served under Federal Rule of Civil Procedure 45 upon a statutory agent in one judicial district cannot compel a corporation located in another judicial district to produce documents within the judicial district of the statutory agent. *See Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (holding that the subpoenaed party – whose headquarters were in Colorado Springs – could not be compelled to produce documents in

Florida – the location of its statutory agent – because the documents were not in Florida, the subpoenaed party had minimal contacts in Florida, the agent did not control the documents, and the documents could be obtained “through another federal district court”); *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (holding that the Federal Rules do not “require that documents, in the custody or control of the head of an agency located outside the judicial district, be brought into the judicial district”). These limitations stem directly from the territorial limitations set forth in Federal Rule of Civil Procedure 45 and because there is a Federal District Court located in every state. *See Ariel*, 693 F.2d at 1060 (discussing impact of territorial limitations on ability to compel production of documents located in foreign judicial district).

As an initial matter, even in district court practice, the cases that Mitsubishi cites have been superseded and rendered essentially moot by an amendment to Rule 45.<sup>1</sup> More importantly, on this issue, the Commission’s Rule of Practice differ markedly from district court practice. Unlike Rule 45, the Commission’s subpoena power is not limited to any particular judicial district. Rather, the Commission has explicit statutory authority to require the production of documentary evidence pursuant to a subpoena “from any place in the United States.” 15 U.S.C. § 49; *see also F.T.C. v. Browning*, 435 F.2d 96, 104 (D.C. Cir. 1970) (holding that 15 U.S.C. § 49 is a grant of authority for extra-territorial service of process). It is also settled that in an adjudicative proceeding, the Respondent may serve subpoenas issued by the Commission. 16 C.F.R. § 3.34(b). Rambus’s subpoena, therefore, is not subject to the territorial

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<sup>1</sup> Federal Rule of Civil Procedure 45 was amended in 1991 to “make[] clear that the person subject to the subpoena is required to produce materials in that person’s control whether or not the materials are located within the district or within the territory within which the subpoena can be served.” Fed. R. Civ. P. 45, 1991 Advisory Committee Note; *see also* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2456 (“Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court’s jurisdiction”); David D. Siegal, *United States Code Annotated, Practice Commentary C45-6* (“As long as the subpoena is served on the subpoenaed person within the proper territorial range of the subpoena . . . it makes no difference that the materials sought are located beyond that range”); 9 MOORE’S FEDERAL PRACTICE 3D § 45.03[2].

limitations at issue in the case law cited by Mitsubishi. *See, e.g., Browning*, 435 F.2d at 104 (holding that district court in D.C. had jurisdiction to enforce subpoena served by mail on person in Pennsylvania). Moreover, Rambus is not requiring Mitsubishi to produce documents in the judicial district of its statutory agent of process. Mitsubishi's motion to quash for lack of proper service, therefore, has no support and should be denied.

In addition, and in violation of its obligations under 16 C.F.R. § 3.22(f), Mitsubishi failed to raise the service issue with counsel for Rambus prior to filing its motion to quash. *See* Declaration of Sean P. Gates ("Gates Decl.") ¶ 2. After counsel for Rambus agreed to extend the return date for the subpoena by one week, counsel for the parties discussed Mitsubishi's concerns related to the subpoena for over two hours on October 21, 2002. *Id.*, ¶ 2. During that discussion, Mitsubishi's counsel *never* raised the issue of improper service but did request and receive a second one-week extension of the return date. *Id.*, ¶ 2. Had Mitsubishi raised the service issue, the parties could have easily resolved this purported "problem" before Mitsubishi filed its motion. In fact, Rambus suggested after it received Mitsubishi's motion that this issue could be resolved were counsel either to accept service of another subpoena or identify the proper recipient of such a subpoena. *Id.*, ¶ 5. Mitsubishi has ignored this suggestion. *Id.*, ¶ 5. Mitsubishi's conduct in this regard is yet another ground to deny its motion. *See Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, 1998 WL 67672 at \*4 (S.D.N.Y., Feb. 18, 1998) (denying discovery motion for failure to fulfill meet and confer requirements).

**B. Rambus's Requests Seek Documents That Are Reasonably Expected To Yield Relevant Information**

According to Mitsubishi, Rambus's subpoena seeks "entire categories of documents" that are not relevant to this proceeding. Mitsubishi Motion at 11. This assertion is based on Mitsubishi's limited understanding of the underlying proceeding. *Id.* According to Mitsubishi, only requests "directed toward documents involving Rambus" are relevant. *Id.* at 11-12. Moreover, Mitsubishi claims that the subpoena is overly broad because, for some categories of documents, it seeks documents from January 1991 to the present. *Id.*

Mitsubishi misapplies the relevant legal standard and fails to understand the scope or nature of the issues raised in this proceeding. The Commission's Rules allow parties to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of [the] respondent." 16 C.F.R. § 3.31(c)(1). The question, therefore, is whether the subpoena seeks information that is reasonably expected to be "generally relevant to the issues raised by the pleadings." *In re Kaiser Aluminum & Chemical Corp.*, Dkt. No. 9080, 1976 FTC LEXIS 68 at \*4 (Nov. 12, 1976). Thus, the "relevancy of the information sought is determined by laying the subpoena along side" the pleadings. *Id.* at \*5. In arguing that Rambus's subpoena should be limited, Mitsubishi fails to make this needed comparison.

Putting the subpoena along side the pleadings demonstrates that Rambus's subpoena seeks documents that may be reasonably expected to yield relevant information. The subpoena generally seeks documents related to five overarching issues: (1) Mitsubishi's participation in JEDEC and its understandings of the JEDEC patent policies (*see* Requests 13, 15-33, 47-48, 50); (2) Mitsubishi's evaluation of the scope of Rambus's intellectual property rights and alternatives to the technologies embodied in those rights (*see* Requests 7, 10-12); (3) technology disclosed to Mitsubishi by Rambus pursuant to a non-disclosure agreement (*see* Requests 1-6, 8); (4) the potential costs of switching to a DRAM technology different from those incorporated in the JEDEC standard, including industry efforts to promulgate alternative standards (*see* Requests 34-44, 49); and (5) the factors driving DRAM pricing (*see* Requests 51-63).

Each of these issues is clearly raised in the pleadings. The Complaint's core allegation is that, through omissions, Rambus intentionally misled the members of JEDEC with regard to the possible scope of Rambus's pending or future patent applications, in violation of the purported JEDEC patent disclosure policy. *See, e.g.*, Complaint ¶¶ 2, 47-55, 70-80. According to the Complaint, had Rambus made the allegedly necessary disclosures, JEDEC could have adopted alternative technologies and avoided Rambus's patented technologies. *See*

Complaint, ¶¶ 62, 65, 69. These allegations raise three fundamental issues: (1) whether the JEDEC disclosure duty is as broad and comprehensive as alleged in the Complaint; (2) whether Rambus actually violated any such duty to disclose imposed by JEDEC rules; and (3) whether the alleged failure to disclose was material and caused the competitive injury alleged in the Complaint.

The Complaint alleges, in part, that Rambus violated JEDEC disclosure rules that were “commonly known” to JEDEC members as a result of oral discussions during committee meetings. *Id.*, ¶ 21. Rambus disputes the Complaint’s description and interpretation of this “commonly known” policy, and it denies that it violated *any* JEDEC disclosure policies. *See, e.g.*, Answer, pp. 1-2, ¶¶ 20-24. Given the parties’ positions on these issues, Mitsubishi’s understanding of the JEDEC patent policies, how it (if at all) came to know what the Complaint alleges was “commonly known,” its internal documents describing JEDEC policies (whether written or simply “commonly known”), and the actions it took or failed to take in compliance with those policies are all clearly relevant. (*See* Requests 13, 15-33, 47-48, 50).

Rambus’s subpoena also seeks documents related to the central question of whether the alleged failure to disclose was material and caused any antitrust injury. If JEDEC participants were aware that Rambus might obtain patent claims covering technologies being incorporated into the JEDEC standard, Rambus’s alleged failure to disclose would be immaterial.<sup>2</sup> The subpoena therefore requests documents that are directly relevant to these issues, *viz.*, documents related to Mitsubishi’s evaluation of the scope of Rambus’s intellectual

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<sup>2</sup> With regard to this issue, the Complaint admits that the Rambus’s patents covering the JEDEC-complaint DRAM products have the same specification as a patent and a foreign patent application that were disclosed to JEDEC members. Complaint, ¶¶ 76-77. According to the Complaint, however, these disclosures did not alert JEDEC members to the fact that Rambus might someday obtain patent claims covering technologies being adopted into the JEDEC standard. *Id.* The Complaint is both factually inaccurate on this point and is based upon a misinterpretation of patent law.

property rights and its evaluation of any purported alternatives to the technologies embodied in those rights (*see* Requests 7, 10-12).<sup>3</sup>

The Complaint also alleges that DRAM manufacturers are locked into compliance with the JEDEC DRAM standards and that Rambus's conduct has led to increased DRAM prices. *See* Complaint, ¶¶ 105-109, 120(b). The subpoena's requests for documents related to the potential costs of switching to a DRAM technology different from those incorporated in the JEDEC standard, including industry efforts to promulgate alternative standards (*see* Requests 34-44, 49) and the factors driving DRAM pricing (*see* Requests 51-63), are therefore relevant.

Mitsubishi also asserts that the temporal scope of the subpoena request (seeking documents from 1991 to present) is too extensive. This argument fails to recognize the issues raised by the pleadings. The Complaint alleges that JEDEC began work on one of the relevant standards "in or around 1990," Complaint, ¶ 26, that Rambus joined JEDEC in 1991, *id.*, ¶ 40, that Rambus breached its duty of disclosure during its tenure at JEDEC (which ended in 1996 according to the Complaint), *id.*, ¶ 77, that the scope of that disclosure duty remained unchanged and was "commonly known" throughout the 1990's and to date, *id.*, ¶ 21, that the relevant JEDEC standards were adopted in 1993 and 1999, *id.*, ¶¶ 89-90, that the DRAM industry started manufacturing JEDEC standard-compliant parts in 1995, *id.*, ¶¶ 89-90, and that Rambus's conduct has and will in the future cause competitive harm, *id.*, ¶ 3. The temporal scope of Rambus's requests is driven by these allegations, and documents created between 1991 and the present are likely to have information relevant to the allegations in the Complaint. *See Kaiser*

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<sup>3</sup> The subpoena also requests documents related to technology disclosed to Mitsubishi by Rambus (*see* Requests 1-6, 8). These requests are "reasonably expected to yield information relevant to the allegations in the complaint" because Rambus disclosed this proprietary technology to several DRAM manufacturers, including Mitsubishi's parent, pursuant to non-disclosure agreements. *See* Gates Decl. Ex. C. Mitsubishi's evaluation of Rambus's disclosed technology thus goes to the issue of whether Mitsubishi was aware of the potential that Rambus could obtain patent claims covering technologies incorporated into the JEDEC standards, i.e., whether Rambus's alleged failure to disclose was material.



*Aluminum*, 1976 FTC LEXIS 68 at \*8 (rejecting motion to limit 10-year time period covered by subpoena requests because of need for evidence on long-term trends in industry).

In sum, Mitsubishi's assertion that the subpoena seeks documents that are not relevant to this proceeding has no merit.

**C. Mitsubishi's Purely Conclusory Claims of Burden Are Insufficient**

Mitsubishi also argues that the subpoena should be limited because it would be overly burdensome to respond to it. In its motion, however, Mitsubishi fails to set forth any concrete facts supporting its assertion. Moreover, Mitsubishi fails to concede that during meetings of counsel, Rambus made a number of proposals to limit the burden of the subpoena requests. Both of these facts militate against Mitsubishi's burdensomeness argument.

“[T]he public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on their defense) be given the opportunity to develop those facts which are essential” to support or undermine the allegations in the pleadings. *In re General Foods Corp.*, Dkt. No. 9085 C, 1978 FTC LEXIS 412 at \*6 (April 18, 1978). Because of this, to support its request to limit the subpoena, Mitsubishi bears the burden to show that compliance would seriously disrupt its business operations:

The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

*F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). The burden is no less for a non-party. See *In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at \*14 (Mar. 19, 1982).

Mitsubishi, therefore, must put forth specific evidence that demonstrates such disruption; a “general, unsupported claim [of burden] is not persuasive.” *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*18. This is especially true where a third party like Mitsubishi is in the “very industry” that is the subject of this proceeding, participated in the JEDEC standard-setting meeting at issue in

this proceeding, stands to benefit depending on the outcome of this proceeding, and therefore has “a special stake in seeing that an informed judgment is rendered.” *In re Coca-Cola Bottling Co.*, Dkt. No. 8992, 1976 FTC LEXIS 33 at \*6 (Dec. 7, 1976) (denying motion to quash that was based on burdensomeness argument).

Mitsubishi has failed to meet its burden. Mitsubishi relies on nothing more than conclusory assertions and the declaration of its outside counsel that compliance would require “full attention” of undisclosed Mitsubishi employees and its counsel “over a period of days.” Declaration of John W. Calkins, ¶ 11. This is manifestly insufficient to support a limitation of the subpoena. As stated in *Kaiser Aluminum*, 1976 LEXIS FTC 68 at \*18, “Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a *substantial degree* of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” (Emphasis added.) As demonstrated above, the subpoena requests seek information relevant to the issues raised in the Complaint. Mitsubishi’s “evidence” of “burden” does not begin to show that compliance would “seriously hinder normal operations” of its business.

Mitsubishi’s burdensome argument is also undermined by the fact that Rambus has been willing to alleviate the burden through compromise. During hours-long negotiations between counsel for the parties, Rambus not only agreed to withdraw several requests in light of Mitsubishi’s concerns of burden, but Rambus’s counsel proposed various means by which Mitsubishi could limit the burden of compliance. Gates Decl., ¶ 4. In light of these efforts, Mitsubishi’s claims of burden cannot be used to limit the subpoena. “[A] Federal Trade Commission subpoena seeking relevant data will not be quashed on the grounds that a burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise.” *In re General Motors Corp.*, Dkt. No. 9077, 1977 FTC LEXIS 18 at \*1 (Nov. 25, 1977); *see also In re R.R. Donnelley & Sons Co.*, Dkt. No. 9243, 1991 FTC LEXIS 272 at \*2 (June 12, 1991)

(refusing to quash or limit subpoena “in light of complaint counsel’s offer to modify some of the subpoena’s specifications”).

**D. The Protective Order Addresses Mitsubishi’s Concerns Regarding Confidential and Commercially Sensitive Information and Mitsubishi Need Not Produce Privileged Documents**

Mitsubishi also complains that the subpoena seeks documents that may contain commercially sensitive and privileged information. The protective order entered in this matter answers the former concern and the rules the latter. Despite the fact that the protective order was attached to the subpoena (and is in fact attached to Mitsubishi’s motion), Mitsubishi never takes issue with the terms of that order. Nor does Mitsubishi refer to 16 C.F.R. § 3.38A, which allows Mitsubishi to withhold privileged documents if it provides a privilege log. Instead, Mitsubishi simply asserts that production would “diminish the value” of its undefined trade secrets and that “to prepare a privilege log would impose an onerous burden.” Mitsubishi Br. at 17. In support of its position, Mitsubishi again turns to Federal Rules of Civil Procedure 45 to argue that Rambus must show “substantial need.”

Contrary to Mitsubishi’s position, “it is clear that relevant confidential business information may properly be called for in subpoenas issued in Commission proceedings.” *Coca-Cola Bottling*, 1976 FTC LEXIS 33 at \*3-4. Thus, “[t]he fact that information sought by a subpoena may be confidential does not excuse compliance.” *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*9. Moreover, in direct contrast to Mitsubishi’s “substantial need” argument, under the Commission’s Rules of Practice “a showing of general relevance is sufficient to justify production of documents containing confidential business information and no further showing of ‘need’ is necessary.” *Id.* at \*10-11; *see also In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at \* 8 (Mar. 19, 1982) (same).

In any event, the protective order entered in this case ameliorates Mitsubishi’s concerns. “[P]rotective orders are routinely issued” to prevent the type of misuse of confidential information that Mitsubishi posits. *Coca-Cola Bottling*, 1976 FTC LEXIS 33 at \*4. Mitsubishi

has pointed to nothing that would undermine the necessary assumption that “the protective order will work.” *Id.* Mitsubishi does nothing more than cavalierly assert that disclosure to “Rambus’s agents and industry experts would diminish the value of [its] trade secrets.” Mitsubishi Br. at 17. But this very type of argument has been rejected in light of the entry of a protective order. *See Coca-Cola Bottling*, 1976 FTC LEXIS 33 at \*4-5 (rejecting argument that industry experts should not receive competitively sensitive information subject to protective order). The fact that Mitsubishi is a third party does not diminish these principles, especially in light of the need for Rambus to obtain the sought-after information for its defense and “the public interest in seeking the truth in every litigated case.” *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*15.

Mitsubishi’s additional argument that the subpoena seeks privileged information is addressed by 16 C.F.R. § 3.38A, which expressly permits Mitsubishi to withhold privileged documents. It appears, however, that Mitsubishi’s real complaint is that it will have to produce a privilege log. Mitsubishi Br. at 17. In other words, Mitsubishi seeks license to withhold documents on privilege grounds without producing the information required by 16 C.F.R. § 3.38A, which is the only way that Rambus or Your Honor could possibly know whether or not Mitsubishi has complied with the subpoena. This request should be dismissed out of hand.

**E. The Evidence Shows That Mitsubishi Has “Control” Over Documents Held By Its Foreign Parent Company**

While admitting that it must produce documents under its “control,” Mitsubishi claims that it need not produce files in the possession of its foreign parent company, MELCO, because Mitsubishi supposedly is “without legal right to demand documents from MELCO.” Mitsubishi Br. at 9. In making this argument, Mitsubishi simply overlooks the appropriate standard: “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.’”<sup>4</sup> *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 at \*9 (S.D.N.Y. Jan. 11, 1999) (citations omitted). The test, therefore, looks to the “nature of the relationship” between the subsidiary and its parent. *See id.*; *see also Gerling Int’l Ins. Co. v. Commissioner of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988) (“Where the relationship is thus such that the agent-subsiary can secure documents of the principal-parent to meet its own business needs . . . the courts will not permit the agent-subsiary to deny control for purposes of discovery by an opposing party”); *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 a number of 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). For example, in *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984), the domestic subsidiary sold and serviced airplanes manufactured by its British parent company; “Essentially defendant is the distributor and servicer in the United States of the British affiliate’s planes.” 102 F.R.D. at 919. The plaintiffs sought certain documents, “mostly service manuals and blueprints,” which the U.S. subsidiary claimed were held by its foreign parent. 102 F.R.D. at 919. The court held that the subsidiary had custody and control of the documents because the “documents plaintiff seeks all relate to the planes that defendant works with every day; it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business.” *Id.*

Here, the evidence establishes that Mitsubishi and MELCO worked closely together on issues relevant in this proceeding and for which documents are sought by the

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<sup>4</sup> This standard of “control” applies to third parties as well to parties. *Addamax Corp. v. Open Software Foundation, Inc.*, 148 F.R.D. 462, 468 (D. Mass. 1993).

subpoena. First, Mitsubishi is a wholly-owned subsidiary of MELCO and serves as the U.S. distributor of DRAM chips manufactured by its parent, MELCO. Gates Decl., ¶ 3. Like the U.S. subsidiary in *Cooper Industries*, it is “inconceivable” that Mitsubishi would not have access in the ordinary course of business to documents related to the DRAM chips it sells. *See also Alcan Int’l Ltd. v. S.A. Day Mfg. Co.*, 176 F.R.D. 75, 79 (W.D.N.Y. 1996) (finding that domestic distributor of foreign parent’s product had control of foreign parent’s documents).

Second, the evidence makes it clear that Mitsubishi and MELCO employees worked together and exchanged documents in connection with industry standard setting efforts at JEDEC and another DRAM-related industry consortium, SLDRAM, Inc. Each company sent representatives to meetings of these organizations, Gates Decl., ¶¶ 7,9,<sup>5</sup> and those representatives exchanged documents concerning these meetings. *Id.*, ¶¶ 8,10. Rambus’s subpoena seeks documents concerning both JEDEC and SLDRAM, Inc., and the evidence clearly indicates that Mitsubishi has “the ability to obtain” such documents from MELCO in the ordinary course of business. *See Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 464, 467 (D. Mass. 1993) (finding that domestic subsidiary served as an agent for its foreign parent with respect to participation in an industry standard-setting body despite having its own “officers, directors, employees, budget and physical facilities”).

Third, the evidence shows that Mitsubishi was involved in licensing from Rambus the intellectual property that is at issue in this case. *See* Complaint, ¶ 93 (alleging that Mitsubishi Electronics America, Inc. (Mitsubishi’s predecessor) licensed from Rambus). During the negotiations between Rambus and the Mitsubishi companies, representatives from both the Japanese parent company *and* the Mitsubishi domestic subsidiary were involved. Declaration of David Mooring, ¶ 2. This also demonstrates that Mitsubishi has “control” over documents at

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<sup>5</sup> Some of the documents attached to the Gates Declaration were produced by other third parties pursuant to the protective order in this case. Under that order, only documents that were transmitted from or to Mitsubishi personnel may be disclosed to Mitsubishi. Therefore, Exhibit D to the Gates Declaration, an attendance list, has been withheld from Mitsubishi's counsel.

MELCO. See *Camden Iron & Metal*, 138 F.R.D. at 443 (finding control where both foreign parent company and U.S. subsidiary were involved in negotiations with party issuing subpoena).

Given this evidence, Mitsubishi cannot claim that it does not have “control” over documents held by MELCO. Mitsubishi should therefore be compelled to produce such documents.

**F. Mitsubishi Is Not Entitled To Reimbursement**

Without citing a single Commission Rule of Practice or a single FTC authority, Mitsubishi argues that it is entitled to reimbursement for its costs of complying with the subpoena. Instead of seeking support from these sources, Mitsubishi returns to Federal Rule of Civil Procedure 45, which *explicitly* allows for reimbursement for compliance. In contrast, reimbursement of costs in FTC adjudicative proceedings is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be “unreasonable” or “extraordinary.” See *In re International Tel. & Tel. Corp.*, 97 FTC 202, 1981 LEXIS 75 at \*3 (March 13, 1981); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268 at \*1 (June 6, 1991) (holding that subpoenaed party “can be required to bear reasonable costs of compliance with the subpoena”). Mitsubishi – one of the world’s largest companies – has made no such showing in this case.

Even if Mitsubishi were to make such a showing, reimbursement would be limited to the cost of copying because it is a participant in the DRAM industry: “Even where costs are awarded to a non-party, where the non-party is in the industry in which the alleged acts occurred and the non-party has interest in the litigation and would be affected by the judgment, only the cost of copying, and no other costs of the search, need be reimbursed.” *Flowers Industries*, 1982 FTC LEXIS 96 at \*16; see also *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*20-21 (“Where the public interest is involved, however, and where the nonparty is in the industry in which alleged acts occurred, the nonparty has an interest in the litigation and would be affected by the judgment. There, only the cost of copying need be reimbursed.”). Here, however,

Mitsubishi has not overcome the *threshold* requirement that it show that the cost of compliance would be extraordinary. Accordingly, Mitsubishi's request should be denied.

**III.**  
**CONCLUSION**

Rambus respectfully submits that Mitsubishi's motion to quash or otherwise limit Rambus's subpoena should be denied. The Court should issue an order requiring Mitsubishi to comply with the subpoena and to produce its responsive documents and those held by MELCO forthwith.

Respectfully submitted,

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Gregory P. Stone  
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Counsel for Respondent Rambus Inc

November 12, 2002

\* Admitted in MA and NY only



**DECLARATION OF DAVID MOORING**

I, David Mooring, declare as follows:

1. I am the President of Rambus Inc. ("Rambus"). The contents of this declaration are within my personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. In 1997, I participated on behalf of Rambus in licensing negotiations with Mitsubishi Electric Company ("MELCO"). Negotiating on behalf of MELCO were representatives from MELCO as well as Michael S. Bocian, Senior Vice President of MELCO's U.S. subsidiary, Mitsubishi Electronics America, Inc.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this \_\_\_ day of November, 2002, at Los Altos, California.

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David Mooring

## DECLARATION OF SEAN P. GATES

I, Sean P. Gates, declare as follows:

1. I am an associate at Munger, Tolles & Olson LLP, counsel of record for Rambus Inc. (“Rambus”), in *In the Matter of Rambus Incorporated*, Dkt. No. 9302. The contents of this declaration are within my personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. After I agreed with counsel for Mitsubishi Electric & Electronics USA, Inc. (“Mitsubishi”) to extend the return date for the subpoena by one week, I discussed Mitsubishi’s concerns related to the subpoena with counsel for Mitsubishi (David T. Burse and John W. Calkins) for over two hours on October 21, 2002. During that discussion, Mitsubishi’s counsel never raised the issue of improper service. At Mitsubishi’s counsel’s request, I granted Mitsubishi a second one-week extension of the return date.

3. During the negotiations, Mitsubishi’s counsel represented to me that Mitsubishi is a wholly-owned subsidiary of Mitsubishi Electric Company (“MELCO”) and serves as the U.S. distributor of DRAM chips manufactured by MELCO. Attached as Exhibit A is a print out from Dun & Bradstreet Reports that also indicates that Mitsubishi is a wholly-owned subsidiary of MELCO. This report also indicates that Mitsubishi Electric & Electronics USA, Inc. was formerly known as Mitsubishi Electronics America Inc.

4. During the negotiations between counsel for the parties, I agreed to withdraw several requests in light of Mitsubishi’s concerns of burden. I also proposed various means by which Mitsubishi could limit the burden of compliance. Mitsubishi’s counsel agreed to discuss these proposals with their client and indicated that the proposals might address their burdensomeness concerns.

5. After receiving Mitsubishi’s motion to quash, I sent a letter to Mitsubishi’s counsel requesting that, should Mitsubishi persist in its position regarding improper service of process, Mitsubishi’s counsel either accept service of another subpoena or identify the

proper recipient of such a subpoena. Attached as Exhibit B is a true and correct copy of that letter. Mitsubishi has not responded to this request.

6. Attached as Exhibit C are true and correct copies of two non-disclosure agreements entered into by Rambus and Mitsubishi's parent company. These agreements state that they were entered into in conjunction with a disclosure by Rambus of its proprietary "DRAM interface technology."

7. Attached as Exhibit D is a true and correct copy of a document that purports to be a directory of participants in SLDRAM, Inc., which on information and belief is a DRAM-related industry consortium. This directory indicates that the following Mitsubishi personnel participated in SLDRAM, Inc.: Larry Alchesky, Sam Chen, and Olivet Chou. This directory also indicates that the following MELCO personnel participated in SLDRAM, Inc.: Kazutami Arimoto, Yoshikazu Morooka, Yasunobu Nakase, Tsukasa Oishi, and Michihiro Yamada.

8. Attached as Exhibit E is a true and correct copy of an email from Olivet Chou at Mitsubishi copying Yoshikazu Morooka and Michihiro Yamada at MELCO, requesting that an SLDRAM presentation be sent to Mitsubishi.

9. Attached as Exhibit F are true and correct copies of the attendance listings from JEDEC meeting minutes that show the following attendees from Mitsubishi – Larry Alchesky, Sam Chen, and Olivet Chou – and the following attendees from MELCO –Yoshikazu Morooka and Michihiro Yamada.

10. Attached as Exhibit G is a true and correct copy of an email from Sam Chen at Mitsubishi copying Yoshikazu Morooka at MELCO, which discusses JEDEC matters and attaches JEDEC documents.

11. Attached as Exhibit H is true and correct copy of the protective order that has been entered in this proceeding. Exhibits C, D, E, and G constitute materials designated as Confidential or Restricted Confidential pursuant to the Protective Order entered in this case. Attached as Exhibit I is a list containing the name and address of the person or persons who

should be notified of the Commission's intent to disclose in a final decision any of the confidential information in those exhibits.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 7th day of November, 2002, at Los Angeles, California.

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Sean P. Gates

**PUBLIC**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

_____	)	
In the Matter of	)	
	)	Docket No. 9302
RAMBUS INCORPORATED,	)	
a corporation.	)	
_____	)	

**[PROPOSED] ORDER DENYING MOTION OF  
MITSUBISHI ELECTRIC & ELECTRONICS USA, INC. TO QUASH  
OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER**

Upon due consideration of the motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or in the Alternative for Protective Order, it is hereby ordered that the motion is DENIED.

Mitsubishi Electric & Electronics USA, Inc. is hereby ordered to comply with that subpoena within ten days of the entry of this order.

IT IS SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
James P. Timony  
Administrative Law Judge

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
)

RAMBUS INCORPORATED, )  
a corporation. )  
\_\_\_\_\_ )

Docket No. 9302

**CERTIFICATE OF SERVICE**

I, Jacqueline M. Haberer, hereby certify that on November 12, 2002, I caused a true and correct copy of the public version of *Rambus, Inc.'s Opposition to Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order* to be served by facsimile, to be followed by overnight delivery, to Bingham McCutchen LLP, counsel for Mitsubishi Electric & Electronics USA, Inc., at 1900 University Avenue, East Palo Alto, California 94303, and on the following persons by hand delivery:

Hon. James P. Timony  
Administrative Law Judge  
Federal Trade Commission  
Room H-112  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

M. Sean Royall  
Deputy Director, Bureau of Competition  
Federal Trade Commission  
Room H-378  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Donald S. Clark, Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Richard B. Dagen  
Assistant Director  
Bureau of Competition  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Room 6223  
Washington, D.C. 20580

Joseph J. Simons  
Director, Bureau of Competition  
Federal Trade Commission  
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Geoffrey D. Oliver  
Deputy Assistant Director  
Bureau of Competition  
Federal Trade Commission  
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Washington, D.C. 20580

Malcolm L. Catt  
Attorney  
Federal Trade Commissions  
Room 3035  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

\_\_\_\_\_  
Jacqueline M. Haberer