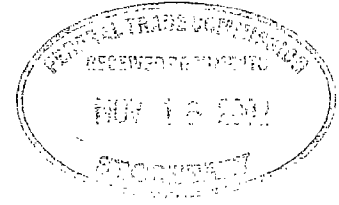


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of  
RAMBUS INCORPORATED,  
a corporation.

Docket No. 9302

**OPINION SUPPORTING ORDER DENYING MOTION OF  
MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.  
TO QUASH OR NARROW SUBPOENA**

On October 30, 2002, non-party Mitsubishi Electric & Electronics USA, Inc. (“Mitsubishi”) filed a motion seeking to quash or limit a subpoena served on it by Respondent Rambus, Inc. (“Rambus”). Respondent filed its opposition to that motion on November 8, 2002. By order dated November 12, 2002, Mitsubishi’s motion to quash or limit the subpoena was denied. Set forth below is the opinion supporting the November 12, 2002 order.

The Complaint alleges that Rambus has monopolized or attempted to monopolize certain markets for technology related to dynamic random access memory (DRAM); that Rambus participated in an industry standard-setting body called Joint Electron Device Engineering Counsel (“JEDEC”); 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; 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; that JEDEC members were unaware of the possibility that Rambus might obtain patents on technologies being incorporated in the JEDEC standard; that if members had been aware of this possibility, they would have incorporated alternative technologies into the relevant standards; and 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.

Rambus's subpoena seeks documents pertinent to the issues raised by these allegations. Mitsubishi is a member of JEDEC 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"). Mitsubishi and MELCO representatives regularly attended JEDEC meetings and meetings that involved certain JEDEC members, and exchanged documents related to those meetings. They were involved in licensing negotiations with Rambus.

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.

### **Subpoena Service**

The subpoena was served on Mitsubishi's statutory agent for process, CT Corporation (CT"), located in Chicago, Illinois. CT Corporation promptly notified Mitsubishi of this subpoena. These facts are enough. *Doula v. United Technologies Corp.*, 759 F. Supp. 1377, 1383 (D. Minn. 1991). 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. The cases upon which Mitsubishi relies stand for 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. *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982); *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623

(5th Cir. 1973). 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. *Ariel*, 693 F.2d at 1060. The Commission, however, has 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; *F.T.C. v. Browning*, 435 F.2d 96, 104 (D.C. Cir. 1970). Rambus’s subpoena is not subject to the territorial limitations at issue in the case law cited by Mitsubishi. *Browning*, 435 F.2d at 104. In addition, Mitsubishi failed to meet and confer on this issue. 16 C.F.R. § 3.22(f).

### **Rambus Seeks Documents Reasonably Expected to Yield Relevant Information**

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.*, 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.

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 issues: (1) Mitsubishi’s participation in JEDEC and its understandings of the JEDEC patent policies (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 (Requests 7, 10-12); (3) technology disclosed to Mitsubishi by Rambus pursuant to a non-disclosure agreement (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 (Requests 34-44, 49); and (5) the factors driving DRAM pricing (Requests 51-63).

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. Complaint at ¶¶ 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. Complaint at ¶¶ 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.* at ¶ 21. 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 relevant. (Requests 13, 15-33, 47-48, 50).

Rambus's subpoena also seeks documents related to 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. The subpoena requests documents that are relevant to these issues, *viz.*, documents related to Mitsubishi's evaluation of the scope of Rambus's intellectual property rights and its evaluation of any purported alternatives to the technologies embodied in those rights (Requests 7, 10-12).

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. Complaint at ¶¶ 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 (Requests 34-44, 49) and the factors driving DRAM pricing (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. The Complaint alleges that JEDEC began work on one of the relevant standards "in or around 1990," Complaint at ¶ 26, that Rambus joined JEDEC in 1991, *id.* at ¶ 40, that Rambus breached its duty of disclosure during its tenure at JEDEC (which ended in 1996 according to the Complaint), *id.* at ¶ 77, that the scope of that disclosure duty remained unchanged and was "commonly known" throughout the 1990's and to date, *id.* at ¶ 21, that the relevant JEDEC standards were adopted in 1993 and 1999, *id.* at ¶¶ 89-90, that the DRAM industry started manufacturing JEDEC standard-compliant parts in 1995, *id.* at ¶¶ 89-90, and that Rambus's conduct has and will in the future cause competitive harm, *id.* at ¶ 3. Documents created between 1991 and the present are likely to have information relevant to the allegations in the Complaint. *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*8.

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

### **Mitsubishi's Claims of Burden**

Mitsubishi argues that the subpoena should be limited because it would be overly burdensome to respond to it. Mitsubishi fails to set forth any concrete facts supporting its assertion. Moreover, Rambus proposed to limit the burden of the subpoena requests.

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. Breadth 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. *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.

Mitsubishi has failed to meet its burden. Mitsubishi relies on 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 at ¶ 11. This is insufficient to support a limitation of the subpoena. *Kaiser Aluminum*, 1976 LEXIS FTC 68 at \*18.

Mitsubishi’s burdensome argument is also undermined by the fact that Rambus has been willing to alleviate the burden through compromise. Declaration of Sean P. Gates at ¶ 4. In light of these efforts, Mitsubishi’s claims of burden cannot be used to limit the subpoena. *In re General Motors Corp.*, 1977 FTC LEXIS 18 at \*1 (Nov. 25, 1977); *R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 272 at \*2 (June 12, 1991).

### **The Protective Order**

Mitsubishi states that the subpoena seeks documents that may contain commercially sensitive and privileged information. The protective order entered in this matter answers the concern. Further, 16 C.F.R. § 3.38A allows Mitsubishi to withhold privileged documents if it

provides a privilege log.

“The fact that information sought by a subpoena may be confidential does not excuse compliance.” *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*9. Moreover, 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; *In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at \* 8 (Mar. 19, 1982).

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. 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.

Commission Rule 16 C.F.R. § 3.38A, permits Mitsubishi to withhold privileged documents, but it will have to produce a privilege log. 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 one could know whether or not Mitsubishi has complied with the subpoena. This request is dismissed.

### **“Control” Over Documents Held by Foreign Parent Company**

Mitsubishi argues that it need not produce files in the possession of its foreign parent company, MELCO, because Mitsubishi is “without legal right to demand documents from MELCO.” “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>1</sup> *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 its 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).

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 subpoena. 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. at ¶ 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. *Alcan Int'l Ltd. v. S.A. Day Mfg. Co.*, 176 F.R.D. 75, 79 (W.D.N.Y. 1996).

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. at ¶¶ 7, 9, and those representatives exchanged documents concerning

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<sup>1</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).



these meetings. *Id.* at ¶¶ 8,10. Rambus's subpoena seeks documents concerning both JEDEC and SDRAM, Inc., and the evidence clearly indicates that Mitsubishi has "the ability to obtain" such documents from MELCO in the ordinary course of business. *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 464, 467 (D. Mass. 1993).

Mitsubishi was involved in licensing from Rambus the intellectual property that is at issue in this case. 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 at ¶ 2. This also demonstrates that Mitsubishi has "control" over documents at MELCO. *Camden Iron & Metal*, 138 F.R.D. at 443. Mitsubishi cannot claim that it does not have "control" over documents held by MELCO.

### **Costs**

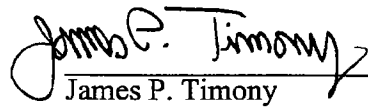
Mitsubishi argues that it is entitled to reimbursement for its costs of complying with the subpoena. Mitsubishi cites the Federal Rule of Civil Procedure 45, which allows for reimbursement for compliance. In contrast, reimbursement of costs in FTC adjudicative proceedings is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be "unreasonable" or "extraordinary." *In re International Tel. & Tel. Corp.*, 97 F.T.C. 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). Mitsubishi has made no such showing.

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; *Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*20-21.

**CONCLUSION**

In accordance with the Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or in the Alternative for Protective Order, issued on November 12, 2002, Mitsubishi's motion to quash or otherwise limit Rambus's subpoena is denied.

SO ORDERED:

  
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James P. Timony  
Administrative Law Judge

Date: November 18, 2002