

**PUBLIC**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMM9.55 TD /F0ON 0 TD52 Tc 0 Tw ( ) Tj -2

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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 manuf

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**II.**  
**ARGUMENT**

**A. The Subpoena Was Properly Served**



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

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*



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

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*

(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**

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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-*

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

Id . . . , C o . . .

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**









proper recipient of such a subpoena. Attached as Exhibit B is a true and correct copy of that

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

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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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: \_\_\_\_\_

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James P. Timony  
Administrative Law Judge

UNITED STATES OF AMERICA