

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 NON-PARTY MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.'S  
10 INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO QUASH  
11 SUBPOENA OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER

12 I. REQUEST FOR COMMISSION REVIEW

13 Pursuant to Rule 3.23(b) of the Rules of Practice for Adjudicative Proceedings  
14 before the United States Federal Trade Commission (“FTC Rules of Practice”), non-party  
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1 responsive documents held by its foreign parent on the grounds that the non-party controlled  
2 these documents because it had “access to the documents” and the “ability to obtain the  
3 documents.” *Addamax*, 148 F.R.D. at 467 (citing *Cooper Industries, Inc. v. British Aerospace,*  
4 *Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *M.L.C. Inc. v. North American Phillips Corp.*, 109 F.R.D.  
5 134 (S.D.N.Y. 1986); and *Camden Iron and Metal, Inc. v. Marubeni American Phillips Corp.*,  
6 138 F.R.D. 438 (D.N.J. 1991)).

7           While MEUS concedes that *Addamax* is on point regarding the issue of whether a  
8 non-party must produce documents from its foreign parent under a subpoena *duces tecum*,  
9 MEUS respectfully points out that Rambus cited no federal circuit court of appeal which adopted  
10 the expanded definition of control found in *Addamax*. Nor can MEUS find one. On the  
11 contrary, circuit courts have continued to apply the traditional interpretation of control which is  
12 the “legal right” to obtain the documents. *See Citric Acid*, 191 F.3d at 1107; *Cochran*  
13 *Consulting*, 102 F.3d at 1229-1230; *Bankers Trust*, 61 F.3d at 469.

14           Given the conflict in authorities, -- i.e., the *Addamax* district court on the one  
15 hand, and the various federal circuit courts of appeal cited above on the other hand --, regarding  
16 the definition of “control” and the resulting impact on the discovery process, the order clearly  
17 involves a controlling question of law as to which there is substantial ground for difference of  
18 opinion.

### 19     **III.     CONTROLLING ISSUE OF POLICY**

1 motion filed in accordance with the provisions of § 3.22(a).” 16 C.F.R. § 3.36(a). Under the  
2 same rule, the party moving for such a subpoena must make four specific showings, including  
3 establishing its “good faith belief that the discovery requested would be permitted by treaty, law,  
4 custom or practice in the country from which the discovery is sought and that any additional  
5 procedural requirements have been or will be met before the subpoena is served.” 16 C.F.R.  
6 § 3.36(b)(4). Here, Rambus has not made this showing vis-à-vis MELCO, a Japanese  
7 corporation. Instead, Rambus seeks to circumvent these procedural safeguards by serving a  
8 subpoena on MEUS in the United States commanding production of documents not only from  
9 MEUS, but also from “its subsidiaries and *parent companies* and each of their officers,  
10 employees, directors, predecessors, successors, and assigns.” Subpoena at 1, ¶ 5 (emphasis  
11 added).

12           If the order denying relief to MEUS is allowed to stand without clarification as to  
13 whether it extends to MELCO, it would eviscerate the purpose of Rule 3.36 by permitting  
14 unfettered access to foreign records of a non-party simply by subpoenaing a domestic non-party  
15 affiliate or subsidiary. The policy implications for this ruling are considerable; indeed, other  
16 courts have rejected subpoenas served on non-party domestic subsidiaries which requested  
17 documents from foreign affiliates because the subpoenaing party did not use proper channels of  
18 discovery. *See Lakar Airways Ltd. v. Pan American World Airways, et al.*, 607 F. Supp. 324,  
19 326 (S.D.N.Y. 1985) (granting motion to quash non-party’s subpoenas *duces tecum* on grounds  
20 that subpoenas were transparent attempt to circumvent the Hague Convention on the Taking of  
21 Evidence Abroad in Civil or Commercial Matters). The substantial ground for differences of  
22 opinion as to the meaning and import of these implications warrants review by the Commission.

23 **IV. SHOULD THE COMMISSION HEAR THIS INTERLOCUTORY**  
24 **APPEAL, IT SHOULD FIND THAT MEUS DOES NOT CONTROL**  
25 **DOCUMENTS HELD BY MELCO**

26           *Addamax* is the only case upon which Rambus can rest its argument that MEUS

1 “controls” documents held by MELCO. All other cases cited by Rambus in support of this  
2 proposition are legally and factually distinguishable. *Hunter Douglas, Inc. v. Comfortex Corp.*,  
3 1999 U.S. Dist. LEXIS 101(S.D.N.Y. 1999), is distinguishable because the subpoenaed non

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1 single case in which a court of appeal adopted the holdings of cases primarily relied upon in  
2 *Addamax -- Camden, Cooper, or M.L.C.*). On the contrary, the prevailing meaning of “control”  
3 in most courts of appeal remains the “legal right to obtain the documents.” *See Gerling*, 839  
4 F.2d at 140-41; *Cochran Consulting*, 102 F.3d at 1229-30; *Chaveriat*, 11 F.3d at 1426; *Citric*  
5 *Acid*, 191 F.3d at 1107; *Searock*, 736 F.2d at 653. The reason for this is obvious. If a domestic  
6 subsidiary has no legal right to obtain documents from a foreign parent, and that parent refused  
7 to provide documents in the face of a subpoena issued to the subsidiary, then the domestic  
8 subsidiary could face punitive legal sanctions for failing to obtain documents which it has no  
9 legal ability to procure.

10                   Rambus bears the burden of demonstrating that MEUS had control over all  
11 requested documents. *Addamax*, 148 F.R.D. at 465, n. 3. Rambus has not met this burden.  
12 Instead it relies upon allegations that MELCO and MEUS personnel have exchanged documents  
13 in the past, attended the same conferences, and participated in negotiations together. These  
14 allegations do not demonstrate the existence of a legal right on MEUS’s behalf to obtain  
15 documents from MELCO. *See Citric Acid*, 191 F.3d at 1107-1108 (denying motion to compel  
16 because subpoenae

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1 V. CONCLUSION

2 For the foregoing reasons, MEUS respectfully requests that the Administrative  
3 Law Judge grant the MEUS's request for review by the Commission of the Administrative Law  
4 Judge's order as it pertains to the documents in the possession, custody, and control of MELCO.

5 DATED: November 18, 2002

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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 Interlocutory Appeal of Order Denying Motion to Quash Subpoena or in  
4 the Alternative for Protective Order were served by fax on November 18, 2002 to Sean Gates of  
5 Munger, Tolles & Olson, LLP, counsel for Rambus Incorporated, at 355 South Grand Avenue,  
6 35<sup>th</sup> Floor, Los Angeles, California 90017 and by overnight delivery to:

7 The Honorable James P. Timony  
8 600 Pennsylvania Avenue  
9 Federal Trade Commission  
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