

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**ORDER ON RESPONDENT’S OBJECTIONS TO THE
DEPOSITION TESTIMONY OF DR. K.H. OH**

On May 9, 2003, Respondent submitted a memorandum in support of its objections to Complaint Counsel’s proposed deposition testimony of Dr. K.H. Oh, a former Hynix executive. Respondent’s objections were in response to Complaint Counsel’s stated intention of playing a videotape of that testimony. Respondent argues that Dr. Oh’s testimony should be excluded under Commission Rule of Practice 3.43(b) which provides that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded.”

Respondent asserts that the bulk of the testimony consists of Dr. Oh testifying about the content of documents that he did not prepare and which he had never seen prior to preparing his deposition. Specifically, Respondent states that the remaining testimony is based on a chart prepared by Dr. Oh’s counsel that was not based on Dr. Oh’s recollections or personal knowledge. As a consequence, Respondent submits that Dr. Oh’s deposition testimony about the meaning of documents is not sufficiently reliable to be admissible.

On May 12, 2003, Complaint Counsel filed its Opposition to Rambus Inc.’s Request to Exclude the Deposition Testimony of Dr. Oh arguing that the testimony sought to be excluded by Respondent is highly probative and reliable testimony which should be admitted under Rule 3.43(b). Complaint Counsel asserts that Dr. Oh is a prominent engineering professor and former Hyundai executive who resides in Korea and is unavailable to testify live at this proceeding. Moreover, Complaint Counsel submits that even if the Court were to entertain any of the objections raised by Respondent the appropriate solution would not be the draconian approach urged by Respondent of wholesale exclusion of large amounts of testimony, but rather to consider such issues when evaluating the weight to be attached to the testimony in question. Complaint Counsel suggests that Dr. Oh should be heard as he has extensive experience in the DRAM industry and brings an important perspective to this proceeding.

Specifically, Complaint Counsel asserts that Respondent's objections are limited to specific questions and answers and do not encompass Dr. Oh's entire testimony; that substantial portions of Dr. Oh's testimony are unrelated to Respondent's objections; that Dr. Oh's testimony is reliable because he answered questions based on his own general knowledge, stemming from years of experience in the DRAM industry; that Dr. Oh was very knowledgeable about the documents used in his deposition; and that the chart Dr. Oh used to refresh his recollection was compiled from other documents produced by Hyundai and was utilized in only a few questions. Finally, Complaint Counsel argues that the Court should overrule Respondent's objections regarding leading questions as such are appropriate to help structure the testimony of a foreign witness.

At the direction of the Court, on May 14, 2003, Respondent filed a Supplemental Memorandum in Support of its Objections which included various attachments containing specific line and page objections to the testimony of Dr. Oh.

Attachment A to Respondent's supplemental memorandum lists the designated deposition excerpts to which Respondent will not object should Complaint Counsel make a sufficient showing of Dr. Oh's unavailability. Attachment B lists all the designated deposition excerpts to which Respondent objects on the grounds that Dr. Oh was neither the author nor a recipient of the document that is the subject of the testimony in question and had, in fact, not seen the document prior to preparing for his deposition. Attachment C lists all deposition excerpts designated by Complaint Counsel to which Respondent objects on the grounds that Dr. Oh did not recall the timing of Hyundai products but relied on a timeline prepared by his counsel. Attachment D lists all deposition excerpts designated by Complaint Counsel to which Respondent objects on other grounds.

Complaint Counsel filed a response to Respondent's supplemental memorandum on June 2, 2003, asserting that Respondent has failed to sustain its burden of showing that the testimony of Dr. No is irrelevant, immaterial or unreliable, such that it should be excluded entirely from the record pursuant to Section 3.43(b)(1) of the Commission's Rules of Practice.

DISCUSSION

The fundamental standard for admissibility of evidence in FTC administrative proceedings is set forth in Rule of Practice 3.43(b)(1), which provides: "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded ." To determine whether evidence is reliable, the Court must look to the Federal Rules of Evidence, particularly Rules 801(c) and 802 which provides that hearsay is not admissible unless it meets one of the well-established hearsay exceptions contained in Rule 803.

Rule 701 of the Federal Rules of Evidence further provides that a witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the

witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702". The 2000 Amendments provide that Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of "proffering an expert in lay witness clothing". The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*.

Rule 602 further states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. Based on these standards, the Court will address the specific objections to the designations at issue as set forth by Respondent as follows:

Attachment B

Page and Line	Respondent's Objection	Ruling
39:13-21	Lack of Foundation (Had Not Seen Document) Irrelevant [Exhibit 2]	Overruled
41:9-43:15		Sustained
45:4-46:4		Overruled
47:11-48:20		Overruled
51:4-52:5		Sustained
53:10-54:13		Overruled
55:2-56:14		Overruled
125:3-5, 17-24	Lack of Foundation (Had Not Seen Document) [Exhibit 7] Admitted into Evidence as CX 2294	Overruled
127:3-129:9		Overruled
131:3-135:4		Sustained
135:23-136:8	Lack of Foundation (Had Not Seen Document) [Exhibit 8] Admitted Into Evidence as CX 2287	Overruled
136:20-138:4		Overruled
138:22-139:16		Sustained
140:2-141:22		Overruled
142:5-143:4		Overruled
144:7-147:2		Sustained
148:25-149:1	Lack of Foundation (Had Not Seen Document) [Exhibit 8] Admitted Into Evidence as CX 2287	Overruled
149:19-150:24		Overruled
150:25-152:24		Sustained
154:10-155:5		Overruled
157:11-159:13	Lack of Foundation (Had Not Seen Document) [Exhibit 8] Admitted Into Evidence as CX 2287	Overruled
159:23-160:13		Overruled

160:14-160:25		Sustained
161:1-4	Lack of Foundation	Sustained
161:17-22	(Had Not Seen Document)	Sustained
163:7-18	[Exhibit 9]	Sustained
165:11-167:7	Admitted into Evidence as	Sustained
	CX 2263	
170:5-17	Lack of Foundation	Sustained
172:15-173:7	(Had Not Seen Document)	Sustained
173:8-173:23	[Exhibit 10]	Overruled
174:3-176:25	Admitted Into Evidence as	Sustained
177:20-178:13	CX 2264	Sustained
183:21-24	Lack of Foundation	Overruled
184:13-190:12	(Had Not Seen Document)	Sustained
	[Exhibit 12]	
	Admitted Into Evidence as	
	CX 2303	
198:20-23	Lack of Foundation	Overruled
	(Had Not Seen Document)	
203:21-205:1	[Exhibit 13]	Overruled
	Admitted Into Evidence as	
	CX 2306	
211:5-17	Lack of Foundation	Overruled
211:25-215:2	(Had Not Seen Document)	Sustained
215:11-221:15	[Exhibit 14]	Sustained
222:17-226:25	Admitted Into Evidence As	Sustained
	CX 2334	

Attachment C

37:9-39:1	Witness Consulted Timeline	Sustained
	Prepared By Counsel. No	

Foundation For Testimony

