

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

RAMBUS'S MEMORANDUM IN SUPPORT OF ITS OBJECTIONS TO THE
DEPOSITION TESTIMONY OF DR. K.H. OH

Respondent Rambus Inc. ("Rambus") respectfully submits this memorandum in support of its objections to the deposition testimony of Dr. K.H. Oh.

I. INTRODUCTION

Complaint Counsel have designated several hours of the deposition testimony of Dr. K.H. Oh, a former Hynix executive, and have stated their intention to begin playing a videotape of that testimony as early as next Monday, May 12. 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 for his deposition. A substantial portion of the remaining testimony is based on a chart prepared by Dr. Oh's counsel that was *not* based on Dr. Oh's recollections. As a consequence, Dr. Oh's deposition testimony is not sufficiently reliable to be admissible.

II. ARGUMENT

Commission Rule of Practice 3.43(b) provides that “[i]rrelevant, immaterial, and unreliable evidence shall be excluded.” Moreover, “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Id. Dr. Oh’s testimony should be excluded under Rule 3.43(b).

A. Dr. Oh Testified About the Meaning of Documents of Which He Had No Personal Knowledge.

The bulk of Dr. Oh’s testimony relates to documents that he could not recall having seen prior to preparation for his deposition. Indeed, with the exception of four documents – three related to Hynix’s license agreement with Rambus and a JEDEC trip report received by Dr. Oh – *all* of the documents marked as exhibits at Dr. Oh deposition fall into this category.¹ If Dr. Oh were testifying in person, Rambus would be able to object to the lack of foundation for Dr. Oh’s testimony regarding the contents and meaning of documents unfamiliar to him. Consistent with Your Honor’s prior rulings in this matter, Rambus expects that such objections would be sustained. For example, during the testimony of former Intel employee Sam Calvin on Tuesday, May 6, the following exchange occurred:

Q. Does this chart accurately reflect your understanding of the progression of CPU performance and DRAM performance as it was understood at this time?

¹ In particular, Dr. Oh could not recall having seen Exhibits 2, 4, 7, 8, 9, 10, 11, 12, 13, 14 prior to preparing for his deposition. *See* Oh Depo. at 248:18 – 249:23; 328:4 - 336:9. The cited pages of Dr. Oh’s deposition transcript are attached hereto.

MR. SWINDELL: Your Honor, I'm going to object. There's no foundation that this particular chart, Mr. Calvin has generally indicated that he has seen similar charts to this, but nothing specific to this chart.

JUDGE McGUIRE: Can you answer that question, Mr. Calvin, either yes or no?

THE WITNESS: Yes. Well, I have not seen this specific chart. One of the issues is –

JUDGE McGUIRE: But before I rule on the objection, if you can answer it no, that it does not depict it, then I don't think there's any need for me to rule. If you can't answer it yes or no, then I am going to uphold the objection.

THE WITNESS: No, I have not seen this specific chart.

JUDGE McGUIRE: All right, then that is sustained, please restate, Counsel.

Hearing Tr., Vol. V, at 1055:21 – 1056:15.

In contrast, Complaint Counsel elicited deposition testimony from Dr. Oh regarding documents with which he was not personally familiar. On cross-examination, Rambus's counsel established the lack of foundation for the earlier testimony. For example, Exhibit 13 to the Oh deposition appears to be an e-mail from a Hyundai employee named D.K. Park to an IBM employee named G. Tressler. Oh Depo. at 198:24 – 199:8. Although Dr. Oh testified on direct examination that he “recognize[d]” the document, *id.* at 199:10-11, on cross-examination he explained that he had meant only that he recognized the document as an e-mail exchange, but had not actually seen it before the deposition. *Id.* at 249:3 – 250:4. Complaint Counsel nevertheless have designated testimony in which Dr. Oh speculates about the meaning of terms in the e-mail from Mr. Park to Mr. Tressler, such as

the following exchange:

Q. Okay. If I could continue reading in this e-mail, the next sentence reads, “Our 256M DDR SDRAM ES & CS schedule is the same as you know, but design tape-out will be end of this year.”

Do you see that sentence?

A. Yes.

Q. Now, the reference to “ES” and “CS,” are those the same references that we saw in other documents yesterday?

A. Yes. Stands for engineering sample and commercial sample.

Oh Depo. at 203:21 – 204:6.

Much of the rest of Dr. Oh’s designated testimony similarly calls on him to speculate regarding the content of documents with which he is not personally familiar. *See, e.g.*, Oh Depo. at 51:4-8 (with regard to Exhibit 2: “Q. Okay. If I could direct your attention to the next page, . . ., it says ‘64MJ/D SDRAM (80 percent).’ What does that refer to?”); *id.* at 132:11-15 (with regard to Exhibit 7: “Q. If I could direct your attention to the -- the second line, states ‘IBM: PC Server application from 1999. Main Storage,’ and then there’s some numbers, ‘from 2001.’ Can you please explain what that means?”); *id.* at 212:16-17 (with regard to exhibit 14 “Q. Okay. So what does the full title mean, “PC100/133 to PC266 Migration Path.”)

Dr. Oh’s speculation regarding documents that he did not prepare and which he had not even seen prior to preparing for his deposition should be excluded as irrelevant and unreliable. To the extent that Your Honor finds any minimal probative value in such testimony, it is plainly outweighed by its potentially misleading nature – since Dr. Oh

could easily be mistaken in his testimony about unfamiliar documents – and the undue delay that hours of such testimony would entail.

B. Much of Dr. Oh's Testimony Was Based Not On His Recollection, But on Charts Prepared by Hynix's Counsel.

Even when Dr. Oh was not testifying about unfamiliar documents, his testimony is not sufficiently reliable to assist the trier of fact, because it is based not on his recollections but on summaries prepared by his counsel. For example, Complaint Counsel has designated testimony in which Dr. Oh testifies regarding the timing of the development of Hyundai's memory products even though the record makes clear that Dr. Oh cannot recall that timing, as the following counter-designated exchange makes clear:

Q. At this time, in October of 1995, was the 256-megabit, was that just a future plan, or was that a product that was already under development?

MR. NISSLY [counsel for Hynix and the deponent]:
Let's say for the record that the witness is obviously looking at a chart which we helped him put together to remember all these dates. We're happy to make it available to counsel.

THE WITNESS: There are so many products, I don't remember all.

Oh Depo. at 52:18 – 53:1.

At various other points, the videotaped record shows the witness unable to answer questions without consulting the chart supplied by his counsel. No foundation was laid regarding the reliability of the chart; Dr. Oh's testimony based on the chart at issue would not be admitted if he were testifying in person without such a foundation, and it should not be admitted in the form of deposition testimony.

III. CONCLUSION

Dr. Oh came to this country for his deposition at Complaint Counsel's request, but Complaint Counsel now claim he is unavailable to testify in person at trial without, apparently, any attempt to procure his presence. Complaint Counsel should not be permitted to use Dr. Oh's absence to obtain the admission of deposition testimony that would be rejected as without foundation if offered live. Rambus respectfully requests that the Court enter an order excluding Dr. Oh's deposition testimony.²

² As Your Honor has noted, the excluded testimony should be preserved for purposes of appeal pursuant to Rule of Practice 3.43(g).

DATED: May 9, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter A. Detre, hereby certify that on May 9, 2003, I caused a true and correct copy of *Rambus's Memorandum in Support of Its Objections to the Deposition Testimony of Dr. K. H. Oh* to be served on the following persons by hand delivery:

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