

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
RAMBUS INC.,
a corporation.

Docket No. 9302

RESPONDENT'S MEMORANDUM REGARDING ADMISSIBILITY OF EXPERT
WITNESS REPORTS

Complaint Counsel have indicated that they intend to offer into evidence reports prepared by their retained expert witnesses. Respondent Rambus Inc. ("Rambus") submits this memorandum in support of its objection to the admission of such reports.

I. **ARGUMENT**

A. **The Contents of an Expert Report are Hearsay.**

“‘[H]earsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). A witness’s own prior, out-of court statements may be hearsay if introduced to prove the truth of the matter asserted therein. *See* McCormick on Evidence § 251 (4th ed. 1992). Under the Federal Rules of Evidence, hearsay is

inadmissible unless it falls into one of the established exceptions to the hearsay rule.¹ Fed. R. Evid. 802.

If offered by the proponent of the expert witness in lieu of or to reinforce the trial testimony of the witness, the statements included in such reports are hearsay falling under no exception to the hearsay rule. *See Ake v. General Motors Corp.*, 942 F.Supp. 869, 877-78 (W.D.N.Y. 1996) (excluding as hearsay the report of an expert because it was not a business record, or a record of events made at or near the time of the event, or a record involving the proponent's regularly conducted business, or a public record, or a prior consistent statement because it was not offered to rebut a charge of recent fabrication or improper motive, or an adoptive admission because it was not offered against the party who adopted it, or the basis for the expert's opinion because "the report is his opinion"); *see also Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2002 U.S. Dist. Lexis 7535, *19-20 (S.D.N.Y. 2003) ("The written report[] of any expert expected to testify for either the [plaintiffs] or [defendant] is hereby excluded as inadmissible hearsay."); *Herrin v. Ensco Offshore Co.*, 2002 U.S. Dist. Lexis 5744, *6-7 (E.D. La. 2002) (sustaining plaintiff's objections to defendant's proffer of two expert reports as trial exhibits on grounds of hearsay). An expert "may testify about . . . things in the report, but the report itself is inadmissible." *Ake*, 942 F.Supp. at 877-78; *see also Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994) ("Rule 702 permits the

¹ Although not strictly controlling in this proceeding, the hearsay rule and the case law construing and applying it should inform this Court's assessment of the admissibility of written expert reports in this proceeding. *See In re Herbert R. Gibson, Jr.*, 1978 FTC Lexis 375, at *2, n.1 (May 3, 1978) ("The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide to the resolution of evidentiary problems.").

admission of expert opinion *testimony* not opinions contained in documents prepared out of court.”) (citing Fed. R. Evid. 702) (emphasis in original); *Law v. National Collegiate Athletic Association*, 185 F.R.D. 324, 341-42 (D. Kan. 1999) (excluding from trial a testifying expert’s written report, and noting that “an expert’s written report is generally inadmissible”).

B. Statements in an Expert Report May Be Admitted Only for the Purpose of Impeachment.

The sole purpose for which a written expert report may be admitted at the hearing in this matter would be for impeachment of the expert on cross-examination.² *See, e.g., Fortier v. State Farm Mutual Auto Ins. Co.*, 2000 U.S. Dist. Lexis 11361, *12-13 (E.D. La. 2000) (sustaining plaintiff’s and defendant’s objections to one another’s inclusion of their own expert’s reports on their trial exhibit lists, noting that such reports “are inadmissible hearsay, unless used for impeachment”). The reports may be admissible for this purpose because such evidence of a witness’ prior, out-of-court statement introduced for the purpose of showing its contrast with the witness’ testimony in court falls outside of the definition of hearsay. *See* Fed. R. Evid. 801(c); *see also* Fed. R. Evid. 613(a), (b) (providing for the examination of a witness concerning a prior statement for the purpose of impeachment, and for the admissibility of extrinsic evidence of such a prior statement for that purpose); 28 Wright & Gold, Fed. Prac. & Proc. Evid. § 6206 (“Where

² The only circumstances under which the expert witness’s prior, out-of-court statements, oral or written, may be admissible as substantive evidence, *i.e.*, to prove the truth of the matter asserted therein, would be if (1) the statements were inconsistent with the expert’s trial testimony and were made under oath; or (2) the statements were consistent with the expert’s trial testimony and were offered to “rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” *See* Fed. R. Evid. 801(d)(1); *see also* Weinstein’s Federal Evidence § 801.21[1]. Neither scenario seems likely to present itself in this matter.

a prior inconsistent statement is offered only to impeach, it is not hearsay since it merely shows the witness is unreliable and says nothing about the truth of the facts asserted therein.”).

II. CONCLUSION

For the foregoing reasons, Rambus respectfully requests that Your Honor sustain its objections to the admission of reports prepared by Complaint Counsel’s expert witnesses should those reports be offered into evidence by Complaint Counsel.

DATED: April 28, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adam R. Wichman, hereby certify that on April 29, 2003, I caused a true and correct copy of *Respondent's Memorandum Regarding Admissibility of Expert Witness Reports* to be served on the following persons by hand delivery:

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CERTIFICATION

I, Adam R. Wichman, hereby certify that the electronic copy of *Respondent's Memorandum Regarding Admissibility of Expert Witness Reports* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 29, 2003 by other means.

Adam R. Wichman
April 29, 2003