

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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**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**

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

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

**Attachment C**

|                  |   |                  |
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| <b>37:9-39:1</b> | <b>Witness Consulted Timeline<br/>Prepared By Counsel. No<br/>Foundation With Work Of<br/>Other Companies</b> | <b>Sustained</b> |
| <b>343:1-23</b>  | <b>Witness Consulted Timeline<br/>Prepared By Counsel. No</b>   | <b>Sustained</b> |

**Foundation For Testimony  
About JEDEC Standardization  
of DDR SDRAM**

**Attachment D**

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| <b>29:7-31:7</b>   | <b>No Foundation of Knowledge of JEDEC Practices or Beliefs of Segments of Computer Industry Other than Memory Manufacturers</b> | <b>Overruled</b>   |
| <b>56:15-57:2</b>  | <b>Non-responsive</b>  | <b>Sustained</b>   |
| <b>57:3-13</b>   | <b>Leading and Irrelevant in Light of Later Testimony</b>  | <b>Sustained</b>   |
| <b>58:8-59:7<br/>60:14-61:22</b>                                   | <b>No Foundation For Testimony About SyncLink</b>  | <b>Overruled<br/>Overruled</b>                             |
| <b>69:2-10</b>   | <b>No Foundation in Light of Later Testimony</b>   | <b>Overruled</b>   |
| <b>70:11-73:2<br/>74:1-3<br/>75:4-77:7</b>                         | <b>Testimony as to Exhibit 3 is Hearsay and Without Foundation;<br/>No Foundation as to License Negotiations With Rambus</b>     | <b>Overruled</b>   |
| <b>91:12-92:6</b>  | <b>Irrelevant</b>  | <b>Overruled</b>   |
| <b>95:24-96:21<br/>99:5-23<br/>100:13-101:12<br/>101:21-102:11</b> | <b>No Foundation Re Licensing Agreement With Rambus</b>  | <b>Overruled<br/>Overruled<br/>Sustained<br/>Sustained</b> |
| <b>103:11-13<br/>103:20-105:19</b>                                 | <b>No Foundation Re Amendment To License Agreement With Rambus</b>   | <b>Overruled<br/>Overruled</b>                             |
| <b>109:3-7</b>   | <b>No Foundation Re Testimony About SyncLink</b>   | <b>Overruled</b>   |
| <b>109:23-110:19<br/>115:21-116:9</b>                              | <b>Testimony that Geoffrey Tate of Rambus Suggested That</b>   | <b>Overruled<br/>Overruled</b>                             |

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|--|--|--------------------------------|
| <b>116:22-117:25<br/>118:22-119:14</b> | <b>Hyundai Stop Participating In SyncLink Is More Prejudicial Than Probative In Light of Later Testimony</b>                   | <b>Overruled<br/>Overruled</b> |
| <b>119:20-23</b>                       | <b>No Foundation Re Similarities Between SDRAM and DDR SDRAM. Improper Opinion Testimony</b>                                   | <b>Overruled</b>               |
| <b>168:10-16</b>                       | <b>No Foundation Re Testing By Hewlett-Packard</b>   | <b>Sustained</b>               |
| <b>227:25-228:19</b>                   | <b>Vague</b>   | <b>Overruled</b>               |
| <b>230:1-232:11</b>                    | <b>No Foundation Re JEDEC and Designing Around Rambus Patents; Improper Opinion Testimony; More Prejudicial than Probative</b> | <b>Overruled</b>               |
| <b>289:21-291:6</b>                    | <b>No Foundation Re JEDEC Patent Policy</b>  | <b>Sustained</b>               |
| <b>354:23-356:11</b>                   | <b>No Foundation Re License Agreement With Rambus. Calls for Speculation and is Leading</b>                                    | <b>Sustained</b>               |
| <b>356:12-357:13</b>                   | <b>Leading</b>   | <b>Sustained</b>               |

ORDERED:

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Stephen J. McGuire  
Chief Administrative Law Judge

Dated: June 3, 2003