

United States District Court
For the Northern District of California

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E-filed: 2/2/2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HYNIX SEMICONDUCTOR INC., HYNIX
SEMICONDUCTOR AMERICA INC.,
HYNIX SEMICONDUCTOR U.K. LTD., and
HYNIX SEMICONDUCTOR
DEUTSCHLAND GmbH,

Plaintiffs,

v.

RAMBUS INC.,

Defendant.

No. CV-00-20905 RMW

ORDER REGARDING RAMBUS'S
OBJECTION TO THE MANUFACTURERS'
DESIGNATION OF RICHARD CRISP'S
DEPOSITION TESTIMONY

[Re Docket No. 3129]

ORDER REGARDING RAMBUS'S OBJECTION TO THE MANUFACTURERS' DESIGNATION OF RICHARD CRISP'S
DEPOSITION TESTIMONY
C-00-20905; C-05-00334; C-06-00244 RMW
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RAMBUS INC.,
Plaintiff,
v.
HYNIX SEMICONDUCTOR INC., HYNIX
SEMICONDUCTOR AMERICA INC.,
HYNIX SEMICONDUCTOR
MANUFACTURING AMERICA INC.,
SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA,
INC., SAMSUNG SEMICONDUCTOR, INC.,
SAMSUNG AUSTIN SEMICONDUCTOR,
L.P.,
NANYA TECHNOLOGY CORPORATION,
NANYA TECHNOLOGY CORPORATION
U.S.A.,
Defendants.

No. C-05-00334 RMW
[Re Docket No. 1155]

RAMBUS INC.,
Plaintiff,
v.
MICRON TECHNOLOGY, INC., and
MICRON SEMICONDUCTOR PRODUCTS,
INC.
Defendants.

No. C-06-00244 RMW
[Re Docket No. 773]

Opening statements in these three consolidated cases is set for the afternoon of February 4, 2008. The Manufacturers¹ hope to prove that Rambus, among other things, monopolized or attempted to monopolize six technology markets. The technology markets cover various technologies essential for making DRAMs.

This order addresses Rambus's recent objection to the Manufacturers' quoting portions of

¹ For purposes of this order, the court collectively refers to the Hynix, Micron, and Nanya entities as "the Manufacturers."

1 prior deposition testimony of a former Rambus employee, Richard Crisp, in their opening statement.
2 The court has reviewed the papers and considered the arguments of counsel. For the following
3 reasons, the court sustains the objection to the quoting of Mr. Crisp's prior testimony in the
4 Manufacturers' opening statement.

5 I. TIMELINESS

6 The Manufacturers first argue that Rambus's motion is untimely, noting that the deadline for
7 motions *in limine* was December 6, 2007. The Manufacturers argue that "[i]t is incredible that
8 Rambus would think that Manufacturers would not introduce evidence that Crisp lied under oath. It
9 has waited until now to file this motion simply to harass Manufacturers as they prepare their opening
10 statement." Opp'n at 2.

11 Putting aside Rambus's subjective motivations, the court's most recent order on trial
12 procedures expressly contemplates such an objection. *See, e.g.*, Order Regarding Trial Procedures,
13 C-00-20905, Docket No. 3106, at ¶ H (N.D. Cal. Jan. 30, 2008). The order states:

14 Trial Exhibits, quotations from depositions or other demonstrative exhibits to be
15 used in opening statements are to be exchanged no later than 5:00 p.m. on Friday,
16 February 1. Objections, if any, to the use of such items will be heard Monday,
February 4, 2008 at 11:00 a.m. with notice to the court of a need for such hearing
given by 8:00 a.m. on the 4th.

17 *Id.* To the extent Rambus's filing addresses the Manufacturers' intention to use portions of Richard
18 Crisp's deposition testimony in their opening statement, the objection is timely.

19 II. IMPEACHMENT AND "MANAGING AGENT" STATUS

20 The Manufacturers submit two arguments regarding the admissibility of Crisp's deposition
21 testimony. First, they argue that the deposition testimony may be used to impeach Crisp pursuant to
22 Federal Rule of Civil Procedure 32(a)(2). Second, they argue that Crisp's purportedly false
23 deposition testimony may be used for any purpose pursuant to Rule 32(a)(3) because Crisp was a
24 "managing agent" of Rambus.

25 Until Crisp testifies, his deposition transcript is inadmissible hearsay. Only after he testifies
26 may his prior testimony be used for impeachment evidence. An opening statement is limited to
27 presenting a guide to the evidence that the parties reasonably believe will be admitted into evidence.

28 ORDER REGARDING RAMBUS'S OBJECTION TO THE MANUFACTURERS' DESIGNATION OF RICHARD CRISP'S
DEPOSITION TESTIMONY

C-00-20905; C-05-00334; C-06-00244 RMW

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1 Quoting prior testimony, except that of a party, for impeachment purposes is inappropriate in an
2 opening statement because the prior testimony may never become admissible. This, of course, does
3 not preclude the Manufacturers from stating in their opening statement that the evidence will show
4 that Mr. Crisp was involved in Rambus's strategy to file divisional patent applications.

5 The Manufacturers second argument is that Mr. Crisp was a "managing agent" within the
6 meaning of Rule 32(a)(3), and that his testimony is therefore admissible "for any purpose." Courts
7 have interpreted "managing agent" flexibly, emphasizing "what the employee actually did, rather
8 than what title or position she held." *Young & Associates Public Relations, L.L.C. v. Delta Air*
9 *Lines, Inc.*, 216 F.R.D. 521, 523-24 (D. Utah 2003). The point in time for determining whether a
10 deponent falls within the "managing agent" exception is the time of the deposition. Fed. R. Civ. P.
11 32(a)(3).

12 The deposition testimony the Manufacturers wish to use comes from a deposition taken on
13 November 8, 2000. The parties agree that Crisp retired from his position as Director of Technology
14 Business and Development at Rambus in June of 2000, although Rambus continued to pay him as a
15 consultant. He had no authority, however, to act on behalf of Rambus. His consulting role was
16 limited to handling his transition and replacement.

17 The Manufacturers' interpretation of "managing agent" to include Richard Crisp would
18 broaden the limits placed on the category of people whose depositions may be used under Rule
19 32(a)(3). But "managing agent" must be interpreted in light of the person's duties, and in
20 comparison to the other people listed in Rule 32(a)(3): "officers," "directors," and "Rule 30(b)(6)
21 and 31(a)(4) designees." These other people all have the capability to bind the corporation with
22 their actions, indeed, a 30(b)(6) or 31(a)(4) designee literally speaks for the corporation.² While the

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24 ² The Ninth Circuit's dictum in *Planned Parenthood of Columbia/Willamette, Inc. v.*
25 *American Coalition of Life Activists*, 290 F.3d 1058, 1118 (9th Cir. 2002) bolsters this reasoning. There,
26 the court remarked "Rule 32(a), for example, clearly favors live testimony over deposition evidence by
27 limiting the use of depositions to three situations: when an adverse party is the deponent; for
impeachment purposes; or when the deponent is not available to testify at trial." *Id.* The Ninth Circuit
collapsed Rule 32(a)(3)'s categories into "an adverse party," i.e., those who speak for the corporation.

1 category of "managing agent" is flexible, it must be interpreted in its context. A "managing agent"
2 must have some authority to act on behalf of the corporation or answer for it. At the time of his
3 deposition, Richard Crisp lacked any authority to act on Rambus's behalf, and accordingly, cannot
4 be considered a "managing agent."

5 The Manufacturers cite to two district court cases that broadly interpreted "managing agent."
6 *See Independent Productions Corp. v. Loew's, Inc.*, 24 F.R.D. 19, 24-25 (S.D.N.Y. 1959); *Calgene,*
7 *Inc. v. Enzo Biochem, Inc.*, 1993 WL 645999, at *8-*9 (E.D. Cal. 1993). Neither case is binding on
8 this court, and both appear to over-extend the coverage of Rule 32(a)(3)..

9 Because the court does not consider Richard Crisp a "managing agent" of Rambus at the time
10 of his deposition, his testimony is not admissible "for any purpose." He will be called as a live
11 witness in this case, and Rule 32(a) favors live witness testimony over prior deposition transcripts.
12 Since Crisp was not a managing agent and will be available at trial, his prior testimony is *only*
13 admissible for impeachment. The possibility that Mr. Crisp will testify inconsistently with prior
14 testimony is insufficient to justify reading that prior testimony to the jury in an opening statement.

15 **III. ORDER**

16 For the foregoing reasons, Rambus's objection to the Manufacturers' intended quoting of Mr.
17 Crisp's prior testimony is sustained. However, nothing in this order precludes the Manufacturers
18 from stating that the evidence will show hat Mr. Crisp was involved in Rambus's strategy to file
19 divisional patent applications or using prior testimony to impeach Mr. Crisp's testimony in this trial,
20 if appropriate.

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22 DATED: 2/2/2008



RONALD M. WHYTE
United States District Judge