ORIGINAL





)	PUBLIC
In the Matter of)	
)	Docket No. 9327
Polypore International, Inc.)	
a corporation.)	
)	

RESPONSE TO RESPONDENT'S MOTION TO REOPEN THE HEARING RECORD

On August 19, 2009, the day of closing argument in this matter and nearly three weeks after completion of post-hearing briefing, Respondent filed this motion to reopen the hearing record to admit exhibit PX3016. Respondent has not shown good cause for reopening the record, as required by 16 C.F.R. § 3.51(e), and therefore the motion should be denied.

Complaint Counsel used PX3016 at the hearing on May 19, 2009, to impeach Mr. Toth's testimony that Polypore has been suffering financially. (Toth, Tr. at 1641-1647). Because Complaint Counsel introduced the exhibit for impeachment purposes, Complaint Counsel was not required to disclose the exhibit to Respondent's counsel in advance. Complaint Counsel subsequently moved to enter PX3016 into evidence. (Toth, Tr. at 1647). Notably, Respondents then objected to the exhibit, and Your Honor stated that Complaint Counsel should inform Respondent of the basis for admissibility of the document, and the two sides should confer as to its admissibility. (Toth, Tr. at 1653-1654). Complaint Counsel never reoffered the exhibit or asked for a ruling from Your Honor.

Rather, Complaint Counsel consistently demonstrated to Respondents that PX3016 was not in evidence. Complaint Counsel's Exhibit Index, served on July 10, 2009, and the final set of exhibits submitted to the Administrative Law Judge after conference with Respondent, did not

include PX3016. In addition, Complaint Counsel did not, and indeed, could not, rely upon PX3016 in its Findings of Fact, or to respond to Respondent's Findings of Fact. *See* Order on Post Trial Briefs, at 2 ("Do not cite to documents that are not in evidence").

Respondent's failure to recognize that PX3016 was not admitted until long after the close of the hearing record on June 22, 2009, does not warrant reopening the record. Section 3.51(e) of the Commission's Rules permits reopening of the record only upon a showing of good cause (a standard that Respondent left out of its quotation of the rule). See 16 C.F.R. § 3.51(e) ("(a)t any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown."). Moreover, admitting PX3016 at this late date will prejudice Complaint Counsel which did not have the opportunity to rely on the exhibit in its submissions to the Court. The proper course of action is that followed by this Court in Chicago Bridge — the Court should not reopen the record to admit PX3016, and citations to PX3016 in post-trial pleadings should be disregarded. See In re Chicago Bridge & Iron, Order Granting Respondents' Motion to Strike, at 2 ("As to the documents that were not admitted as exhibits, there can be no dispute that reference to these documents in any post trial pleading is improper and they will be disregarded.").

Dated: August 24, 2009

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, I filed *via* hand and electronic mail delivery an original and two copies of the foregoing Response to Respondent's Motion to Reopen the Hearing Record with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on August 24, 2009, I served *via* hand and electronic mail delivery two copies of the foregoing Response to Respondent's Motion to Reopen the Hearing Record with:

The Honorable D. Michael Chappell Administrative Law Judge Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580 oalj@ftc.gov

I hereby certify that on August 24, 2009, I served *via* electronic mail and first class mail delivery a copy of the foregoing Response to Respondent's Motion to Reopen the Hearing Record with:

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