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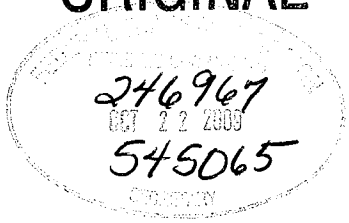

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	Docket No. 9327
POLYPORE INTERNATIONAL, INC.,	)	
Respondent.	)	**Public**

ORDER GRANTING RESPONDENT'S SECOND MOTION TO REOPEN THE HEARING RECORD AND SETTING HEARING SCHEDULE

I.

On September 25, 2009, Respondent submitted its Second Motion to Reopen the Hearing Record ("Motion"). Complaint Counsel submitted its opposition on October 1, 2009 ("Opposition"). By Order dated October 2, 2009, Respondent was required to file a reply brief.

Respondent submitted its reply, with an affidavit of Harry D. Seibert, on October 7, 2009. On October 9, 2009, Respondent submitted a motion for leave to file a supplemental affidavit of Harry D. Seibert. In that motion, Respondent states that additional relevant information related to Exide Technologies, Inc. ("Exide") and the subject of the affidavit arose after the deadline for filing Respondent's reply. On October 14, 2009, Complaint Counsel submitted an opposition to Respondent's motion to file a supplemental affidavit. Complaint Counsel states that the information contained in the supplemental affidavit is merely a restatement of the opinions Seibert expressed in his original affidavit. Upon review of both affidavits, the supplemental affidavit does contain additional statements that could not have been made prior to the filing of the original affidavit. Accordingly, Respondent's motion for leave to file the supplemental affidavit of Harry D. Seibert is GRANTED.

For the reasons set forth below, Respondent's Second Motion to Reopen the Hearing Record is GRANTED.

II.

As a preliminary matter, Respondent's and Complaint Counsel's briefs refer to information from documents or testimony which had previously been granted *in camera* treatment or which constitute confidential information pursuant to the Protective Order

entered in this case.[1] In addition, on October 9, 2009, Exide filed a motion for *in camera* treatment for the Declaration of Douglas Gillespie, submitted with Complaint Counsel's Opposition. That motion is pending.

Commission Rule 3.45(a) allows the Administrative Law Judge "to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *In re Bristol-Myers Co.*, No. 8917-19, 90 F.T.C. 455, 457, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in another leading case on *in camera* treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions." *In re General Foods Corp.*, No. 9085, 95 F.T.C. 352, 356 n.7, 1980 FTC LEXIS 99, at *12 n.7 (Mar. 10, 1980).

Although the parties have designated in their briefs information as "*in camera*" or confidential "subject to Protective Order," there are portions of that information discussed in this Order that do not require *in camera* or confidential treatment. Accordingly, such material is disclosed in the public version of this Order, pursuant to Commission Rule 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding"). Where *in camera* or confidential information subject to the Protective Order is used in this Order, it is indicated in bold font and braces ("{ }") in the *in camera* version and is redacted from the public version of the Order, in accordance with 16 C.F.R. § 3.45(f).[2]

III.

Respondent states that Exide, a significant customer of Respondent, waited until after the record was closed, and, in the span of three months, has placed orders for {[redacted]} supply of PE separators from Daramic. Respondent also states that Exide has advised Daramic that Exide intends to move a significant portion of its separator purchases to a different supplier. Based on the foregoing, Daramic asserts that Exide apparently has decided not to purchase PE separators from Daramic {[redacted]}, and that, thus, Daramic stands to lose this significant customer. Respondent states that Daramic already lost at the end of 2008 a significant customer, and that if it loses Exide, Daramic will lose another significant customer, which, combined, accounted for {[redacted]} of Daramic's North American PE business. Respondent contends that if Daramic

[1] Under the Commission's Rules of Practice, a party or a non-party may file a motion seeking *in camera* treatment for material, or portions thereof, offered into evidence. 16 C.F.R. § 3.45(b). The Administrative Law Judge may order that such material be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). Pursuant to Commission Rule 3.45(b), several orders were issued granting *in camera* treatment to material that met the Commission's standards.

[2] Pursuant to Commission Rule 3.45(f), a public version of this Order shall be filed within five days. 16 C.F.R. § 3.45(f).

were to be able to salvage any of Exide's future business, it could do so only by providing Exide with a {[redacted]}. Respondent argues that both of these events – Daramic's lose of a significant customer and Exide's ability to exert {[redacted]} – are persuasive evidence of Daramic's lack of market power.

For those reasons, Respondent requests that the record be reopened for a half-day hearing, at which Respondent proposes to offer testimony regarding the following:

1. After the close of the record, Exide decided to move {[redacted]} its PE separator purchases for {[redacted]} to another supplier, and in the span of less than three months, Exide has placed orders from Daramic in excess {[redacted]} of PE separators, all requested to be delivered by {[redacted]}. This amount exceeds any reasonable forecast provided by Exide, is inconsistent with past order patterns and, based on Exide's {[redacted]}, amounts to approximately {[redacted]} worth of PE separator[s]. Douglas Gillespie of Exide has admitted to Respondent that Exide's recent purchase orders equate to {[redacted]} worth of PE separator purchases from Daramic.

2. With Exide's purchase orders for more than {[redacted]} of PE separators from Daramic, Exide does not intend to and will not purchase any additional PE separators from Daramic in either {[redacted]}.

3. In light of Exide's apparent decision not to purchase PE separators from Daramic in {[redacted]}, Daramic will likely have to {[redacted]}.

4. If Daramic is able to retain any small amount of business from Exide in {[redacted]}, or thereafter, which appears unlikely, Daramic will only be able to obtain such sales through a {[redacted]}.

5. Exide's conduct here is strong evidence that Daramic does not have market power, as Complaint Counsel contends.

Complaint Counsel argues that Respondent seeks to delay a ruling in this matter by reopening the record to introduce cumulative evidence on issues that Respondent has already fully argued at trial and in its post-trial briefs.[3] Complaint Counsel further argues

[3] Complaint Counsel cites to *In re Chicago Bridge & Iron*, Dkt. 9300, 2003 FTC LEXIS 98, *3 (June 12, 2003) for the statement: "Unless due process is to be completely ignored in these proceedings, then the date the record closes must mean that the record is indeed closed." The context presented in that case is not comparable to the instant motion. Here, Respondent has filed a motion seeking to reopen the record. In *Chicago Bridge*, Complaint Counsel developed charts and graphs after the close of the record and cited to them as if they had been offered and introduced at trial without seeking leave to reopen the record to admit them.

that none of Respondent's claimed "new" and "additional" evidence would impact the outcome of this matter because none of the proffered evidence addresses the market structure, concentration levels, or lack of entry proven by Complaint Counsel. In addition, Complaint Counsel contends that reopening the record to allow Respondent to present the proffered evidence will prejudice Complaint Counsel because the resulting delay harms consumers "who continue to pay monopoly prices" and because Complaint Counsel "has not had the opportunity to gather additional evidence of ongoing anticompetitive conduct by Respondent." Opposition at 2-3.

In its reply, Respondent states that the requested reopening of the record is not intended for delay. Respondent reiterates that the proffered evidence shows that Daramic is losing market share and pricing power and is, therefore, relevant to whether Daramic has monopoly power. In addition, Respondent argues that the proffered evidence is relevant to the disputed factual issues of whether Exide is a power buyer and whether customers are able or willing to stockpile and warehouse large amounts of PE separators. Respondent argues that it will be prejudiced if it is denied the opportunity to place relevant evidence in the record, and that Exide's decision to wait until after the hearing to place the orders at issue should not be held against Respondent.

IV.

A.

Under the Commission's Rules of Practice governing this adjudication, Rule 3.51(e)(1) states: "At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence." 16 C.F.R. § 3.51(e).[4] Commission cases confirm this standard. *In re Kellogg Co.*, 1979 FTC LEXIS 89, at *3 (Nov. 16, 1979) ("[W]e note that the ALJ is free to reopen the record at any time prior to filing the Initial Decision, Rule 3.51(d)."); *In re Chicago Bridge & Iron Co,*, 139 F.T.C. 553, at *561 n.27 (May 10, 2005). *See also In re Litton Indus.*, 82 F.T.C. 793, 1973 FTC LEXIS 83, at *35-36 (Mar. 13, 1973) (where respondent filed a motion to reopen the record for the limited purpose of receiving evidence with reference to relevant matters occurring after the close of the record, the hearing examiner reopened the record, held a hearing at which respondent offered evidence, re-closed the record, and authorized the parties to file supplemental proposed findings regarding the new evidence received).

When the FTC recently amended its Rules of Practice, Rule 3.51(e)(1) was revised to add a "good cause" standard. "At any time from the close of the hearing record pursuant to § 3.44(c) until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown." 16 C.F.R. § 3.51(e). The comments to the interim final

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[4] On January 13, 2009, while this matter was pending, the FTC amended Parts 3 and 4 of its Rules of Practice. However, in the interim final rules, the FTC stated that the rules that were in effect before January 13, 2009 would govern all then pending adjudicatory proceedings. 74 Fed. Reg. 1804 (Jan. 13, 2009). Because the instant case was pending before January 13, 2009, the prior Rule 3.51(e) is applicable.

rules that accompanied the January 13, 2009 rule changes do not define "good cause." Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804 (Jan. 13, 2009). In other contexts, good cause has been defined to require a showing that the action sought could not have been achieved despite the diligence of the party making the request. *In re Chicago Bridge*, No. 9300, 2002 FTC LEXIS 64, at *4 (Oct. 16, 2002).

The Commission, in deciding whether to reopen the record to receive supplemental evidence when the case is pending before it, considers: "(1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party." *In re Brake Guard Products, Inc.*, No. 9277, 125 F.T.C. 138, 248 n.38 (Jan. 15, 1998) (citing *Chysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977)) (affirming admission of supplemental evidence where the Commission noted that the evidence was not available at the time of the trial before the ALJ and that Complaint Counsel had acted with due diligence). The Commission reaffirmed this standard for reopening the record while a case is before the Commission in *In re Rambus Inc.*, No. 9302, 2004 FTC LEXIS 230, at *3 (Dec. 6, 2004).

As the foregoing authorities make clear, Complaint Counsel's argument that the hearing should not be reopened because the proffered evidence will not "affect the outcome" is not the standard and places too high a barrier for a party moving to reopen the record. At this stage of the proceedings, the "outcome" cannot be presumed, and new evidence that is relevant to the issues to be determined should be admitted in the interest of fairness and justice. *See Caracci v. Brother Int'l Sewing Mach. Corp.*, 222 F. Supp. 769, 771 (E.D. La. 1963), *aff'd*, 341 F.2d 377 (5th Cir. 1965) (holding that the trial court may properly look with more favor upon a motion to reopen made after submission, but before any indication by it as to its decision, so that the court may have all of the facts upon which it can render full justice on the merits).

B.

Respondent has proffered five items for which it seeks to reopen the proceeding for the reception of further evidence. The items listed by Respondent, set forth above and numbered as 1 through 4, are factual propositions. Respondent's item number 5, as set forth above, constitutes legal argument and, therefore, is not an appropriate proffer. Accordingly, for purposes of this Order, Respondent's proffer is hereby limited to items numbered 1 through 4 above.

Although Respondent is neither required to show good cause for reopening this proceeding for the reception of further evidence under the Rule 3.51(e) that governs this proceeding, nor held to the standard for reopening the record when a proceeding is before the Commission, as set forth below, Respondent has met those standards.

First, Respondent has demonstrated due diligence. According to the proffer, after the close of the record, Exide submitted purchase orders for PE separators in an amount

sufficient to meet Exide's needs for {[redacted]}, and, according to Respondent, Exide, whose contract with Daramic expires {[redacted]}, confirmed to Daramic that it will move a significant portion of its business to another supplier. Because both of these events were under the control of Exide and did not occur until after the close of the record, Respondent has provided a bona fide explanation for the failure to introduce the proffered evidence at trial, and, therefore, has demonstrated due diligence.

Second, the proffered evidence would be probative. The Complaint in this case charges that the effect of the challenged acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Complaint ¶¶ 48, 49. The Complaint alleges that the acquisition and Daramic's conduct substantially lessened competition in numerous ways, including increasing the level of concentration and market power in the automotive market; leading to increased prices in the relevant markets; and allowing Daramic to unilaterally exercise its market power in the relevant markets. Complaint ¶ 38. The Complaint also charges Respondent with unlawful monopolization in several markets, including PE separators for automotive batteries. Complaint ¶¶ 52, 53. *See generally* Complaint Counsel's Post-Trial Brief at 2-4. If Daramic has, after the close of the record, potentially lost a significant customer, as proffered by Respondent, such evidence would directly bear on Respondent's market share and power to control prices -- critical elements for evaluating the Section 7 and monopolization charges.

Third, the evidence described in the proffer is not cumulative. Respondent did not have, and, thus, did not present at trial, facts described in the proffer regarding what Daramic claims is a decision by Exide not to purchase PE separators from Daramic in {[redacted]}, or the claimed consequence that Daramic will likely have to {[redacted]}.

Lastly, an evaluation of prejudice to Complaint Counsel, the non-moving party, weighs in favor of reopening the record. By previous Order, dated September 8, 2009, Respondent's motion to reopen the record to admit PX 3016 after the completion of all post-trial briefs, proposed findings of fact, and replies thereto, and closing arguments was denied on the ground that it would be prejudicial to Complaint Counsel, since Complaint Counsel was not able to rely on or respond to the exhibit in its post-trial pleadings. No such prejudice exists here, where, as set forth below, Complaint Counsel will be allowed to conduct cross-examination and provide briefing and argument on the evidence described in the proffer.

Complaint Counsel contends that reopening the record to allow Respondent to present the proffered evidence will prejudice Complaint Counsel because the resulting delay harms consumers "who continue to pay monopoly prices." Opposition at 2. Complaint Counsel's assertion assumes as "fact" that Respondent is charging monopoly prices, which is a disputed issue that has not yet been determined. Because the evidence described in the proffer is relevant to that issue, Complaint Counsel's argument only

reinforces the importance of admitting the evidence. It does not support a finding of undue prejudice against Complaint Counsel.

Complaint Counsel further contends that it will be prejudiced because Complaint Counsel "has not had the opportunity to gather additional evidence of ongoing anticompetitive conduct by Respondent." Opposition at 3. To the extent that Complaint Counsel is claiming that discovery and production of supplemental evidence for its case in chief are necessary to avoid prejudice, that argument is unpersuasive. Avoidance of prejudice does not require a "quid pro quo." Complaint Counsel does not contend that it will be unable to effectively cross-examine or otherwise rebut the evidence described in the proffer. This Order provides Complaint Counsel with pre-hearing procedures to ensure that Complaint Counsel is capable of effective rebuttal.

Finally, any potential prejudice to Complaint Counsel is sufficiently outweighed by the potential prejudice to Respondent, should Respondent be precluded from placing relevant facts in the record prior to the decision in this case. The purpose of reopening the record before a final decision has been reached is to enable the fact finder to "have all of the facts upon which it can render full justice on the merits" of the action. *Caracci*, 222 F. Supp. at 771. Accordingly, where, as here, newly discovered, relevant evidence is available prior to the decision, the "interest of fairness and justice" permits the record to be reopened. *See id.*

C.

Respondent has demonstrated good cause for reopening the record prior to the filing of the Initial Decision. In addition, Respondent has provided a bona fide explanation for the failure to introduce the proffered evidence at trial, demonstrated that the proffered evidence is probative and is not cumulative, and shown that the reopening of the record would not unduly prejudice Complaint Counsel.

Accordingly, Respondent's Second Motion to Reopen the Hearing Record is GRANTED, and, pursuant to Commission Rule 3.51(e), the hearing record is hereby reopened for the reception of evidence limited to Respondent's proffer as set forth in this Order.

V.

The following schedule shall be adhered to. All depositions, witness and exhibit lists, offers of evidence, and post-hearing supplemental briefs and proposed findings of fact shall be limited to the proffered evidence, as listed in items numbered 1 through 4 above.

October 27, 2009 - Deadline for depositions, limited to the individuals to be called at the hearing and limited to the proffered evidence.

October 28, 2009	-	Parties exchange and serve courtesy copies on ALJ of their proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the testimony of each witness.
October 28, 2009	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
October 29, 2009	-	Deadline for filing motions for *in camera* treatment of proposed exhibits.
November 2, 2009	-	Exchange objections to final proposed exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter-designations. The parties shall attempt to stipulate to admissibility of exhibits and any designated testimony.
November 3, 2009	-	Provide to ALJ any remaining objections to final proposed exhibits and any remaining objections to designated testimony.
November 3, 2009	-	Deadline for filing responses to motions for *in camera* treatment of proposed exhibits.
November 3, 2009	-	File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
November 4, 2009	-	Prehearing conference to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Exhibits will be admitted or excluded to the extent practicable.

November 4, 2009	-	Commencement of hearing, to begin immediately after the prehearing conference, in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Each party will be allowed a brief opening statement and closing argument.
November 17, 2009	-	Deadline for filing concurrent post-hearing supplemental briefs, proposed findings of fact, and proposed conclusions of law.
November 24, 2009	-	Deadline for filing concurrent post-hearing supplemental reply briefs and replies to proposed findings of fact.

D. Michael Chappell
Chief Administrative Law Judge

Date: October 22, 2009