ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONSE TO RESPONDENT'S SECOND MOTION TO REOPEN THE HEARING RECORD

Respondent ("Polypore") seeks to delay a ruling in this matter by reopening the record and Hearing to introduce cumulative evidence on issues it has already fully argued at trial and in post trial briefings. The "new" and "additional" evidence that Respondent claims this Court must consider would not impact the outcome in this matter because none of the proffered evidence addresses the market structure, concentration levels, or lack of entry proven by Complaint Counsel. Complaint Counsel respectfully opposes any delay.

The issue Respondent wants to raise {[redacted]} was well developed at trial. {[redacted].} But as the attached {[redacted]} declaration explains, there is nothing new that has changed the competitive dynamics after trial. Respondent offers no evidence of anything new but instead offers mere supposition by its attorneys that perhaps {[redacted]} This is not new evidence; it is not evidence at all. Moreover, the one photograph of an unauthenticated document supposedly from a trade show in Asia would never be admitted into evidence in any event, and it does not say what Respondent says it does. On its face, it merely says that Anpei, which sells multiple products,

has "the best quality service" around the world – it says nothing about selling any of the products at issue in this case anywhere.

In addition, any delay harms customers who continue to pay monopoly prices. Such a further delay will harm consumers and is not warranted because Respondent failed to show sufficient grounds for reopening and, even if admitted and true, the alleged "new" facts would have no impact on the outcome of the Hearing, since they do not address market structure, concentration, or entry.

RESPONDENT CANNOT DEMONSTRATE WHY THE RECORD SHOULD BE REOPENED TO ADMIT CUMULATIVE AND IRRELEVANT EVIDENCE

As His Honor has previously held, "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." Chicago Bridge & Iron Co., Docket No. 9300, Order, June 12, 2003. Respondent must show good cause to introduce new evidence during the proceeding, much less to reopen the hearing in order to add new evidence, something it has failed to do.[1]

Respondent provides for no precedent for such a drastic delay of the ALJ's initial decision. The Part 3 Rules specifically provide that "Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded." 16 C.F.R. § 3.41(b). Further, the Part 3 Rules provide strict time limits on adjudicative proceedings that can only be altered on a showing of "extraordinary circumstances."

[1] *See, e.g., Brake Guard Products, Inc.* 125 F.T.C. at 248 n.38 (noting the standard for reopening the record in a pending administrative litigation after trial has ended but before the Commission has issued its opinion: "(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-

16 C.F.R. § 3.51(a). Respondent has failed to show good cause for the introduction of new evidence, much less the extraordinary circumstances necessary to delay a ruling so it can have an additional Hearing. This is particularly true where Respondent appears to proffer a document from a conference in Asia that can only be authenticated by a witness from Anpei, a company which is located in Asia and has no personnel in North America. Respondents' additional "facts" are simply irrelevant and speculative. Indeed, Respondent fails to offer any admissible evidence to support its theories, which it previously argued repeatedly at trial.

The investigation of this matter started in March 2008. Polypore has had ample time to review documents, question witnesses, and prepare its defenses in this matter. Indeed Polypore listed both { } and Anpei witnesses on its witness lists, but decided not to call them. { } Polypore may not now delay a decision by post-hoc rethinking its litigation strategy and adding additional evidence after the close of discovery, much less the close of the hearing and the record.[2]

Moreover, if Polypore is permitted to add evidence into the record of things that occurred after the close of discovery, Complaint Counsel will be prejudiced because it has not had the opportunity to gather evidence of ongoing anticompetitive conduct by Respondent. Thus there is simply no possibility that reopening the record would be merely a "half a day" hearing, as Respondent suggests. To reopen the record to admit Respondent's "new" evidence would cause "undue delay, waste of time, or needless presentation of cumulative evidence," and thus the exclusion is proper under 16 C.F.R. §3.43 (b).

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moving party.").

[2] Discovery in this matter closed on March 13, 2009; Respondent's final witness and

RESPONDENT FAILS TO PROVIDE ANY PROBATIVE, ADDITIONAL FACTS

Respondent urges the court to reopen the Hearing so it can put on evidence for two "new" facts: {[redacted].} The unsupported arguments made by Respondent are not new at all, but are a rehash of the arguments it has already made. {[redacted]} In short, nothing has changed competitively. {[redacted]}

Daramic claims, however, that this supposed evidence is new because [redacted] } This is nothing new at all.[3] {[redacted]

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exhibit lists were submitted March 27, 2009.

[3] {[redacted]

[redacted]

[redacted]

[redacted] This fact was well-developed at trial, and has not changed.

[redacted] Respondent has thus not demonstrated the proper bases that would necessitate an additional Hearing. Accordingly, Respondent's motion should be denied.

THE PHOTO OF AN ALLEGED ANPEI DOCUMENT IS NOT ADMISSIBLE

Respondent has not met-and-conferred with Complaint Counsel with respect to the

proposed, alleged Anpei exhibit, and to the extent that Respondent is attempting to move this document into evidence, it must be denied for this reason, among many others. Certainly Respondent has not made any attempt to show good cause as to why this document should be admitted into evidence. Respondent has even failed to make a formal proffer concerning this document, although it suggests through a limp *non sequitur* that Anpei's representations of "best quality service" coupled with [redacted] This unauthenticated document does not even begin to support this allegation at all. Indeed, the evidence at trial, as confirmed by the attached declaration, demonstrated that this is not true because [redacted]

In short, this purported "evidence" is a photo of an inadmissible and unreliable hearsay document presumably from a third party that does not support the inference urged by Respondent. As Respondent concedes in its motion, it is not clear that the document refers to Anpei's sales PE separators at all. A document that states only that Anpe Sepa (presumably, Anpei) has the "best quality service" around the world adds nothing new or relevant to the mix. Respondents' proffer of this document should be denied.

Dated: October 1, 2009

Respectfully submitted,

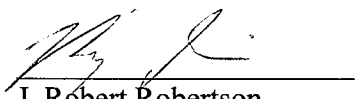

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EXHIBIT A

ATTACHMENT TO
RESPONSE TO RESPONDENT'S SECOND MOTION
TO REOPEN THE HEARING RECORD

POLYPORE INTERNATIONAL, INC.
A CORPORATION

DOCKET NO. 9327

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2009, I filed *via* hand delivery an original and two copies of the foregoing Response to Respondent's Second 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 October 1, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing Response to Respondent's Second Motion to Reopen the Hearing Record with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on October 1, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing Response to Respondent's Second Motion to Reopen the Hearing Record with:

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