UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

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

ORDER ON RESPONDENT'S THIRD MOTION TO REOPEN THE HEARING RECORD

Respondent Polypore International, Inc. has filed a Third Motion to Reopen the Hearing Record, in which it seeks leave to conduct additional discovery and for a hearing before the Commission to permit the introduction of new evidence. Respondent asserts that it has uncovered evidence that recently entered the deep-cycle and motive markets, thus calling into question the Administrative Law Judge's (ALJ) conclusion that Daramic's acquisition of Microporous eliminated Daramic's only competitor in these markets.[1] Complaint Counsel oppose the motion. For the reasons described below, the Commission will deny Respondent's motion, but will as a matter of discretion admit into evidence the four affidavits submitted in support of Respondent's motion and the declaration submitted in support of Complaint Counsel's opposition to Respondent's motion.

[1] Respondent and Complaint Counsel redacted the identity of certain companies in their briefs, even though confidential treatment appears unnecessary and neither party filed a motion for in camera treatment. In the interest of public disclosure, we omit only those identities deemed confidential by the ALJ. Accordingly, this Order will be placed on the public record in its entirety ten calendar days after it has been served upon Respondent and Complaint Counsel, consistent with Section 21(d)(2) of the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(2), and Commission Rule of Practice 3.45, 16 C.F.R. § 3.45. *See also* Notice of Intent to Disclose Provisionally Redacted Information, *Intel Corporation*, FTC Docket No. 9341 (Jan. 26, 2010); *Orkin Exterminating Co.*, 108 F.T.C. 147 (1986); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *RSR Corp.*, 88 F.T.C. 206 (1976); *RSR Corp.*, 88 F.T.C. 734, 735 (1976); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

Under Commission Rules 3.51(e)(1) and 3.54(a), 16 C.F.R. §§ 3.51(e)(1), 3.54(a),[2] a party may move to "reopen the proceeding for the reception of further evidence" at any time before the Commission issues its decision. The parties agree that *Brake Guard Products* sets forth the applicable standard for reopening the record. Under that test, "the Commission 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. *Brake Guard Products, Inc*., 125 F.T.C. 138, 248 n.38 (1998) (citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977)); *see also Rambus Inc*., FTC Docket No. 9302, 2006 WL 2522715 (Aug. 1, 2006) (relying on *Brake Guard Products* standard). Complaint Counsel concede that the proffered evidence is probative (Brief of Complaint Counsel at 7), so we focus on the other three factors. None militates in favor of reopening the hearing in this matter.

First, Respondent has not acted with due diligence in presenting evidence of the competitor's alleged entry into the deep-cycle markets.[3] Respondent asserts that it was unaware of entry until informed by two battery manufacturers, , in May and June of this year and that it then promptly filed its motion to reopen. However, the record demonstrates that Respondent was aware of development of a deep-cycle product prior to the hearing before the ALJ. Specifically,

(Pfanner Dep. at 77-80 (Jan. 28, 2009) (confidential).) Respondent did not call this witness at trial, but did put this information into its expert report. (RX00945-132, *in camera*.) In addition, a different witness testified at the hearing that Entek was developing a deep-cycle separator. (Balcerzak, Tr. 4130-31, 4138-39.) In short, Respondent has not offered a bona fide explanation for its failure to introduce additional evidence at trial regarding attempts to develop a deep-cycle separator product.

Second, Respondent's evidence is cumulative of what was presented at the hearing. As previously noted, there was evidence before the ALJ regarding

---

[2] On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. *See* 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. *See id.*; *see also* 74 Fed. Reg. 1804 (establishing interim final rules for actions commenced after January 13, 2009). Because the complaint in this matter was issued on September 10, 2008, the Rules of Practice in effect prior to the amendments govern this proceeding.

[3] Respondent's brief asserts that has also entered the motive market, as evidenced by from that company. However, none of the affidavits accompanying Respondent's motion refers to motive separators or motive batteries. In addition, Complaint Counsel have submitted a declaration from JCI indicating that JCI does not make motive batteries. (Gruenstern Dec. ¶ 2; *see also* Hall, Tr. 2665 ("Q. Does JCI make any motive power batteries? A. No. Johnson Controls isn't in that segment.").)

development of a deep-cycle separator. Respondent's witness from Crown Battery testified at the hearing that it had plans to test a deep-cycle separator sample from Entek. (Balcerzak, Tr. 4130-31 ("I've asked him to make us golf car material, which he's working on right now."); *see also id*. at 4138-39.)

Third, reopening the record to permit additional discovery and a hearing before the Commission would prejudice Complaint Counsel. Although Respondent claims to seek only "limited discovery," it is in fact seeking broad discovery that could require significant time and expense by Complaint Counsel. Specifically, Respondent requests the right to issue subpoenas for documents and testimony relating to the manufacture, development, marketing, purchase, or testing of deep-cycle and motive battery separators in the United States since the close of discovery. (Respondent's Proposed Order at 1-2.) Furthermore, the Commission is mindful that in any litigation involving a consummated merger, unnecessary procedural delays may increase the risk of ongoing injury to consumers and competition. That risk is heightened here, given the ALJ's findings that the acquisition of Microporous by Daramic resulted in higher prices to customers. (Findings of Fact 897-922; Initial Decision at 261-62.) Respondent has therefore failed to establish that reopening the record is warranted.

Notwithstanding the denial of Respondent's request to reopen the hearing record to conduct additional discovery and to hold an evidentiary hearing, the four affidavits accompanying Respondent's motion shall be admitted into evidence and considered by the Commission when rendering its decision. While the probative value of these affidavits is limited, their admission into evidence will not delay these proceedings or prejudice Complaint Counsel. Indeed, Complaint Counsel have already submitted a rebuttal declaration, which will also be admitted into evidence and considered by the Commission.

Much of the content of these affidavits and declarations is, of course, hearsay, but the Commission has held that "all relevant and material evidence—whether hearsay or not—is admissible, as long as it is reliable." *American Home Products Corp.*, 98 F.T.C. 136, 368 n.9 (1981). *See also Kellogg Co.*, 99 F.T.C. 8, 31-32 (1982) ("Section 3.43(b) of the Commission's Rules of Practice provides for the admission of relevant, material, and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received."); *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) ("[I]t is long settled that hearsay evidence is not to be out of hand rejected or excluded by administrative tribunals.").[4] Respondent's affidavits have sufficient indicia of reliability as to the deep-cycle market on account of their consistency with existing evidence in the record, in particular the testimony of Crown Battery.

Accordingly,

[4] The Commission recently revised Rule 3.43(b) of its Rules of Practice to acknowledge that hearsay evidence may be considered if it is relevant, material, and reliable. *See* note 2, *supra*.

IT IS ORDERED THAT the affidavits of Robert B. Toth, S. Tucker Roe, Randy A. Hanschu, and Steve McDonald accompanying Respondent's Third Motion to Reopen the Hearing Record shall be admitted into evidence;

IT IS FURTHER ORDERED THAT the declaration of Robert Gruenstern accompanying Complaint Counsel's Response to Respondent's Third Motion to Reopen the Hearing Record shall be admitted into evidence;

IT IS FURTHER ORDERED THAT Respondent's Third Motion to Reopen the Hearing Record is otherwise denied; and

IT IS FURTHER ORDERED THAT oral argument shall take place according to the Notice Scheduling Oral Argument issued on June 28, 2010.

By the Commission.

Donald S. Clark

Donald S. Clark
Secretary

ISSUED: July 19, 2010