

ORIGINAL



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**RESPONDENT’S MOTION TO EXCLUDE USE OF PX0803  
BY COMPLAINT COUNSEL**

Pursuant to the Federal Trade Commission Rules of Practice, Respondent Polypore International, Inc. (“Polypore”), by and through counsel, submits this Motion to Exclude Use of PX0803 by Complaint Counsel.

**ARGUMENT**

The Federal Trade Commission Rules of Practice provide that “[i]rrelevant, immaterial, and unreliable evidence” shall be excluded from adjudicative proceedings. *16 C.F.R. § 3.43(b)*. Although hearsay may be admitted, it must be relevant, material, and bear satisfactory indicia of reliability so that its use is fair. *Id.*

Complaint Counsel argues that PX0803 is admissible under two legal theories. First, Complaint Counsel argues that PX0803 is admissible as an admission by a party-opponent pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence. Specifically, Complaint Counsel argues that Mr. Randy Hanschu, a salesperson, made an admission binding on Polypore when he stated that “[i]t is sure getting difficult to convince our customers that we are not a monopoly.” (PX0803.)

Rule 801(d)(2)(D) of the Federal Rules of Evidence defines as nonhearsay a statement offered against a party that is “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” FED. R. EVID. 801(d)(2)(D). In order to introduce evidence of an out-of-court statement as

nonhearsay under Rule 801(d)(2)(D), a party must lay a sufficient foundation by establishing “(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency.” *Pappas v. Middle Earth Condominium Ass’n*, 963 F.2d 534, 537 (2d. Cir. 1992). Complaint Counsel has not and cannot show that Mr. Hanschu’s off-hand comment was made within the scope of his employment at Polypore.

Complaint Counsel has attempted to portray Mr. Hanschu as a key sales manager within the Polypore corporate hierarchy, but this characterization is simply misleading. Despite holding the title of Senior Technical Sales Manager, Mr. Hanschu is considered an entry-level salesperson at Polypore and he does not even supervise a single Polypore employee. (Affidavit of Randy A. Hanschu (“Hanschu Aff.”), ¶ 2.) Polypore salespeople are simply referred to as “sales managers” for customer relations purposes. (Hanschu Aff., ¶ 2.)

That issue aside, “the position of the individual in the so-called corporate hierarchy is not in and of itself determinative of an 801(d)(2)(D) type of issue.” *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1565 (11th Cir. 1991). The appropriate focus is instead upon whether the employee’s statement concerned a matter within the scope of his agency or employment. *Id.*; see also *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (“The mere fact that each of these men was a ‘manager’ within the expansive Spiegel organization is clearly insufficient to establish that matters bearing upon [plaintiff’s] discharge were within the scope of their employment”).

Mr. Hanschu’s statement was clearly not made within the scope of his employment. As a matter of law, a legal “opinion or conclusion of an agent ... is not binding upon his principal unless the latter has authorized his agent to form and express an opinion on his behalf.” *Fidelity & Casualty Co. v. Haines*, 111 F. 337, 338 (8th Cir. 1901). Mr. Hanschu’s job is to interface with approximately ten Polypore customers. (Hanschu Aff., ¶ 3.) But he is not a lawyer; he does

not have legal training or expertise; he does not have the authority to enter into contracts on behalf of Polypore; and he does not have the authority to make legal statements or decisions on behalf of Polypore. (Hansch Aff., ¶ 2.) Therefore, his statement cannot constitute an admission by Polypore. *See Strauch v. United States*, 637 F.2d 477 (statement by postal inspector that Postal Service appeared to be liable for plaintiff's injuries did not constitute an admission); *Haines*, 111 F. 337 (statement by insurance agent did not constitute an admission of the insurance company because he was not authorized to make such statements on behalf of the company).

Second, Complaint Counsel argues that Mr. Hanschu's statement is admissible pursuant to the *Lennox* presumption found in 16 C.F.R. § 3.43(d)(3). But even this presumption does not give Complaint Counsel *carte blanche* to introduce irrelevant, immaterial, and unreliable evidence. *See 16 C.F.R. § 3.43(b)*. Mr. Hanschu's statement is precisely the type of unreliable "evidence" that 16 C.F.R. § 3.43(b) is designed to exclude. In addition to making a bald legal conclusion outside of the scope of his authority, Mr. Hanschu admitted that his statement was *false*. (Hansch Aff., ¶ 4.) He stated that "[n]o customer has ever informed me that they considered Polypore a monopoly; I have never attempted to convince a customer that Polypore was not a monopoly; and I am not aware of any other Polypore salesperson attempting to convince a customer that Polypore was not a monopoly."<sup>1</sup> (Hansch Aff., ¶ 4.) He further stated that he does not even know the legal definition of the term "monopoly," but he does not believe that Polypore is a monopoly as that term is commonly used. (Hansch Aff., ¶ 4.) Mr. Hanschu admitted this off-hand statement was made "in a moment of frustration while dealing with a customer service issue." *See generally, Staheli v. University of Mississippi*, 854 F.2d 121, 127

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<sup>1</sup> *See generally, Oki America, Inc. v. Microtech Int'l*, 872 F.2d 312, 314 (9th Cir. 1988) (employee statement does not constitute an admission by the company when employee admits that he did not have any factual basis for the alleged statement).

(1988) (“statement did not concern a matter within the scope of his agency and was made in his capacity as wiseacre only”).

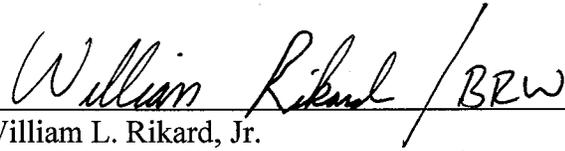
Polypore submits that Complaint Counsel knows this statement is unreliable and has crafted his litigation strategy to avoid dealing with this issue. Complaint Counsel has not even attempted to depose Mr. Hanschu or compel his appearance at trial. But Complaint Counsel has deposed Mr. Hanschu’s former supervisor, William Keith, who was a recipient of Mr. Hanschu’s e-mail in PX0803. (*See* PX0803.) Complaint Counsel did not ask Mr. Keith a single question about Mr. Hanschu’s alleged admission. This was not a simple oversight. The rationale is simple: facts and context would prevent Complaint Counsel from parading this e-mail in front of the Court. PX0803 is precisely the type of irrelevant, immaterial, and unreliable “evidence” that *16 C.F.R. § 3.43(b)* is designed to exclude and therefore it should not be admitted by this Court.

#### **CONCLUSION**

For the foregoing reasons, Polypore respectfully requests that its Motion to Exclude Use of PX0803 be granted.

Dated: June 11, 2009

Respectfully submitted,



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*Attorneys for Respondent*

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**PUBLIC DOCUMENT**

**PROPOSED ORDER**

Upon consideration of Respondent's Motion to Exclude Use of PX0803 by Complaint Counsel, any opposition thereto, any hearing thereon, and the entire record in this proceeding,

IT IS HEREBY ORDERED, that Respondent's Motion is GRANTED.

IT IS FURTHER ORDERED, that the document identified as PX0803 shall not be admitted into evidence in this proceeding.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Motion to Exclude Use of PX0803 by Complaint Counsel***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Rm. H-135  
Washington, DC 20580  
[secretary@ftc.gov](mailto:secretary@ftc.gov)

I hereby certify that on June 11, 2009, I caused to be served one copy via electronic mail delivery and two copies via hand delivery of the foregoing ***Respondent's Motion to Exclude Use of PX0803 by Complaint Counsel*** upon:

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

I hereby certify that on June 11, 2009, I caused to be served via hand delivery and electronic mail delivery a copy of the foregoing ***Respondent's Motion to Exclude Use of PX0803 by Complaint Counsel*** upon:

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**AFFIDAVIT OF RANDY A. HANSCHU**

Randy A. Hanschu, being duly sworn, deposes and says:

1. I am a Senior Technical Sales Manager for Daramic, LLC, a subsidiary of Polypore International, Inc. (collectively "Polypore"). I have personal knowledge of the matters set forth herein, except as to those matters stated herein to be alleged upon information and belief, and as to those matters, I believe them to be true. I respectfully submit this affidavit in support of Respondent's Motion *in Limine* To Exclude Use Of PX0803 By Complaint Counsel.

2. Despite the title, the position of Senior Technical Sales Manager is considered an entry level sales position at Polypore. Polypore salespeople are commonly referred to as "sales managers" for customer relations purposes. I do not supervise any Polypore employees; I do not have the authority to enter into contracts on behalf of Polypore; I do not have the authority to make legal statements or decisions on behalf of Polypore; and I have no legal training or expertise.

3. My job responsibilities include interfacing with approximately ten Polypore customers located in the United States and Canada. I do not communicate with other Polypore customers.

4. I authored the June 24, 2008 e-mail contained within PX0803, wherein I stated that "[i]t is sure getting difficult to convince our customer that we are not a monopoly."

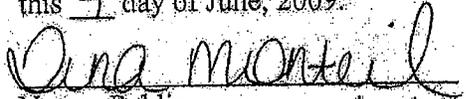
(PX0803.) That was an inaccurate statement. No customer has ever informed me that they considered Polypore a monopoly. I do not know the legal definition of the term “monopoly,” but I do not believe that Polypore is a monopoly as that term is commonly used.

5. I made this off-hand statement in a moment of frustration while dealing with a customer service issue. I did not intend for this statement to be taken seriously, and if I had been deposed or called to testify by Complaint Counsel, I would have corrected and clarified this misstatement.

This 9 day of June, 2009.

  
Randy A. Hanschu

Subscribed and sworn to before me  
this 9 day of June, 2009.

  
Notary Public  
My Commission Expires 3/13/10

