



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 *See* Order on Post Trial Briefs, at 2 ("Do not cite to documents that are not in evidence .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  
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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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