

ORIGINAL

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



_____)
In the Matter of _____)
POLYPORE INTERNATIONAL, INC., _____)
Respondent. _____)
_____)

Docket No. 9327

**ORDER DENYING RESPONDENT'S MOTION
TO REOPEN THE HEARING RECORD**

I.

On August 20, 2009, Respondent filed its motion to reopen the hearing record to rule on the admissibility of PX 3016. Complaint Counsel filed its opposition on August 24, 2009. For the reasons set forth below, Respondent's motion is DENIED.

II.

On the sixth day of trial, Complaint Counsel moved to offer PX 3016 into evidence during the redirect examination of Robert Toth. Transcript of Testimony before the ALJ ("Tr."), 1647. Respondent's counsel objected to the admissibility of PX 3016 on the ground that the document had been presented to Respondent's counsel only earlier that day. Tr., 1647. Complaint Counsel requested that the ruling on admissibility of PX 3016 be deferred until Respondent's counsel had the opportunity to review it. Tr., 1647. The parties were directed to discuss the exhibit and to inform the Administrative Law Judge later if Respondent's counsel continued to object to the admissibility of PX 3016. Tr., 1647.

Respondent states that this discussion occurred near the conclusion of Mr. Toth's testimony at the end of the day, that another witness was called to the stand the next morning, and that the matter of admissibility of PX 3016 did not come up again. Respondent further states that Complaint Counsel never withdrew its motion to offer PX 3016 into evidence and that Respondent's counsel did not realize that the admissibility of PX 3016 remained unsettled. Respondent also states that it has no objection to PX 3016 and withdraws its objection based on Complaint Counsel's failure to provide timely notice of its use.

Complaint Counsel argues that Respondent has not shown good cause for reopening the record, as required by Rule 3.51(e), and that the motion should therefore be denied. Complaint Counsel states that it demonstrated to Respondent that PX 3016 was not in evidence through its final set of exhibits, which did not include PX 3016. Complaint Counsel argues that Respondent's failure to recognize that PX 3016 was not admitted until long after the close of the hearing record does not warrant reopening the record. Complaint Counsel urges that admitting

PX 3016 at this late date would prejudice Complaint Counsel, who did not have the opportunity to rely on the exhibit in its post-trial briefs and proposed findings of fact.

III.

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). The FTC amended Parts 3 and 4 of its Rules of Practice on January 13, 2009. Under the revised rules, Rule 3.51(e)(1) states: "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).

In the interim final rules, the FTC stated that the rules that were in effect before January 13, 2009 would govern all then pending Commission adjudicatory proceedings. Accordingly, Rule 3.51(e), as applicable to this proceeding, does not require Respondent to show good cause for reopening the proceeding for the reception of further evidence.

Although good cause need not be shown, Respondent has not demonstrated a sufficient basis to reopen the record at this point in the proceedings. To admit PX 3016 at this late date, after the completion of all post trial briefs, proposed findings of facts, replies thereto, and closing arguments, would be prejudicial, as Complaint Counsel was not able to rely on or respond to the exhibit. Accordingly, Respondent's motion is DENIED.


D. Michael Chappell
Chief Administrative Law Judge

Date: September 8, 2009