



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

)
In the Matter of)
)
Polypore International, Inc.)
)
a corporation.)

Docket No. 9327
Public Version

**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S MOTION FOR
A PROTECTIVE ORDER REGARDING TESTIMONY OF PHILIP BRYSON
AND CROSS MOTION TO COMPEL TESTIMONY OF PHILIP BRYSON**

Introduction

Respondent moves to protect Philip Bryson from cross-examination at a deposition or at the hearing on baseless grounds. Contrary to the statements made in Respondent’s Motion, Complaint Counsel told Respondent’s Counsel orally and in writing earlier this week that it intended to call Mr. Bryson as a fact witness at the hearing (either in person or by deposition) because Mr. Bryson “was directly involved in negotiating with Exide on the issues [Respondent] raised in [its] motion. He personally discussed these issues with Mr. Gillespie and is a witness to these events. None of this involved attorney advice to his client, which does not interest us.”¹ (Exhibit 1). Respondent’s Motion does not deny that Mr. Bryson is indeed a fact witness. Polypore just thinks it is oppressive for him to have to testify. But when Mr. Bryson became personally involved as a negotiator with Exide on the issue that Polypore wants to raise with this Court, he became a key witness on this issue. Complaint Counsel should be

¹ Although we believe that Respondent has told this Court incorrectly that these are new, post-trial issues, because your Honor has found that based on Respondents’ proffer these are unanticipated issues, by definition this is the proper context for rebuttal with a fact witness who directly negotiated with a third party on this issue. See, e.g., *In re North Texas Specialty Physicians*, 2004 WL 1369274, No. 9312 (Order, May 18, 2004).

given the opportunity to have the “effective rebuttal” that this Court offered in its Order.

By this motion, and pursuant to Federal Trade Commission Rules of Practice (“Rules”) §3.33(a), §3.31(c)(1), §3.31(d), and §3.38(a), Complaint Counsel respectful moves the Court to deny Respondent’s Motion for a Protective Order Regarding Testimony of Philip Bryson (“Motion for Protective Order”) and compel Philip Bryson to appear for deposition on October 27, 2009. Complaint Counsel has repeatedly attempted to resolve this matter with Respondent, but cannot reach a resolution.

Argument

First, Respondent claims that Complaint Counsel cannot call any witnesses at trial. But this Court gave Complaint Counsel “pre-hearing procedures to ensure that Complaint Counsel is capable of effective rebuttal.” (Second Hearing Scheduling Order at 7). Surely, this does not mean that Complaint Counsel cannot even depose a witness who actually negotiated with Exide on the issue that is being proffered by Respondent.

Second, Respondent claims that Complaint Counsel does not have any witnesses at this hearing. Again, this is not correct. When Respondent asked Complaint Counsel if he had any witnesses, we responded: “[O]ur witness list is Messrs. Toth, Bryson, Seibert, and Gillespie. We assume you will call Toth, Seibert, and Gillespie, as you told the court, and we will cross-examine. But if you choose not to call one or more of them, we reserve the right to call them and Mr. Bryson in rebuttal. ... Then we may call Mr. Bryson, although we may do it by deposition.” (Exhibit 1; *see also* Rule §3.33(a) and (c)(1) (“Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.”)). Complaint Counsel believes that that Mr. Bryson

personally negotiated with Mr. Gillespie of Exide over the issues raised in Respondent's Second Motion for Reopening the Hearing and thus should be allowed to depose him for the requested two hours.

Third, there is no reason to believe that the deposition will "stray into matters covered by attorney-client privilege." (Motion for Protective Order, ¶4). As Complaint Counsel has told Respondent's counsel several times, he will not be inquiring into the advice that Mr. Bryson gave to Daramic. Instead, Complaint Counsel will be conducting discovery regarding Mr. Bryson's direct involvement in negotiating with Exide on the proffered issues. There is no basis for concern. A dual role at Daramic is nothing new for Mr. Bryson. Mr. Bryson described his function within Polypore as "probably less than 50% on legal duties and the rest as part of the 'business.'" (PX1104; *see also* Exhibit 2 - Heglie (IGP) IH Tr. 55:16-56:7)). With regard to Mr. Bryson's role as a business person within Daramic, there is no dispute.

Furthermore, the case law demonstrates that an attorney can be deposed. In *United States v. Philip Morris, Inc.*, 209 F.R.D. 13 (D.D.C. 2002), the court made it clear that "it is important to emphasize that the Federal Rules of Civil Procedure create no special presumptions or exceptions for lawyers, or anyone else - even a sitting President of the United States," and there is no rule at this Agency that suggests otherwise. *See Sadowski v. Gudmundsson*, 206 F.R.D. 25 (D.D.C.2002) (trial counsel may be deposed on non-privileged factual information); *Amicus Communications v. Hewlett Packard Company*, 99-0284, 1999 WL 33117227 (D.D.C.1999) (opposing counsel could be deposed on non-privileged and factual material); *quoting United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 249 (D.Kan.1995) ("[w]hen a party employs a

counsel to represent it in a case where an attorney has played a role in the underlying facts, both the attorney and the party have every reason to expect that the attorney's deposition may be requested.”). Consistent with the case law, Mr. Bryson can be deposed about his role in negotiations with Exide.

Fourth, Respondent incorrectly assumes that “Mr. Bryson’s testimony would add nothing to the evidence and, at best, would be cumulative of the evidence to be presented throughout the testimony of Robert Toth, Harry Seibert, and Douglas Gillespie.”

(Motion for Protective Order, ¶4). Complaint Counsel disagrees with Respondent and believes it has the right to obtain direct evidence related to Respondent’s proffers from Mr. Bryson under Rule §3.33(a) and this Court's Second Hearing Schedule Order.

Specifically, Complaint Counsel has learned that Mr. Bryson has personally negotiated with Exide’s Mr. Gillespie on the issues raised in Respondents’ Motion.

Fifth, Respondent completely mischaracterizes Complaint Counsel's intended purpose for taking Mr. Bryson's deposition. Complaint Counsel has told Respondent several times why it needs to take Mr. Bryson's deposition:

“I understand that you may oppose the deposition of Mr. Bryson. However, as I mentioned yesterday, he was directly involved in negotiating with Exide on the issues you raised in your motion. He personally discussed these issues with Mr. Gillespie and is a witness to these events. None of this involved attorney advice to his client, which does not interest us. If you have an objection, please make it quickly, so that we have some chance to resolve the issue before Tuesday.”

(Exhibit 1). Since Complaint Counsel is not calling Mr. Bryson for the reasons Respondent disingenuously claims, justice does not require this Court to protect Mr. Bryson “from annoyance, embarrassment, oppression, or undue burden or expense...”

(Rule §3.31(d)). Indeed, at Respondent's request, Complaint Counsel is flying to Charlotte to take the deposition and has offered to take no more than two hours of Mr. Bryson's time.

Lastly, the information sought by Complaint Counsel's Requests is central to the pending hearing. In particular, Complaint Counsel needs the information to contradict the proffered facts claimed by Respondent, which lie at the core of this hearing. Without the information gained from Mr. Bryson's testimony, Complaint Counsel is prejudiced, and this Court will not hear the true facts that underlie the alleged issue.

CONCLUSION

It would be inappropriate for this Court to issue a protective order to prevent Mr. Bryson's testimony and would prejudice Complaint Counsel's ability to respond. Pursuant to 16 C.F.R. §3.33(a), §3.31(c)(1), §3.31(d), and §3.38(a), Complaint Counsel respectfully moves the Court to deny Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson and compel Philip Bryson to appear for deposition on October 27, 2009 and testify as a witness at trial if called.

October 22, 2009

Respectfully submitted,

 / JRR

J. Robert Robertson
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
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PROPOSED ORDER

Upon consideration of Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson, Complaint Counsel's Response to Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson and Complaint Counsel's Motion to Compel Philip Bryson to appear for deposition on October 27, 2009, any opposition thereto, and the Court being fully informed,

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

IT IS FURTHER ORDERED, that Respondent shall have Philip Bryson available for deposition on Tuesday, October 27, 2009 and testify as a witness at trial if called.

D. Michael Chappell
Administrative Law Judge

Dated:

Exhibit 1

to

**Complaint Counsel's Reply to Respondent's Motion
for a Protective Order Regarding Testimony of Philip Bryson and
Cross Motion to Compel Testimony of Philip Bryson**

OCTOBER 22, 2009

**Polypore International, Inc.,
Docket No. 9327**

Antonio, Stephen

From: Dahm, Steven A.
Sent: Wednesday, October 21, 2009 10:15 AM
To: Antonio, Stephen
Subject: FW: Depositions

From: Gris, Benjamin
Sent: Wednesday, October 21, 2009 9:38 AM
To: Dahm, Steven A.
Subject: Fw: Depositions

From: Robertson, J. Robert
To: 'williamrikard@parkerpoe.com' <williamrikard@parkerpoe.com>; Gris, Benjamin
Cc: 'ericwelsh@parkerpoe.com' <ericwelsh@parkerpoe.com>
Sent: Tue Oct 20 19:26:01 2009
Subject: Re: Depositions

We can start at 10 for Mr Toth with Seibert to follow later that morning. Unless we find out that others are relevant to your claims on the three narrow issues outlined by the court, our witness list is Messrs. Toth, Bryson, Seibert, and Gillespie. We assume you will call Toth, Seibert, and Gillespie, as you told the court, and we will cross-examine. But if you choose not to call one or more of them, we reserve the right to call them and Mr Bryson in rebuttal.

You said half a day for the three witnesses, so I am anticipating that you will use about 30 minutes per witness. We are entitled to equal time, if we need it.

Then we may call Mr. Bryson, although we may do it by deposition. But if he doesn't get deposed on Tuesday, then he will have to come live.

Let me know if you have any questions. Thanks.

From: Rikard, Jr., William L. <williamrikard@parkerpoe.com>
To: Robertson, J. Robert; Gris, Benjamin
Cc: Welsh, Eric D. <ericwelsh@parkerpoe.com>
Sent: Tue Oct 20 17:53:28 2009
Subject: RE: Depositions

Robby:

We will proceed with Tuesday. We are going to file a motion on Philip's deposition. Bob Toth has an early morning conflict, but we can start his deposition at 10. Based on our conversation yesterday, my understanding is that you do not propose to call a witness at the hearing. Please confirm.

William

William Rikard, Jr.
Partner

10/22/2009



Parker Poe

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From: robert robertson [mailto:rrobertson@ftc.gov]
Sent: Tuesday, October 20, 2009 4:03 PM
To: Rikard, Jr., William L.
Cc: Welsh, Eric D.; Gris, Benjamin; Steven Dahm
Subject: Depositions

William:

Received your voicemail asking to put off the depositions until the last day allowed for discovery on the issues raised in your motion. Although we do not want to delay depositions until Tuesday, we also do not believe we can get the issue resolved in time to make a difference. Thus, we agree to take the depositions at your offices beginning at 9:00 am with Mr. Toth; Mr. Seibert at 11:00am; and Mr. Bryson at 2:00pm.

I understand that you may oppose the deposition of Mr. Bryson. However, as I mentioned yesterday, he was directly involved in negotiating with Exide on the issues you raised in your motion. He personally discussed these issues with Mr. Gillespie and is a witness to these events. None of this involved attorney advice to his client, which does not interest us. If you have an objection, please make it quickly, so that we have some chance to resolve the issue before Tuesday.

We still disagree with your position that we are "not entitled" to obtain any of the documents in your possession that relate to the issues you raised in your motion. We would like to have that issue decided before the depositions to avoid prejudice to us, but will not put off the depositions if the issue is not resolved by then. We'd rather have half the evidence, rather than none of it.

Thanks. Robby.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

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10/22/2009

Exhibit 2

to

**Complaint Counsel's Reply to Respondent's Motion
for a Protective Order Regarding Testimony of Philip Bryson and
Cross Motion to Compel Testimony of Philip Bryson**

OCTOBER 22, 2009

**Polypore International, Inc.,
Docket No. 9327**

1 Q. If EnerSys was to get out of their
2 contract with Microporous at the time of the Daramic
3 acquisition, would that affect the valuation of
4 Microporous?

5 A. I don't know.

6 Q. Isn't that what you are positing here?
7 You say, "If that were the case, I'm not confident
8 their valuation of MPLP" -- MPLP's referring
9 Microporous Products, correct?

10 A. Yes.

11 Q. "-- would be very attractive to us." You
12 were speculating that if EnerSys got out of the
13 contract, that would hurt the valuation of
14 Microporous. Is that correct?

15 A. It looks like it from this email, yeah.

16 Q. Turning to the first page of PX1104, in
17 the email from Mr. Gilchrist to yourself,
18 Mr. Gilchrist noted, Phillip Bryson is the internal
19 counsel for Polypore but he described his function
20 to us last week as probably less than 50 percent on
21 legal duties and the rest as part of the "business."
22 Is this description that Mr. Gilchrist gave to you
23 similar to what you recall Mr. Hauswald telling you
24 about his role at Daramic Polypore?

25 A. You mean Bryson?

1 Q. Mr. Bryson, yes. I'm sorry.

2 A. I don't recall, but probably. I remember
3 being left with this impression.

4 Q. Left by Mr. Bryson --

5 A. Yes.

6 Q. -- with that impression?

7 A. Yes.

8 Q. Okay.

9 Moving to the bottom of Mr. Gilchrist's
10 email, Mr. Gilchrist notes that "EnerSys, as well as
11 others, will be frustrated by this acquisition. Our
12 contract with EnerSys allows only for the fact that
13 EnerSys cannot be compelled to assign the contract
14 to a competitor buying" Microporous, or he says
15 "MPLP," and, again, that's referring to Microporous,
16 correct?

17 A. I would assume so.

18 Q. Why would you assume that?

19 A. That MPLP refers to Microporous, because I
20 think he's done it interchangeably.

21 Q. He goes on to say, "The reality is that
22 this means basically nothing as there are no other
23 choices from which to source industrial separators
24 but MPLP and Daramic. Amer-Sil is not an option.
25 The reality is that everyone would be stuck with

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2009, I filed via hand and electronic mail delivery an original and two copies of the foregoing Complaint Counsel's Reply to Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson and Cross Motion to Compel Testimony of Philip Bryson with:

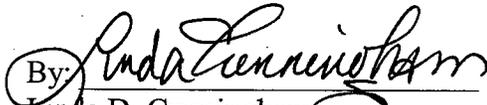
Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580

I hereby certify that on October 22, 2009, I filed via hand and electronic mail delivery two copies of the foregoing Complaint Counsel's Reply to Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson and Cross Motion to Compel Testimony of Philip Bryson with:

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

I hereby certify that on October 22, 2008, I filed via electronic and first class mail delivery a copy of the foregoing Complaint Counsel's Reply to Respondent's Motion for a Protective Order Regarding Testimony of Philip Bryson and Cross Motion to Compel Testimony of Philip Bryson with:

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