

ORIGINAL

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



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In the Matter of )  
 )

POLYPORE INTERNATIONAL, INC., )  
Respondent. )  
\_\_\_\_\_ )

Docket No. 9327

**ORDER ON COMPLAINT COUNSEL'S  
MOTION FOR OFFICIAL NOTICE**

**I.**

On January 26, 2010, Complaint Counsel submitted a Motion for Official Notice of New Contract Agreement Between Polypore and Exide Technologies, Inc. ("Motion"). Respondent submitted a response on February 2, 2010 ("Response"). Having fully considered Complaint Counsel's Motion and Respondent's Response, and as more fully set forth below, the Motion is GRANTED.

**II.**

Complaint Counsel seeks official notice, pursuant to Commission Rule 3.43(d), "of the recent signing of a supply agreement between Exide Technologies Inc. and Respondent," as announced in an 8-K filing Respondent made with the Securities and Exchange Commission ("SEC") on January 19, 2010. Motion at 1. A copy of the Form 8-K is attached to Complaint Counsel's Motion as Exhibit A.

Respondent does not dispute the fact that it filed a Form 8-K with the SEC on January 19, 2010, and does not object to taking official notice of that fact. Respondent requests, however, that any official notice be limited to the fact of the filing and exclude official notice of any inferences and arguments based upon the filing. Response at 1.

**III.**

**A. General Principles**

As a general rule, "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision" in an administrative adjudication. 5 U.S.C. § 556(e); *see also* Commission Rule 3.51(c)(1) ("An initial decision shall be based on a consideration of the whole record

relevant to the issues decided . . .”), 16 C.F.R. § 3.51(c)(1). Commission Rule 3.43(d) permits consideration of a fact outside the record in limited circumstances, stating: “When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.” 16 C.F.R. § 3.43(d); *see also* 5 U.S.C. § 556(e) (“When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”).

Official notice and its “close parallel,” judicial notice, “permit a court or agency to take notice of an adjudicative fact ‘not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (quoting Fed. R. Evid. 201(b)).

## **B. Official Notice of Public Documents**

Applying the foregoing principles, the Commission has held that “[m]atters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and ‘records and reports of administrative bodies.’” *In re S.C. State Bd. of Dentistry*, No. 9311, 2004 FTC LEXIS 289, at \*18 & n.4 (July 28, 2004), quoting in part *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (taking official notice of statutes, regulations, Board minutes, and a press release issued by Office of the Governor, in evaluating motion to dismiss). Accordingly, the Commission has taken official notice of SEC filings, *In re Chicago Bridge & Iron Co. N.V.*, No. 9300, 2005 FTC LEXIS 70, at \*40 (May 10, 2005) (taking official notice of SEC form 10-K filing to find that certain entities had been sold), publicly filed consent orders, *In re Telebrands*, No. 9313, 2005 FTC LEXIS 178, at \*99 (Sept. 19 2005), and U.S. Census data. *In re Avnet, Inc.*, No. 8775, 1973 FTC LEXIS 125, at \*132 (Feb. 16, 1973). Federal court cases have also taken judicial notice of SEC filings. *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000). In *Oran*, the court reasoned that official notice of “properly-authenticated public disclosure documents filed with the SEC” is permissible because such documents are “required by law to be filed with the SEC and no serious questions as to their authenticity can exist.” 226 F.3d at 289, citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276 (11th Cir. 1999); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

Official notice is not an appropriate vehicle to draw inferences or determine arguments. *In re Rambus, Inc.*, No. 9302, 2003 FTC LEXIS 135, at \*5 (Aug. 27, 2003). As the court explained in *York v. AT&T*, 95 F.3d 948, 958 (10th Cir. 1996), regarding judicial notice under Federal Rule of Evidence 201: “Judicial notice is appropriate where a matter is ‘verifiable with certainty.’ . . . It replaces the evidentiary procedure that would otherwise be necessary to establish ‘adjudicative facts’ that are generally known or ‘capable of accurate and ready determination’ by resort to reliable sources.” *Id.* *See also*

Commentary to Fed. R. Evid. 201 (“When a Trial Judge draws inferences from a writing, the Judge is not taking judicial notice; she is engaging in factfinding and Rule 201 does not apply.”).

In the instant case, Respondent does not dispute or object to taking official notice of the Form 8-K filing that is the subject of Complaint Counsel’s Motion. Accordingly, in accordance with applicable law, as set forth above, official notice will be taken that a Form 8-K filing was made by Respondent with the SEC on January 19, 2010, announcing that its wholly-owned subsidiary, Daramic, LLC, entered into a new evergreen supply agreement with Exide Technologies. *See* Motion, Exhibit A, at 2. This official notice will not include, and will specifically exclude, any inferences and arguments based upon the SEC filing.

#### IV.

Having fully considered Complaint Counsel’s Motion for Official Notice and Respondent’s Response, and for all the foregoing reasons, it is hereby ORDERED:

Official notice is hereby taken that a Form 8-K Current Report was filed by Respondent with the SEC announcing: “On January 19, 2010, Polypore International, Inc. issued a press release announcing that its wholly-owned subsidiary, Daramic, LLC, entered into a new evergreen supply agreement with Exide Technologies.” Inferences and arguments regarding the 8-K filing are excluded from the official notice taken under this Order.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: February 16, 2010