ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO SET HEARING LOCATION

I. INTRODUCTION

On March 13, 2009, Respondent submitted a Motion to set the hearing location of the above-captioned matter in Charlotte, North Carolina. As discussed in more detail below, Respondent's motion should be denied for the following reasons: (1) Respondent's Counsel did not confer with Complaint Counsel, as required by Provision 5 of the Scheduling Order, (2) Respondent and Complaint Counsel are not in agreement that the trial should be held in Charlotte, North Carolina, (3) Respondent's arguments in support of its motion are not grounded in fact, (4) the legal doctrine of *forum non conveniens* is relevant, and pursuant to the principle's governing the law of *forum non conveniens*, Respondent did not overcome the strong presumption in favor of Complaint Counsel's choice of forum, and (5) there are important policy reasons restricting a respondents ability to force the Commission to litigate in distant forums merely by selecting counsel outside of Washington, D.C.

On January 16, 2009, Respondent filed a motion for a new scheduling order that set room H-532 of the Federal Trade Commission in Washington, DC, as the place of the hearing in this matter. Over Complaint Counsel's objections that the delay would harm customers, the Administrative Law Judge granted the motion setting the trial date for May 12, 2009, in

Washington, DC. The FTC is on a very tight budget and as a result of this order has not budgeted for the witnesses and FTC staff to travel to Charlotte for a two month of trial. Respondent has had months to actually discuss the trial location with Complaint Counsel and has failed to do so. In addition, while the FTC's courtroom has the latest electronic litigation technology, Complaint Counsel knows nothing about Respondent's proposed courtroom. It is simply too late to change gears and shift this litigation to Charlotte and it makes no sense to do so.

II. ARGUMENTS AND AUTHORITIES

Respondent's motion should be denied solely based on the fact that Respondent did not confer with Complaint Counsel prior to filing this motion, as required by the Scheduling Order.[1] In addition, Respondent's motion should be denied simply because Complaint Counsel and Respondent are not in agreement that the trial should be held in Charlotte, North Carolina. Notwithstanding the fact that those two points are dispositive, Respondent's arguments are not grounded in fact, and all things considered, having the trial in Charlotte, North Carolina would be primarily for the convenience of Respondent's business people who will be called as party witnesses, and Respondent's counsel, whose offices are located in Charlotte, North Carolina. This Court can find guidance in the doctrine of *forum non conveniens*, the analysis of which is relevant to the arguments being considered in support of, and in opposition to, Respondent's motion. Finally, there are strong policy reasons against allowing a respondent to dictate the location of a trial to the Commission simply by its choice of local counsel.

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[1]This is not the first time that Respondent has flaunted the Judge's Order that the parties meet-and-confer prior to the filing of a Motion. *See* Judge Chappell's November 14, 2008, *Order on Respondent's Motion for Protective Order and Complaint Counsel's Cross-Motion to Compel.*

A. Respondent Did Not Confer With Complaint Counsel As Required By Provision 5 Of The Scheduling Order

Provision 5 of the Scheduling Order requires that, "Each motion . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such a statement may be denied on that ground." Respondent did not confer with complaint counsel to resolve the issues raised by its motion.

On March 10, 2009, Complaint Counsel responded to a casual remark from Respondent's Counsel that they would see Complaint Counsel in North Carolina for the hearing by sending an e-mail informing Respondent's Counsel that Complaint Counsel could not agree to have the hearing anywhere but in Washington, DC, as ordered by this Court in the February 4, 2009 Scheduling Order.[2] Respondent's Counsel did not respond to this email. Subsequently, on March 13, 2009, Complaint Counsel was served with the motion under consideration. Between March 10 and March 13, Respondent did not contact or make any attempt to contact Complaint Counsel about the issues raised by that e-mail and by this motion. Indeed, except for the communication discussed above, there has not been any other communication between the parties with respect to the Hearing location. Not one.

Mr. Rikard's "Statement Pursuant to Scheduling Order" is at best disingenuous. Mr. Rikard asserts that "Parker Poe and Complaint Counsel have discussed the issues raised by Respondent's motion on several occasions over the past several months." However, the only

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[2] As recognized by Respondent in its motion, The Scheduling Order dated February 4, 2009 states, "Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580."

"issue" raised by Respondent's motion that has been discussed between the parties at all is whether or not Respondent would agree to a two day recess during the trial. These discussions never included the Hearing location.[3]

The point of Provision 5 of the Scheduling Order is not simply that parties file a piece of paper telling this Court, using cookie-cutter language, that they have conferred to resolve the issues raised by the motion. Rather, the point of Provision 5 is to require parties to actually confer and discuss the issues raised by the potential motion so that the judge's time will not be wasted by something that could be resolved by and between counsel. In this case, the only communication was contained in a single e-mail from Complaint Counsel stating in relevant part:

> I should also note that the judge ordered that the hearing take place in Washington, DC, which is where we are expecting it to take place. I have been informed that we have not budgeted for any other location, so we cannot agree to have the hearing anywhere but in DC. Doing it anywhere else would be a great inconvenience and expense to the government and for numerous third parties, which are closer to DC than to Charlotte.

See attached Exhibit A. Respondent's Counsel did not respond to the March 10 e-mail or even bother to call Complaint Counsel to discuss it. Rather, Respondent filed this motion three days later, asserting that Complaint Counsel and Respondent were "at an impasse." A ridiculous assertion in view of Respondent's failure to even attempt to discuss it.

Respondent failed to meet-and-confer, as required by Provision 5. Accordingly, Complaint Counsel respectfully requests that this Court deny the motion on the ground that Respondent failed to meet-and-confer prior to filing the motion with the Court.

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[3] This is also reflected in Respondent's Motion where it states "[a]ssuming that the hearing would be held in Charlotte, Respondent's Counsel told Complaint Counsel that it did not object to a recess in the hearing." Motion at ¶ 11.

B. Complaint Counsel Does Not Agree To Have The Trial In Charlotte, North Carolina

At the October 22, 2008, scheduling hearing, Judge Chappell merely invited the parties to consider having the trial in North Carolina. Judge Chappell stated, "If *everyone agrees* that we'd be better off having this trial where the witnesses are – and that's I guess North Carolina or whatever . . . if anybody wants to *talk about that*, come to some *agreement* . . ." (emphasis added).[4] Respondent's counsel responded, "That would be something that we would like to consider and we'll talk to Mr. Robertson about." Though Mr. Robertson expressed optimism that an agreement might be reached, he did not agree to conduct the hearing in North Carolina and expressly reserved that such a location would be acceptable only if it "works out." At no time following the scheduling conference did Respondent's Counsel negotiate with Mr. Robertson about moving the trial to North Carolina. Respondents and Complaint Counsel have not agreed to move the trial to Charlotte, North Carolina. Absent any agreement, the trial should be held where this Court ordered it take place in its *February 4, 2009 Order Granting Respondent's Motion To Amend The Scheduling Order*; to wit at the Federal Trade Commission Building in Washington, DC, where almost all administrative proceedings before the Federal Trade Commission occur.

C. Many Of Respondent's Arguments Are Not Grounded In Fact

Respondent makes a myriad of arguments as to why its motion to move the trial location to Charlotte, North Carolina should be granted. Although Complaint Counsel believes that the

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[4] Respondent reads too much into the exchange on that subject that occurred at the Scheduling Conference, arguing that "[a]t the scheduling conference held on October 22, 2008, Administrative Law Judge Chappell, Complaint Counsel and Respondent's Counsel all recognized that convenience and economic efficiency dictated that the hearing would likely need to occur in North Carolina."

issues raised above are dispositive of Respondent's motion, Complaint Counsel addresses many of Respondent's arguments below.

Respondent argues that many of the witnesses Complaint Counsel and Respondent intend to call reside in Charlotte. This is simply not true. No more than four of approximately 25 of Complaint Counsel's witnesses reside in Charlotte, North Carolina. Accordingly, the vast majority of Complaint Counsel's witnesses will have to travel, regardless of whether the trial is in North Carolina or Washington, DC. Respondent admits this in paragraph 7 of its motion in which it states, "None of the third-party witnesses are located in either Charlotte, North Carolina or Washington, DC, and therefore such third-party witnesses will have to travel regardless of whether the hearing is held in Charlotte or Washington, DC."[5]

Respondent also argues that Charlotte, North Carolina is the most convenient and cost-effective hearing location for the parties and other participants to the hearing. As only four of Complaint Counsel's witnesses reside in Charlotte and none of the third-party witnesses are located in either Charlotte or Washington, the majority of witnesses called to testify at trial will have to travel, at the expense of the party calling them to testify, regardless of where the trial is located. In addition, the Judge and Complaint Counsel are both located in Washington, DC. Litigating a trial in Charlotte, North Carolina will come at a huge expense to the Government, and thus, the taxpayers of the United States. As a matter of fact, with the exception of a few witnesses, the only parties for whom a trial location in Charlotte will be more convenient are

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[5] Complaint Counsel does not believe that there is any reason to have this trial in Charlotte; however, except for no more than four witnesses we intend to call, none of the remaining witnesses are in Charlotte. These same witnesses are on Respondent's list as well, and we assume that Respondent will put on its direct of these witnesses during Complaint Counsel's case in chief.

Respondent's counsel and the Polypore business people who will be called to testify. Even this overstates the inconvenience for Respondent, as it's special in-house counsel, Michael Shore, reportedly owns a home in Bethesda, Md., and its former counsel in this matter, Hogan & Hartson also have offices in D.C., which they have made available to Parker Poe to conduct the deposition of Complaint Counsel's expert Dr. Simpson.

Respondent argues that a trial in Washington, DC will impose lost work and travel time hardships that Polypore employees should not have to bear. Each testifying employee will more than likely be asked to spend a very limited amount of time in Washington, DC testifying. In addition, Washington, DC is a mere one hour flight from Charlotte, NC. Even if the trial is located in North Carolina, those same employees would lose work time preparing for trial testimony and actually testifying at trial. Not much additional time would be lost for these employees in the short, one hour flight from Charlotte to Washington, DC, which Complaint Counsel has made countless times during discovery in this matter.

It is also worth considering that most of the customers who will be called in this case actually reside in California (Trojan) or in Western Pennsylvania (EnerSys). The Trojan witnesses can fly direct to Washington, DC or take two flights to get to Charlotte. The EnerSys witnesses have been driving the two-hour drive to Washington, DC from Pennsylvania, so it would be an increased burden for them to have to fly to Charlotte, North Carolina. Both also have counsel here in Washington, DC, who would have to travel to North Carolina as well, at these customers' expense.[6] It would be more than an insult for this accused monopolist to jack

[6] The other major customer, Exide, is in Atlanta with its counsel being located in Washington, DC. Only the witnesses travel expenses are reimbursed; not their attorney travel and lodging expenses. Thus, third party witnesses such as Exide and Trojan with counsel in D.C. would bear additional costs and expenses related to their attorneys' travel to North

up prices well above competitive levels and then say that these customers must pay to come to a trial in Charlotte because Polypore International, which has facilities all over the world, cannot be bothered with showing up at trial in Washington, DC.

Respondent argues that Charlotte, North Carolina has extensive air transportation service to and from a multitude of locations. As the Nation's Capital, Washington, DC has three airports that also provide extensive air transportation service to and from a multitude of locations.

Respondent argues that Respondent's Counsel, Parker Poe Adams & Bernstein LLP has its headquarters office in Charlotte, North Carolina, and that a Washington, DC based hearing would require Respondent to incur significant attorney-related travel and hotel expenses that could be avoided if the hearing takes place in Charlotte. Both Judge Chappell and Complaint Counsel are located in Washington, DC. A Charlotte, North Carolina based hearing would require the Judge, Complaint Counsel, and thus, the Federal Government, to incur significant travel and lodging expenses.

Respondent further argues that Charlotte is a more appropriate venue because of its proximity to Piney Flats, Tennessee, which is a three hour car ride from Charlotte. Respondent claims in its motion that it plans to move for an order allowing Judge Chappell to view Respondent's manufacturing facility in Piney Flats during the course of the hearing. First, Complaint Counsel has never seen this motion, and this motion is not before this Court for consideration at this time. Second, it would certainly be cheaper for Judge Chappell to take a one-day trip to Piney Flats, Tennessee from Washington, DC than it would be for him to incur the costs of spending an entire trial away from his home in the Washington, DC area. Third,

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Carolina.

Respondent offers no evidence on why a picture of Piney Flats, or a video detailing the operation of its facilities, will not suffice.

As the foregoing demonstrates, many of Respondent's arguments as to why North Carolina is a more appropriate venue are not based in fact. For every argument as to why Charlotte, North Carolina is a more convenient location for Respondent, Complaint Counsel can show that Washington, DC is a more appropriate location for the hearing in this matter. Accordingly, this Court should deny Respondent's motion and proceed with the trial where this Court ordered it take place, in Washington, DC.

D. The Legal Doctrine Of *Forum Non Conveniens* Would Dictate That The Trial Be Held In Washington, DC.

In addition, this Court can find guidance in the legal doctrine of *forum non conveniens*. Although not directly on point, the doctrine of *forum non conveniens* is a balancing test used by federal courts to determine where a trial should be conducted and in what state or judicial district is most appropriate, considering the parties involved. The doctrine of *forum non conveniens* is available to parties to a trial if they believe the trial should be brought in a more appropriate forum. Pursuant to the law of *forum non conveniens,* upon a motion made by a party to the case, a court may resist imposition upon its jurisdiction even when the jurisdiction is authorized by the letter of a general venue statute, if another venue or forum is more appropriate. *Norex Petroleum Ltd. v. Access Indus.*, 416 F.3d 146, 153 (2d Cir. 2005). Courts have outlined a three-step process to guide the analysis. First, a court determines the degree of preference properly accorded the plaintiff's choice of forum. Second, the court considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. And third, the court will balance the private and public equities implicated in the choice of forum. *Norex*

Petroleum Ltd., at 153.

Respondent's motion is not a *forum non conveniens* motion. However, it is akin to one, and the legal principles governing the analysis are on point and can guide this Court in its consideration of the motion. Each element of the three-part test is analyzed below.

"Any review of a *forum non conveniens* motion starts with a 'strong presumption in favor of the plaintiff's choice of forum.'" *Norex Petroleum Ltd.*, at 154. Complaint Counsel's choice of forum is Washington, DC. In its motion, Respondent failed to offer facts that would overcome the presumption in favor of Complaint Counsel's choice of forum. As Respondent admits in Paragraph 7 of its motion, "None of the third-party witnesses are located in either Charlotte or Washington, DC, and therefore . . . will have to travel regardless of whether the hearing is held in Charlotte or Washington, DC." In addition, notwithstanding Respondent's assertions, no more than four of Complaint Counsel's approximately 25 witnesses are located in Charlotte, North Carolina. Moreover, the Judge is located in Washington, DC. All things considered, Charlotte, North Carolina is a more convenient location only for Respondent and some of its attorneys. Those unsupported arguments fail to overcome the strong presumption in favor of the plaintiff's choice of forum in a *forum non conveniens* analysis.

The next step in the analysis is to consider whether the alternative forum proposed by the Respondent is adequate to adjudicate the parties' dispute. In *Norex*, the court concluded that there was nothing in the record that suggested that either party gained or lost any advantage in the quality of the legal representation by having the trial in the plaintiff's choice of forum. *Norex Petroleum Ltd.*, at 156. Likewise, in this case, Respondent offers no evidence that either Respondent or the Government will gain or lose anything in the quality of legal representation if the trial is held at Complaint's Counsel's forum of choice, Washington, DC. In fact, the

Government stands to lose something important.

The last step in a *forum non conveniens* analysis is to balance the private and public equities implicated in the choice of forum. In the present case, many of the third party witnesses will have to travel, regardless of whether the trial is held in Washington, DC or Charlotte, North Carolina. In addition, both the Judge and Complaint Counsel are located in Washington, DC. The alternative forum would require the Government and Judge to travel, to the benefit of only Respondent and Respondent's attorneys. If the trial is held in Charlotte, North Carolina, both the Judge and Complaint Counsel will incur travel, lodging, and other costs that will come at the expense of the Federal Government, and ultimately, Unites States' taxpayers.

E. Strong Policy Grounds Dictate Against a Respondent's Ability to Select a Forum

There are strong policy reasons for denying Respondent's motion. If all respondents before the Federal Trade Commission can force the government to litigate it's cases in distant forums merely by arguing that their business people and attorneys will be inconvenienced because they are located outside Washington, DC, then the Commission will be put to great expense and inconvenience in every litigation that it brings. In this case, Polypore changed its counsel in Washington, DC, Hogan & Hartson, in favor of Parker Poe in North Carolina. It now argues that it and its attorneys will be inconvenienced by a trial in DC. The law cannot be that a respondent can influence the Commission's choice of venue by respondents choice of counsel.

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that Respondent's *Motion To Set Hearing Location* be denied.

Dated: March 20, 2009

Respectfully submitted,

By: _____

J. ROBERT ROBERTSON
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 325-2008
Fax: (202) 326-2884

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2009, I filed via hand an original and two copies of the foregoing Complaint Counsel's Opposition to Respondent's Motion To Set Hearing Location with:

Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-172
Washington, D.C. 20580

I also certify that on March 20, 2009, I delivered via hand delivery two copies of the foregoing to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-113
Washington, D.C. 20580

I also certify that on March 20, 2009, I delivered via electronic mail one copy of the foregoing to:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
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Charlotte, North Carolina 28202
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By: Terri Martin

Terri Martin
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, D.C. 20001
Telephone: (202) 326-3488
tmartin@ftc.gov (Email)

Exhibit A

From: Robertson, J. Robert
Sent: Tuesday, March 10, 2009 10:10 AM
To: Rikard, Jr., William L.
Cc: Moscatelli, Catharine M.; Dahm, Steven A.; Gris, Benjamin
Subject: RE: Trial Date

William:

We will keep with the judge's May 14th date. I expect that our first few witnesses will be from Polypore. I expect Messrs. Toth, Hausweld, and Roe to be within the first few days. We expect that we will then follow with the other Polypore/Microporous witnesses on our list. Please let them know that they will need to be available on those dates.

I should also note that the judge ordered that the hearing take place in Washington, DC, which is where we are expecting it to take place. I have been informed that we have not budgeted for any other location, so we cannot agree to have the hearing anywhere but in DC. Doing it anywhere else would be a great inconvenience and expense to the government and for numerous third parties, which are closer to DC than to Charlotte.

Thank you for informing of the recent lawsuit against Trojan. We expect to add this as another example of monopoly conduct in our case.

At present, you are holding off any sale of the extruder equipment until we meet on March 27th. Please let me know if your client changes any position on this point.

Thank you. Robby Robertson.

-----Original Message-----
From: Rikard, Jr., William L. [mailto:williamrikard@parkerpoe.com]
Sent: Mon 3/9/2009 12:01 PM
To: Robertson, J. Robert
Subject: RE: Trial Date

Robby,

Just returned from an out of office meeting. Will talk with client and get back to you as soon as possible.

William Rikard, Jr.
Partner

<http://www.parkerpoe.com/images/logo_small.jpg>
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<http://maps.google.com/maps?q=401 South Tryon Street%2CCharlotte%2CNC%2C28202%2CUnited States>

From: Robert Robertson [mailto:rrobertson@ftc.gov]
Sent: Monday, March 09, 2009 9:31 AM
To: Rikard, Jr., William L.
Subject: Trial Date

William:

You suggested we start the trial after the 21st. Do you want to start on Friday, the 22nd, or Tuesday, the 26th? The 25th is Memorial day. Pls let me know as soon as possible. I am trying to schedule another trial this morning. Thanks.