ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS
AND TO LIMIT SUBPOENA SERVED BY RESPONDENT ON NON-PARTY

EnerSys respectfully moves this Court for an Order directing Respondent Polypore International, Inc. ("Respondent") to compensate EnerSys for all attorneys' and paralegals' fees and costs incurred in reviewing the documents that are potentially responsive to a subpoena *duces tecum* ("Subpoena") served on EnerSys by Respondent in this proceeding, and for the outside vendor charges incurred to facilitate that review and the ultimate production of documents.

Alternatively, EnerSys requests that the Court order Respondent to participate in a procedure proposed by EnerSys designed to reduce the unreasonable and extraordinary burden imposed on EnerSys by the Subpoena.

EnerSys further requests that the Court further limit the Subpoena by striking Requests 10, 13-14, and 19-24 and modifying Paragraph 9(e) of the Protective Order dated October 23, 2008 to shield EnerSys' production from disclosure to Respondent's special in-house counsel, Michael Shor.

In support thereof, EnerSys respectfully refers the Court to, and incorporates by

reference herein, the contemporaneously-filed memorandum and the Affidavit of John Gagge submitted therewith.

Dated: December 16, 2008

STEVENS & LEE, P.C.

By _____

Neil C. Schur
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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2008, I filed via overnight courier and electronic mail an original and two copies of the foregoing Motion of EnerSys for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party, supporting Memorandum and proposed Order with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580
secretary@ftc.gov

I hereby certify that on December 16, 2008, I delivered via overnight courier and electronic mail two copies of the foregoing Motion of EnerSys for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party, supporting Memorandum, and proposed Order to:

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

I hereby certify that on December 16, 2008, I served via overnight courier and electronic mail a copy of the foregoing Motion of EnerSys for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party, supporting Memorandum, and proposed Order on:

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MEMORANDUM IN SUPPORT OF
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS
AND TO LIMIT SUBPOENA SERVED ON NON-PARTY

INTRODUCTION

EnerSys respectfully submits this memorandum in support of its motion for an Order directing Respondent Polypore International, Inc. ("Respondent") to compensate EnerSys for all attorneys' and paralegals' fees and costs incurred in reviewing the documents that are potentially responsive to a subpoena *duces tecum* ("Subpoena") served on it by Respondent in this proceeding, and for the outside vendor charges incurred to facilitate that review and the ultimate production of documents.

Alternatively, EnerSys requests that the Court order Respondent to participate in a procedure proposed by EnerSys (described in detail below) designed to reduce the unreasonable and extraordinary burden imposed on EnerSys by the Subpoena.

EnerSys further requests that the Court further limit the Subpoena by striking Requests 10, 13-14, and 19-24 and modifying Paragraph 9(e) of the Protective Order dated October 23, 2008 to shield EnerSys' production of documents from disclosure to Respondent's in-house counsel, Michael Shor.

As set forth below, EnerSys has already expended considerable time and resources to comply with Respondent's broad Subpoena by gathering approximately 200,000 potentially responsive documents in EnerSys' possession, custody or control worldwide.

But the Subpoena imposes a further unreasonable and extraordinary burden on EnerSys, which is neither a party to this litigation nor a competitor of Respondent. The Subpoena will likely require EnerSys to spend more than $50,000 (possibly more than $75,000) to review and produce the documents. This is far beyond the burden a non-party under these circumstances should be expected to bear under F.T.C. Practice Rules and as a matter of fundamental fairness. As a result, EnerSys respectfully asks this Court to order Respondent to pay EnerSys the attorneys' and paralegals' fees and costs (or at least some sizeable portion thereof) it will incur in reviewing the documents requested prior to their production to Respondent.

EnerSys anticipates that Respondent will point to case law rejecting requests for cost reimbursement filed by other parties in other matters. EnerSys submits that this case is distinguishable from those cases because EnerSys does not seek herein to recover the costs of gathering responsive documents, *i.e.*, for the lost time of its employees, or to recover after-the-fact fees and costs incurred. Instead, EnerSys seeks – in advance – an award of the massive out-of-pocket expense it will be forced to incur for attorney and paralegal time spent reviewing the documents. As discussed below, EnerSys further submits that the rationale of those cases holding that a subpoenaed third party must bear its own cost of compliance is somehow in furtherance of an agency's legitimate inquiry or the public interest has no application where a respondent, rather than an agency, issues the subpoena.

Simply stated, while EnerSys is willing to absorb the not insubstantial costs of ***gathering*** the documents as a cost of doing business, the ***review*** of the now gathered, potentially responsive documents for relevance, attorney-client privilege and confidentiality imposes an unreasonable and extraordinary burden on EnerSys. EnerSys has participated in a telephonic "meet and confer" with Respondent's counsel and has further conferred via electronic mail

correspondence, pursuant to 16 C.F.R. § 3.22(f) (2008). *See* Statement of Counsel Pursuant to 16 C.F.R. § 3.22(f), filed herewith. Stunningly, Respondent's proposed solution to the massive burden of attorney and paralegal review in this matter was that EnerSys ***simply produce the documents without reviewing them at all.***[1] Throughout counsel's discussions, Respondent has been unwilling to make any meaningful accommodation to EnerSys with regard to the massive burden of paying counsel to review the now gathered, potentially responsive documents.

EnerSys, in sharp contrast, has attempted to reduce the burden on both Respondent and EnerSys by making a balanced proposal involving three phases:

> 1. EnerSys would make the documents available for inspection in its counsel's offices in Reading, Pennsylvania. Respondent's counsel could review each document and/or search the documents in Summation, a software program that allows some searches ("Summation"), and Respondent's counsel would select those documents for production and, it is hoped, cull down the production to a more manageable number of pages.
>
> 2. EnerSys' counsel would review for relevance, privilege and confidentiality the documents selected by Respondent, and, if the number of documents selected remains voluminous, Respondent's counsel would pay EnerSys for reasonable attorney and paralegal time incurred and for outside vendor charges. Respondent is obviously incentivized to minimize the burden by being required to pay for the review. If Respondent selects a volume of documents that imposes a *de minimis* burden on EnerSys, EnerSys would agree not to seek fees and costs.
>
> 3. EnerSys would produce the documents about which there was no dispute, and counsel would meet and confer regarding any disputed documents. Any further dispute would be resolved by the Court.

Respondent flatly rejected this eminently reasonable proposal. It is apparently willing to review all the documents now in EnerSys' counsel's possession, but does not want to

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[1] *See* E-mail of Neil C. Schur, Esquire to Eric D. Welsh, Esquire, dated December 12, 2008, a true and correct copy of which is attached hereto as Exhibit 2 (rejecting Respondent's proposal that EnerSys produce the documents without reviewing them).

give EnerSys' counsel an opportunity to review the documents and is unwilling to reimburse EnerSys for all or any part of its expenses incurred in doing so (other than photocopying charges) even if the selected documents continue to impose an unreasonable burden on EnerSys. In short, despite EnerSys' extensive efforts to gather documents and comply with Respondent's subpoena in this case, as well as EnerSys' good faith efforts to reach a reasonable compromise regarding the review, Respondent has made no meaningful accommodation regarding the burden imposed by the patently necessary review of the documents and instead, blithely dismisses EnerSys' concerns. Apparently, Respondent fully expects EnerSys to pay a staggering likely bill of more than $50,000 solely so that Respondent can obtain from EnerSys – free of charge – documents that Respondent hopes will enable it to defend itself against the Federal Trade Commission's ("F.T.C.") charges.

In view of the above, EnerSys is left with no option but to turn to this Court for relief and respectfully move this Court to order Respondent to pay EnerSys the attorneys' and paralegals' fees and costs EnerSys will incur in reviewing the documents called for by Respondent's broad subpoena or accept EnerSys' proposal, set forth above.

FACTUAL BACKGROUND

EnerSys is a global manufacturer of flooded lead acid batteries headquartered at 2366 Bernville Road, Reading, Pennsylvania 19605.

Prior to the stock purchase at issue in this case, EnerSys purchased high-performance polyethylene battery separators from both Respondent and Microporous Products L.P. At present, EnerSys purchases high-performance polyethylene battery separators solely from Respondent. In short, EnerSys is a customer – not a competitor – of Respondent.

Respondent has directed a Subpoena to EnerSys (the "Subpoena"), a true and correct copy of which is attached hereto as Exhibit 1. EnerSys received the Subpoena from

counsel for the F.T.C. on November 7, 2008. The Subpoena requests documents as set forth in 34 paragraphs, generally seeking documents generated as early as January 1, 2003. (Ex. 1.)

Among the documents sought by the Subpoena are all documents relating to:

(a) Communications between EnerSys, on one hand, and Respondent, Microporous, ENTEK or any third party, on the other hand, regarding (a) any actual or potential contract for lead acid battery separators, (b) any actual or proposed change in Respondent prices and/or (c) any actual or potential increase or decrease in the volume of lead acid battery separators purchased from Respondent;

(b) Any actual or potential contract or agreement between EnerSys, on one hand, and Respondent, Microporous, ENTEK or any third party, on the other hand, for the manufacture and sale to EnerSys of lead acid battery separators;

(c) Any internal discussion or consideration internally at EnerSys about EnerSys producing or manufacturing lead acid battery separators;

(d) All lead acid battery separators purchased by EnerSys from any supplier, including but not limited to the specific, product(s) purchased, the amount or volume of each such product(s) purchased, the price(s) of the product(s) purchased, the date(s) of purchase, the end use(s) or application(s) of the product purchased and the EnerSys plant to which such product was shipped;

(e) Units, price, square meters and product type or brand, of all battery separators purchased by EnerSys from any source from January 1, 2000 to the present; and

(f) Actual or anticipated end use or application of certain products purchased by EnerSys and the destination of the shipment of such product.

(Ex. 1.) The foregoing list is a summary, not a quotation. Moreover, the foregoing list is representative and is in no sense exhaustive. (*See id.*)

EnerSys determined quickly that it needed to move the Administrative Law Judge for an extension of time within which to file a motion to and including December 16, 2008. On November 14, 2008, EnerSys filed with the Secretary of the Federal Trade Commission a Motion to Extend Time in Which to Move to Limit Subpoena Served by Respondent Upon Third Party and to Seek Cost Reimbursement. On November 17, 2008, the Court granted that motion and allowed EnerSys to file this motion on or before December 16, 2008.

Meanwhile, promptly upon receipt of the Subpoena, EnerSys had begun gathering responsive documents and electronically stored data worldwide and preparing same for production. Certain potentially responsive documents were housed outside the United States, and certain potentially responsive electronically stored information was housed outside the United States. (Affidavit of John Gagge ("Gagge Aff."), a true and correct copy of which is attached hereto as Exhibit 3, at ¶ 10.)

Respondent has received from the F.T.C. a copy of all documents EnerSys produced to the F.T.C. in response to its subpoena, and likewise has the transcripts of the sworn testimony of EnerSys executives John Gagge and Larry Axt, who testified at the investigative hearings.

EnerSys executives John Gagge and Larry Burkert, along with counsel, oversaw the gathering of documents at EnerSys in response to the Subpoena and coordinated a worldwide search for responsive documents. (Ex. 3, Gagge Aff. ¶¶ 5, 9.) They contacted approximately thirty supervisors and executives throughout EnerSys, and asked them to pass on the requests for documents and information to their subordinates and coordinate the collection of potentially responsive documents. (Ex. 3, Gagge Aff. ¶ 11.) As a result of those efforts, EnerSys gathered approximately 200,000 potentially responsive pages. (Ex. 3, Gagge Aff. ¶ 12.)

On November 28, 2008, EnerSys sent a drive containing the gathered documents to the undersigned counsel. (Ex. 3, Gagge Aff. ¶ 13.) Counsel began its review of the documents and quickly discovered that EnerSys had gathered approximately 200,000 pages of responsive documents. As a result, EnerSys immediately halted the review and hired an outside vendor to make the documents more manageable. The outside vendor loaded the documents onto Summation (making them searchable to some extent), assisted with opening password-encrypted documents, and most importantly, eliminated duplication, reducing the volume of the potentially responsive documents from approximately 200,000 pages to approximately 100,000 pages or 15,500 documents. With the exception of one folder of documents that was password-encrypted, the potentially responsive documents were loaded onto the undersigned counsel's computer system on December 9, 2008.

On December 10, 2008, EnerSys participated in a meet and confer with Respondent's counsel. EnerSys explained the steps it had taken to comply with the Subpoena, including the gathering of documents as set forth above, the loading of the documents onto Summation, and the attempted elimination of duplication. EnerSys also objected to specific document requests in the Subpoena, including Requests 5, 7, 10, 13-14, 17-24, 31 and 33. On a more global level, EnerSys explained that it possessed a number of documents in which a portion of the document was relevant but much of the document was irrelevant and contained highly confidential proprietary information regarding EnerSys' business plans and trade secrets. As a result, EnerSys explained, it would obviously need to review each document carefully to identify and redact the irrelevant and highly sensitive information. Furthermore, EnerSys explained, the fact that a business person involved in the search effort selected a document as potentially responsive does not mean that EnerSys concedes its relevance and responsiveness or that the

entire document is relevant or responsive. EnerSys further objected that the Subpoena called for the production of documents in several foreign languages, which EnerSys would not agree to produce without translation at Respondent's cost and attorney review. EnerSys further objected that the documents should not be shown to Michael Shor, Respondent's in-house counsel, and should simply be reviewed by Respondent's outside counsel. EnerSys proposed that Respondent agree to modify Paragraph 9(e) of the Protective Order dated October 23, 2008 to shield EnerSys' production from Mr. Shor, strike certain Requests, and either: (1) agree to pay EnerSys' attorneys' fees and costs incurred in reviewing the documents and the outside vendor charges discussed above; or (2) adopt the three-phase proposal outlined above in an effort to efficiently review the documents and simultaneously reduce the burden on Respondent.

Both on that December 10, 2008 "meet and confer" conference call and in electronic mail correspondence on December 12th and 13th, Respondent refused to agree to either option. (*See* Email of Eric D. Welsh, Esquire to Neil C. Schur, Esquire, dated December 12, 2008, a true and correct copy of which is attached hereto as Exhibit 4 ("I have talked with my client and we cannot agree to your proposal.").) Respondent agreed to pay reasonable photocopying charges.

Following that call, Respondent has agreed to withdraw Requests 5 and 7 (seeking agreements and communications between Respondent and EnerSys) and forego the production of documents written in a language other than English "for the time being." Most of the more burdensome requests, however, including the requests EnerSys asks this Court to strike, were not able to be substantially narrowed.

On December 11, 2008, the password-encrypted documents were opened and loaded onto EnerSys' counsel's computer system, adding approximately 250 documents.

ARGUMENT

Pertinent Legal Authority

F.T.C. Practice Rule 3.31(d)(1) expressly provides that the "Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. § 3.31(d)(1) (2008).

The F.T.C. Practice Rules further authorize the Administrative Law Judge to limit discovery under the following circumstances:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules ***shall*** be limited by the Administrative Law Judge if he determines that:
>
> (i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
>
> (iii) ***The burden and expense of the proposed discovery outweigh its likely benefit.***

16 C.F.R. § 3.31(c)(1) (2008) (emphasis added).

It is equally clear that in F.T.C. proceedings, non-party witnesses may be compensated to cover the cost of producing voluminous records in response to a subpoena. Fed. Trade Comm'n, Operating Manual (hereinafter "*F.T.C. Manual*") § 10.13.6.4.7.8, *available at* http://www.ftc.gov/foia/adminstaffmanuals.shtm (last accessed Dec. 15, 2008). The *F.T.C. Manual* provides:

> Third party witnesses may move for recompense to cover the cost of producing voluminous records in response to a subpoena. When appropriate, the ALJs have entered such an order; in such event the proponent of the subpoena must tender payment.

Id.

Reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96 at *16 (F.T.C. Mar. 19, 1982). "An ALJ does have the authority, in proper cases, to condition issuance of a subpoena upon an agreement to reimburse expenses of compliance, or to deny a motion to quash on the condition that reimbursement be made." *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 1981 LEXIS 75 (1981). If the cost of compliance is unreasonable, the ALJ "should require the proponent of the subpoena to cure the unreasonable burden, either by conditioning his denial of the motion to quash upon the proponent's agreement to reimburse the recipient so as to reduce compliance costs to a reasonable level, or (absent such an agreement) by granting the motion to quash." *Id.*

Requests for cost reimbursement after compliance have been found untimely. *Id.* Requests for costs of compliance may be granted, however, if a subpoenaed party begins to comply and then later realizes the compliance costs are unreasonable. As the Administrative Law Judge in *In re Int'l Tel. & Tel. Corp* explained:

> Of course, compliance costs may not be fully foreseen. A subpoena recipient may undertake compliance with a subpoena on the belief, which turns out to be incorrect, that the costs will be reasonable. Therefore, the ALJ should afford the producing party the opportunity, even after compliance begins, to file a motion for a protective order conditioning further compliance upon an agreement for reimbursement of anticipated costs. ***The producing party may be able to show that its experience with partial compliance reveals the unreasonableness of the costs of remaining compliance. If so, the ALJ may act to relieve the undue burden in either of the ways available to him were a motion to quash filed: by conditioning further compliance upon the proponent's agreement to reimburse such compliance costs, or, if the subpoena proponent will not agree, by terminating the obligation for further compliance.***

Id. (emphasis added).

The Federal Rules of Civil Procedure may be consulted for guidance and interpretation of F.T.C. Rules where no other authority exists. *F.T.C. Manual* § 10.7. Federal Rule of Civil Procedure 45(c)(2)(B) provides that where a party issuing a subpoena moves to compel production of documents, the Court "shall protect any person who is not a party ... from significant expense resulting from the inspection and copying commanded." FED. R. CIV. P. 45 (C)(2)(B). As Professors Wright and Miller explain:

> A final protection unique to subpoenas *duces tecum* is to be found in Rule 45(c)(2)(B)(ii), which protects nonparties who are required to produce documents or materials. ***The provision requires that orders compelling persons who are neither parties nor officers of parties to produce designated materials or permit inspection of these materials be protected from "significant expense."...*** The district court is not obligated to fix the costs in advance of production, although this often will be the most satisfactory accommodation between imposing expense on the subpoenaed party while protecting the party seeking discovery from excessive costs by way of an award under the rule. In some instances, it may be preferable to leave the matter uncertain, determining costs after the materials have been produced, provided that the risk of this uncertainty is disclosed fully to the discovering party.

9A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 2463 (2008) (emphasis added and footnotes omitted).

The Court Should Order Respondent to Pay
EnerSys' Legal Fees Or Accept EnerSys' Proposal

EnerSys is neither a party to this litigation nor a competitor of Respondent. Nonetheless, EnerSys has already produced two witnesses in Washington, D.C. to testify in this matter, produced hundreds of pages of documents to the F.T.C. in response to a prior subpoena, and gone to great lengths to gather more than 15,000 documents that are potentially responsive to Respondent's Subpoena. Only at this point does EnerSys "cry uncle" and argue the burden of reviewing those documents is undue, unreasonable and extraordinary.

Respondent's Subpoena forces EnerSys to pay substantial out-of-pocket costs – likely more than $50,000 – to review the potentially responsive documents it has gathered in response to Respondent's broadly-worded Subpoena. While EnerSys is willing to absorb limited costs and fees incurred in ***gathering*** such documents, the burden imposed by ***reviewing*** approximately 15,500 documents, or 100,000 pages, of potentially responsive documents is simply undue and unreasonable. Compensation of EnerSys is therefore appropriate. *See In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96; *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202; *F.T.C. Manual* § 10.13.6.4.7.8.

If this Court looks to case law interpreting Federal Rule of Civil Procedure for guidance, compensation is appropriate to protect EnerSys from "significant expense." WRIGHT & MILLER, *supra*, § 2463.

EnerSys' Motion is timely because it seeks an award of its fees in advance of full compliance (*i.e.*, EnerSys has gathered the documents but has not yet reviewed them) and in advance of incurring the fees and costs at issue (*i.e.*, the fees and costs incurred for reviewing and producing the documents). *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202 ("The producing party may be able to show that its experience with partial compliance reveals the unreasonableness of the costs of remaining compliance.").

Indeed, EnerSys has come to court seeking relief before incurring the vast majority of the fees and costs at issue and has sought to reduce the burden on it and Respondent by proposing a procedure that would allow Respondent to review and/or search the documents gathered by EnerSys and select those documents it wants. EnerSys submits that many of the documents called for by the Subpoena and gathered by EnerSys will not make any disputed fact more or less likely and will not aid Respondent in defending itself against the F.T.C.'s

allegations in this matter. *See* 16 C.F.R. § 3.31(c)(1) (2008) ("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.").

As a result, EnerSys' proposal that Respondent first review the documents may substantially reduce the burden on EnerSys. If, for example, Respondent could quickly determine that it has no interest in a certain type of document, that determination could potentially save EnerSys (or ultimately, Respondent) thousands of dollars in attorneys' fees.

If Respondent is ordered to pay those fees, it is incentivized to reduce them. That incentive structure avoids the moral hazard of allowing a party to increase the quantity, complexity, and scope of document requests boundlessly without any regard for the costs of gathering and reviewing them. Respondent's broad requests here and frank unwillingness to cooperate with EnerSys in resolving the dispute regarding the burden imposed by the necessary document review demonstrate an utter lack of regard for the marginal and total costs imposed upon others compelled to gather and review each potentially responsive document. (*See* Ex. 1.) The appetite of an unrestrained glutton for documents imposes costs upon others, and can be readily constrained here by limiting the scope of the Subpoena or by ordering Respondent to adopt EnerSys' proposal.

In one relatively recent case, this Court found a burden not "undue" only after substantially limiting the scope of the subpoena. *See In re North Tex. Specialty Physicians*, F.T.C. Docket No. 9312, Order dated January 30, 2004 (granting in part subpoenaed party's motion to quash, and concluding: "In light of the limitations set forth below in this Order, the burden on BCBSTX is not an undue burden."). Similarly, here, requiring Respondent to first review in good faith the documents in EnerSys' counsel's offices and select those documents it

actually wishes EnerSys to produce is likely to make the burden substantially less onerous or perhaps even not undue.

Moreover, EnerSys proposes ultimately to review these documents using junior associates and one or more paralegals, with supervision of a shareholder, in an effort to reduce the cost. But if Respondent could initially reduce the scope of the review and provide to EnerSys' counsel the Summation searches that yielded the documents it wants, EnerSys may be able to avoid lengthy reviews of certain entire categories of documents, further reducing the burden. But rather than engage EnerSys in a true, good faith discussion, Respondent has blithely dismissed EnerSys' plainly legitimate concerns and good faith efforts to resolve the dispute regarding burden.

EnerSys anticipates that Respondent will claim EnerSys is to blame and should have tried to narrow the scope of the Subpoena before gathering the documents. But ***Respondent asked for, indeed, commanded the production of, these documents*** and cannot now wash its hands of the mess it has created. Request 20 is illustrative. It seeks "All documents relating to any testing or qualification by EnerSys of lead acid battery separators produced by any entity other than Polypore or Micorporous." (Ex. 1 at 3, Req. 20.) When pressed, Respondent's counsel conceded Respondent did not want actual test results but instead sought only "summaries and status reports regarding the testing and qualification of separators/suppliers." (Ex. 4.) No reasonable reading of Request 20 on its face would reveal that Respondent did not want test results. (Ex. 1.) Indeed, to the contrary, a reasonable reading of that request would be that such results were the primary category of documents it sought. (Ex. 1.) EnerSys cannot now be faulted because Respondent drafted its Subpoena inartfully or overly broadly and EnerSys, in turn, gathered potentially responsive documents. In any event, the burden of

searching for such summaries may be greater than the burden of gathering all testing documents because each document relating to testing must be reviewed. The rub is that EnerSys responded to the request as drafted by Respondent, and as a result, Respondent cannot now complain that EnerSys did not object and attempt to carve out the most obviously responsive category of documents from the request. Such revisionism simply makes no sense, and the burden Respondent has created is obvious. Moreover, as the *In re Int'l Tel. & Tel. Corp.* opinion makes clear, "compliance costs may not be fully foreseen. A subpoena recipient may undertake compliance with a subpoena on the belief, which turns out to be incorrect, that the costs will be reasonable." *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202.

EnerSys further submits that the rationale, expressed in a number of opinions denying a subpoenaed party's request for reimbursement of costs of compliance, that such compliance is in furtherance of an agency's legitimate inquiry and the public interest[2] makes no sense ***when a respondent, rather than the agency itself, drafts and issues the subpoena***. The rationale arose in cases challenging the burdensomeness of an investigative subpoena issued ***by an agency***, including the F.T.C. or the Securities and Exchange Commission,[3] and has been misapplied to cases in which a respondent drafts and issues the subpoena.

A respondent in such a case is virtually identical to a defendant in a private litigation: it simply seeks documents to aid its defense. The respondent's discovery of such documents furthers no "agency's legitimate inquiry" and serves no "public interest" in an F.T.C. action any more than a defendant's discovery of such documents in a private action. In both

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2 *In re Evanston Northwest Healthcare Corp.*, F.T.C. Docket No. 9315, 2004 WL 3826416 (F.T.C. July 7, 2004); *In re North Tex. Specialty Physicians*, F.T.C. Docket No. 9312, Order dated January 30, 2004; *In the Matter of Rambus Inc.*, No. 9302, 2002 WL 31868184 (F.T.C. Nov. 18, 2002); *Fed. Trade Comm'n v. Dresser Indus., Inc.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977).

cases, the subpoenaing party should bear excessive costs of compliance. The private action would be governed by Rule 45, under which fees and costs (or a portion of them) may be shifted to the subpoenaing party. *See* FED. R. CIV. P. 45(c)(2)(B). There is no compelling reason for any different result in an agency proceeding. Assume, for example, that a private party had sued Polypore in a United States district court under Section 1 of the Sherman Act, and Polypore (as a defendant) had served a subpoena on EnerSys. In such a case, Rule 45 would protect EnerSys from the "significant expense" of reviewing such a large volume of documents. *See* FED. R. CIV. P. 45(c)(2)(B). But here, in this F.T.C. proceeding, Respondent asks this Court to order EnerSys to review and produce documents ***that are potentially responsive to Respondent's requests***, without Respondent contributing a single penny other than photocopying charges[4] or taking any steps to mitigate the burden of the review. There is simply no rational basis for such dramatically different treatment for a subpoena served by a respondent in an F.T.C. action and a defendant in a private action. Accordingly, EnerSys respectfully submits that this Court should hold that the reasoning underlying those F.T.C. opinions that have denied costs to subpoenaed parties on the basis of furthering an agency's legitimate inquiry and the public interest has no application to cases in which a respondent – not an agency – issues and serves the subpoena.

In sum, this case cries out for an Order of compensation, as a matter of due process, required by the F.T.C. procedures cited above, and fundamental equity, required by our judicial and administrative system. For all the foregoing reasons, and pursuant to the authorities cited above, EnerSys respectfully requests that this Court order Respondent to compensate

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[3] *See, e.g., Fed. Trade Comm'n. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (citing cases). Those cases are also distinguishable because they addressed burden as a basis for quashal, rather than an award of fees and costs. *Id.* EnerSys does not seek to avoid discovery or quash the Subpoena in its entirety.

EnerSys for all attorneys' and paralegals' fees and costs incurred in reviewing the documents called for by Respondent's Subpoena and for the outside vendor charges incurred to facilitate that review and the ultimate production of documents. Alternatively, EnerSys requests that the Court order Respondent to participate in the three-phase procedure proposed by EnerSys, as set forth above.

The Court Should Further Limit the Subpoena

In addition to the limitation identified above (requiring Respondent to either pay EnerSys' costs of compliance or accept EnerSys' proposal to reduce the burden), EnerSys respectfully requests that the Court further limit the Subpoena as follows.

First, EnerSys requests that the Court strike Requests 10, 13-14, and 19-24. (Ex. 1.) These Requests are overly broad and unduly burdensome. For example, the amount of EnerSys' purchases of battery separators, the price paid, and the dates of purchase are simply irrelevant to whether Respondent harmed competition by acquiring Microporous. (*See* Ex. 1 at Req. 10, 13-14.)

Similarly, while testing of battery separators may be relevant to the issue of barriers to entry, Respondent's request for all documents "relating to any testing or qualification by EnerSys of lead acid battery separators" manufactured by anyone (*see* Ex. 1 at Req. 19-20) is vastly overbroad. Respondent's cryptic proposal to limit its request after the fact to "summaries and status reports regarding the testing and qualification of separators/suppliers" (*see* Ex. 4) does not reduce the burden on EnerSys at this stage, and would not have reduced the burden of review if initially requested in this manner because extensive review of large volumes of documents is

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[4] It is unclear what charges are included in "photocopying charges", as document productions of this size are typically made electronically without any photocopying. To date, Respondent has not offered to cover EnerSys' outside vendor charges, paralegals' fees, or Information Technology employees' time spent loading and organizing the documents, which EnerSys submits are analogous to photocopying charges.

still required by the request – even as narrowed. Also, because it is unclear what Respondent's counsel will view as "summaries and status reports," EnerSys may go to great lengths to exclude all other testing documents only to be faced with a complaint from Respondent's counsel that the production was incomplete or improper.

More importantly, the revised Request remains unduly burdensome because EnerSys' summaries and status reports of its testing are highly unlikely to be relevant to this case, as explained below, and the burden outweighs the relevance. *See* 16 C.F.R. § 3.31 (2008) (empowering an Administrative Law Judge to limit discovery where the "burden and expense of the proposed discovery outweigh its likely benefit."). A typical summary or status report of tests of separators will not reveal or even address the lead time for such testing, which will drive the analysis of barriers to entry. (Ex. 3, Gagge Aff. ¶ 14.) Instead, such a document will summarize the *results of the tests or trends in the results, or the status of the testing* (*see* Ex. 3, Gagge Aff. ¶ 14), an entirely different topic that will not aid Respondent, the F.T.C. or the Court one iota.

Requests 21 and 23 (seeking all documents regarding "any type of battery separator" or any manufacturer of lead acid battery separators will inevitably capture literally tens of thousands of documents that are entirely irrelevant to this case. (*See* Ex. 1 at Reqs. 21, 23.) They are by no means narrowly tailored to gather only those documents that are relevant or reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, *see* 16 C.F.R. § 3.31(c)(1) (2008).

Request 22 is simply incoherent and incapable of a response as phrased. Viewed another way, EnerSys has no documents regarding the "products comprising lead acid battery separators." (*See* Ex. 1 at Req. 22.)

The Court should strike these Requests because they impose an unreasonable and extraordinary burden on EnerSys. *See In re North Tex. Specialty Physicians*, F.T.C. Docket No. 9312, Order dated January 30, 2004 (granting in part subpoenaed party's motion to quash, and concluding: "In light of the limitations set forth below in this Order, the burden on BCBSTX is not an undue burden.").

Finally, EnerSys respectfully requests that the Court modify Paragraph 9(e) of the Protective Order dated October 23, 2008 to shield EnerSys' production from disclosure to Respondent's in-house counsel, Michael Shor. EnerSys is aware that Respondent has made representations to this Court regarding Mr. Shor's role in Respondent's business operations and pledged that he will not negotiate contracts for two years. Although EnerSys is not a competitor of Respondent, many of the documents called for by the Subpoena contain highly sensitive, confidential information regarding pricing (including EnerSys' internal analysis and strategy regarding the prices EnerSys pays Respondent) as well as testing of battery separators and efforts to find an alternative source of polyethylene battery separators. Respondent is represented by competent counsel, and there is simply no need for EnerSys' confidential documents to be reviewed by Respondent's in-house counsel, Mr. Shor. Respondent has offered to shield the production from Mr. Shor only if EnerSys and Respondent reach a global resolution of this dispute. As a result, EnerSys is compelled to respectfully seek this relief from the Court.

CONCLUSION

For all the foregoing reasons, EnerSys respectfully requests that the Court enter one of the two Orders submitted herewith, directing Respondent to compensate EnerSys for all attorneys' and paralegals' fees and costs incurred in reviewing the potentially responsive documents, and for the outside vendor charges incurred to facilitate that review and the ultimate production of documents. Alternatively, EnerSys requests that the Court order Respondent to

participate in the procedure described above. EnerSys further respectfully requests that the Court further limit the Subpoena by striking Requests 10, 13-14, and 19-24 and modifying Paragraph 9(e) of the Protective Order dated October 23, 2008 to shield EnerSys' production of documents from disclosure to Respondent's in-house counsel, Michael Shor.

Dated: December 16, 2008

STEVENS & LEE, P.C.

By _____

Neil C. Schur
Eugene V. Lipkowitz
1818 Market Street, 29th Floor
Philadelphia, Pennsylvania 19103
(215) 751-1944
ncsc@stevenslee.com
evl@stevenslee.com

SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO

EnerSys
2366 Bernville Road
Reading, PA 19605

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

Parker Poe Adams & Bernstein, LLP
Three Wachovia Center
401 S. Tryon Street, Suite 3000
CHarlotte, NC 28202

4. MATERIAL WILL BE PRODUCED TO

Polypore International, Inc.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

November 25, 2008 9:30 a.m.

6. SUBJECT OF PROCEEDING

In the Matter of Polypore International, Inc., Docket No. 9327

7. MATERIAL TO BE PRODUCED

See Attached Requests, Instructions and Definitions.

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

Eric D. Welsh
(704) 335-9052

DATE ISSUED

October 24, 2008

SECRETARY'S SIGNATURE

Donald S. Clark

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

SUBPOENA *DUCES TECUM* ISSUED TO ENERSYS
ON BEHALF OF POLYPORE INTERNATIONAL, INC.
FTC DOCKET NO. 9327

EXHIBIT A

I. REQUESTS

1. All documents (including without limitation internal email or other written communication at EnerSys) relating to any communication between EnerSys and Polypore regarding (a) any actual or potential contract for lead acid battery separators, (b) any actual or proposed change in Polypore prices and/or (c) any actual or potential increase or decrease in the volume of lead acid battery separators purchased from Polypore.

2. All documents (including without limitation internal email or other written communication at EnerSys) relating to any communication between EnerSys and Microporous regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or proposed pricing of lead acid battery separators by Microporous, (c) actual or proposed development and/or testing of lead acid battery separators or (d) Polypore.

3. All documents (including without limitation internal email or other written communication at EnerSys) relating to any communication between EnerSys and ENTEK regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or proposed prices for lead acid battery separators by ENTEK, (c) actual or proposed development and/or testing of lead acid battery separators, (d) Microporous or (e) Polypore.

4. All documents (including without limitation internal email or other written communication at EnerSys) relating to any communication between EnerSys and any Third Party other than Polypore, Microporous or ENTEK regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or potential prices for lead acid battery separators, (c) actual or proposed development and/or testing of lead acid battery separators, (d) Microporous, (e) ENTEK or (f) Polypore.

5. All documents constituting or reflecting any actual or potential contract or agreement between EnerSys and Polypore for the manufacture and sale by Polypore to EnerSys of lead acid battery separators.

6. All documents constituting or reflecting any actual or potential contract or agreement between EnerSys and ENTEK for the manufacture and sale by ENTEK to EnerSys of lead acid battery separators.

7. All documents constituting or reflecting any actual or potential contract or agreement between EnerSys and Microporous for the manufacture and sale by Microporous to EnerSys of lead acid battery separators.

8. All documents constituting or reflecting any actual or potential contract or agreement between EnerSys and any Third Party other than ENTEK, Polypore or Microporous for the manufacture and sale by any such Third Party to EnerSys of lead acid battery separators.

9. All documents reflecting any discussion or consideration internally at EnerSys about EnerSys producing or manufacturing lead acid battery separators whether in response to Polypore's actual or potential acquisition of Microporous, any actual or potential change in price of lead acid battery separators or otherwise.

10. All documents or any database reflecting all lead acid battery separators purchased by EnerSys from any supplier, including but not limited to the specific product(s) purchased, the amount or volume of each such product(s) purchased, the price(s) of the product(s) purchased, the date(s) of purchase, the end use(s) or application(s) of the product purchased and the EnerSys plant to which such product was shipped.

11. All documents relating to any consideration by EnerSys or any Third Party to sponsor, finance or support entry or expansion of a battery separator business in (a) North America or (b) the world

12. All documents discussing, describing or reflecting any actual or potential ownership interest of EnerSys in any joint venture or other entity that manufactures lead acid battery separators.

13. All documents discussing, describing or reflecting, by dollar amount, units, price, square meters and product type or brand, all battery separators purchased by EnerSys from any source from January 1, 2000 to the present.

14. For all product responsive to Request No. 13, all documents reflecting the actual or anticipated end use or application of the product purchased by EnerSys and the destination of the shipment of such product.

15. All documents discussing, describing or reflecting any internal discussions, communications or consideration given by EnerSys to purchasing or acquiring a supplier of lead acid battery separators, entering into a joint venture or similar relationship for the supply of lead acid battery separators, or building a plant to manufacture lead acid battery separators for use by EnerSys.

16. All documents discussing, describing or reflecting any actual or potential entrant in the manufacturing of lead acid battery separators.

17. All documents relating to any company or entity that entered or was viewed as a potential entrant into the production and sale of lead acid battery separators.

18. All documents relating to any actual or potential barrier to entry for suppliers or manufacturers of lead acid battery separators, including without limitation, costs of entry or achieving minimum viable scale, in (a) North America and (b) the world.

19. All documents relating to any testing or qualification by EnerSys of lead acid battery separators manufactured by Polypore or Microporous.

20. All documents relating to any testing or qualification by EnerSys of lead acid battery separators produced by any entity other than Polypore or Microporous.

21. All documents reflecting or discussing any manufacturer of lead acid battery separators.

22. All documents describing, discussing or reflecting by brand name or manufacturer the products comprising lead acid battery separators including those products used for the following end uses or applications: golf car or cart; floor scrubber or sweeper; automotive; motorcycle; truck; train; fork lift; pallet truck; submarine; uninterrupted power supply for hospitals, telephone companies and other uses; motive; industrial; marine; stationary; and/or nuclear power plant.

23. All documents discussing or referring to any type of battery separator, including AGM separators, other than those used in flooded lead acid batteries.

24. All documents describing, discussing or reflecting products that are or might be competitive with lead acid battery separators including those products used for the following end uses or applications: golf car or cart; floor scrubber or sweeper; automotive; motorcycle; truck; train; fork lift; pallet truck; submarine; uninterrupted power supply for hospitals, telephone companies and other uses; motive; industrial; marine; stationary; and/or nuclear power plant.

25. Documents discussing or describing any technology used in the manufacture of battery separators for lead acid batteries.

26. All documents discussing or mentioning the actual or potential acquisition of Microporous by Polypore.

27. All documents discussing, mentioning or describing any effect, actual, potential or perceived, on EnerSys's business of an acquisition of Microporous by Polypore, and all documents relating to any plan or course of action considered or adopted by EnerSys to address such effect.

28. All documents reflecting any product or technology that is a substitute for lead acid battery separators manufactured by Polypore or Microporous, including but not limited to, any substitute product or technology considered by EnerSys as an alternate technology for lead acid battery separators manufactured by Polypore or Microporous.

29. All documents referring to or discussing other sources of lead acid battery separators that EnerSys could or might be able to use to replace Polypore as a source of supply.

30. All documents referring to or discussing Polypore's past, present or future competitive position in the lead acid battery separator business.

31. All documents relating to any actual or perceived advantage to EnerSys of the location of its lead acid battery supplier.

32. All documents, including affidavits and statements, which EnerSys provided to the FTC relating in any way to Polypore.

33. A copy of any transcript of any testimony, deposition or investigational hearing conducted in the Polypore Matter.

34. All documents evidencing, relating or referring to communications between the FTC and EnerSys relating in any way to Polypore or Microporous.

II. INSTRUCTIONS AND DEFINITIONS

1. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, e-mail, envelope, telegram, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index tabulation, graph, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation in your possession, custody or control, including all drafts or all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono record, tape and other data compilations from which information can be obtained, translated, if necessary, by EnerSys through detection devices into reasonably usable form, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

2. "You" "your" and "EnerSys" for purposes of this request, means EnerSys or any of its parents, divisions, subdivisions, subsidiaries, affiliates, officers, directors or managing agents, attorneys, employees, consultants and agents, as well as any predecessors in interest, and all other persons acting or purporting to act on its behalf.

3. "Polypore" for the purposes of this request, means the Polypore International, Inc. and any subsidiary or division thereof, including without limitation, Daramic, LLC, and their respective employees.

4. "Microporous" for the purposes of this request, means the Microporous Products, L.P., and any affiliate, subsidiary or division thereof, and their respective employees, officers, directors, partners, attorneys and agents.

5. "ENETK" for the purposes of this request, means the ENTEK International LLC, and any affiliate, subsidiary or division thereof, and their respective employees, officers, directors, partners, attorneys and agents.

6. "FTC" means the Federal Trade Commission, and any of its directors, commissioners, employees, consultants and agents.

7. "Polypore matter" means the investigation conducted by the FTC under Rule No. 081-0131 and this Administrative Proceeding, Docket No. 9327.

8. "Investigation" means any FTC investigation, whether formal or informal, public or non-public.

9. "Third Party" means any person; corporate entity; partnership; association; joint venture; state, federal or local governmental agency, authority or official; research or trade association; or any other entity other than EnerSys or any of its subsidiaries.

10. "Complaint" means the Complaint issued by the Federal Trade Commission to Polypore International, Inc. in Docket No. 9327.

11. "Relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying or stating.

12. Unless otherwise stated, the relevant time period for these requests is January 1, 2003 to the present.

13. The use of the singular shall be deemed to include the plural and vice versa.

14. The terms "and" and "or" shall be interpreted liberally as conjunctive, disjunctive, or both, depending on the context, so as to have their broadest meaning.

15. Whenever necessary to bring within the scope of a request all documents that might otherwise be construed to be outside its scope, the use of a verb in any tense shall be construed as the use of the verb in all other tenses.

16. The term "all" includes any and vice versa.

17. If you object to any part of a document request under the FTC Rules of Practice §3.37(b), set forth the basis for your objection and respond to all parts of the document request to which you do not object. No part of a document request shall be left unanswered merely because an objection is interposed to another part of a document request.

18. If a document database is provided, provide an explanation of the definitions used and the fields existing in such database.

19. All documents that respond, in whole or in part, to any portion of any document request shall be produced in their entirety, including all attachments, enclosures, cover memoranda and post-it notes.

20. If any privilege is claimed as a ground for not producing any document, provide for each such document withheld on the basis of privilege all information required by FTC Rules of Practice §3.38A.

21. In the event that any responsive document was, but is no longer in your possession, state what disposition was made of it, when, and the reason for such disposition. In the event that a responsive document has been destroyed or returned to a Third Party, state (i) the reason for such document's destruction or return, the date on which the document was destroyed or returned, and the Third Party to whom the document was returned or on whose behalf the document was destroyed; (ii) the name, title, and location thereof within EnerSys of the individual in whose possession, custody or control the document was when it was destroyed or returned; and (iii) the name, title, and location thereof within EnerSys of the individual who destroyed or returned the document.

22. These document requests are continuing in nature, up to and during the course of the adjudicative hearing. All documents sought by these requests that you obtain or locate after you

serve your responses must be immediately produced to counsel for Polypore by supplementary response.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, I caused a copy of a ***Subpoena Duces Tecum*** directed to ***EnerSys*** to be served upon the following persons, at the addresses and through the means noted below:

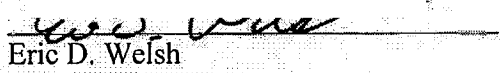
Via Certified Mail:

EnerSys
2366 Bernville Road
Reading, PA 19605

Via Electronic Mail:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
rrobertson@ftc.gov

Steven Dahm, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
sdahm@ftc.gov



Eric D. Welsh
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Three Wachovia Center
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Charlotte, NC 28202
Telephone: (704) 335-9052
Facsimile: (704) 334-4706

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

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

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the Parties and Third Parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

For purposes of this Protective Order, the following definitions apply:

1. "Confidential Material" shall mean all Discovery Material that is confidential or proprietary information produced in discovery. Such material is referred to in, and protected by, section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); section 21 of the Federal Trade Commission Act, 15 U.S.C. § 57b-2, the FTC Rules of Practice, Sections 4.9, 4.10, 16 C.F.R. §§ 4.9, 4.10; and precedents thereunder. Confidential Material shall include non-public trade secret or other research, development, commercial or financial information, the disclosure of which would likely cause commercial harm to the Producing Party or to Respondent. The

following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Material: strategic plans (involving pricing, marketing, research and development, product road maps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer, or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Material. Discovery Material will not be considered confidential if it is in the public domain.

2. "Document" means the complete original or a true, correct, and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced. "Document" includes, but is not limited to, any writing, letter, envelope, telegraph, e-mail, meeting minute, memorandum, statement, affidavit, declaration, transcript of oral testimony, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, printout, microfilm index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, and any other data compilation from which information can be obtained, and includes all drafts and all copies of such Documents and every writing or record that contains any commentary, notes, or marking whatsoever not appearing on the original.

3. "Discovery Material" includes without limitation deposition testimony, exhibits, interrogatory responses, admissions, affidavits, declarations, Documents, tangible thing or

answers to questions produced pursuant to compulsory process or voluntarily in lieu thereof, and any other Documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

4. "Commission" shall refer to the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

5. "Polypore" means Polypore International, Inc., and its predecessors, divisions, and subsidiaries, and all persons acting or purporting to act on its behalf.

6. "Respondent" means Polypore.

7. "Party" means the Commission or Polypore.

8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Matter and its employees, directors, officers, attorneys and agents.

9. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Material to any of the Parties. With respect to Confidential Material of a Third Party that is in the possession, custody or control of the FTC, or has been produced by the FTC in this matter, the Producing Party shall mean the Third Party that originally provided such material to the FTC. The Producing Party shall mean the FTC for purposes of any Document or Discovery Material prepared by, or on behalf of, the FTC.

10. "Matter" means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Any Document or portion thereof submitted by Respondent or a Third Party during the Federal Trade Commission ("FTC") investigation preceding this Matter or during the course of proceedings in this Matter that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as Confidential Material for purposes of this Protective Order. For purposes of this Protective Order, the identity of a Third Party submitting such Confidential Material shall also be treated as Confidential Material where the submitter has requested in writing such confidential treatment.

2. The Parties and any Third Parties, in complying with informal discovery requests, disclosure requirements, discovery demands or formal process in this Matter may designate any responsive document or portion thereof Confidential Material, including documents obtained by them from Third Parties pursuant to discovery or as otherwise obtained.

3. The Parties, in conducting discovery from Third Parties, shall provide to each Third Party a copy of this Protective Order so as to inform each such Third Party of his, her or its rights herein.

4. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes Confidential Material as defined in Paragraph 1 of the Definitions of this Protective Order. All deposition transcripts

shall be treated as Confidential Material.

5. If any Party seeks to challenge the Producing Party's designation of material as Confidential Material, the challenging Party shall notify the Producing Party and all other Parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation by providing the challenging Party and all other Parties a written statement of the reasons for the designation within five (5) business days of receiving notice of the confidentiality challenge. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Materials, absent a written agreement with the Producing Party or order of the Commission providing otherwise.

6. If any conflict regarding a confidentiality designation arises and the Parties and Producing Party involved have failed to resolve the conflict via good-faith negotiations, a Party seeking to disclose Confidential Material or challenging a confidentiality designation may make written application to the hearing officer for relief. The application shall be served on the Producing Party and the other Parties to this Matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The Producing Party and any other Party shall have five (5) business days after receiving a copy of the motion to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the hearing officer of the propriety of a requested disclosure or change in designation.

7. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Confidential Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to Persons not otherwise entitled to access under the terms of this Protective Order. If Confidential Material is produced without the designation attached, the material shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondent's Counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked materials.

8. Material produced in this Matter may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL-FTC Docket No. 9327" or any other appropriate notice that considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL-FTC Docket No. 9327" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. The foregoing designation of "CONFIDENTIAL-FTC Docket No. 9327" shall not be required for confidentiality to apply to documents and information previously produced voluntarily or pursuant to a Civil Investigative Demand or subpoena during the investigational phrase preceding this Matter for which confidential treatment was requested. Masked or otherwise redacted copies of documents may be produced where the portions deleted

contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

9. Confidential Material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the commission as experts or consultants for this proceeding, (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter, (c) court reporters in this matter, (d) outside counsel of record for Respondent, its associated attorneys and other employees of its law firm(s), provided they are not employees of Respondent, (e) Michael Shor, Polypore Special Counsel, (f) anyone retained to assist outside counsel in the preparation of hearing of this proceeding including consultants, provided they are not affiliated in any way with Respondent and have signed Exhibit A hereto, (g) any witness or deponent who may have authored or received the information in question; (h) any individual who was in the direct chain of supervision of the author at the time the Discovery Material was created or received, except that this provision does not permit disclosure of Industrial Growth partner or Warburg Pincus International documents to Polypore or former Microporous personnel who would not otherwise have had access to the Discovery Material; (i) any employee or agent of the entity that created or received the Discovery Material; (j) anyone representing the author or recipient of the Discovery Material in this Matter; and (k) any other Person(s) authorized in writing by the Producing Party.

10. Disclosure of confidential material to any person described in Paragraph 9 of this Protective Order shall be only for the purposes of the preparation and hearing of this Matter, or any appeal therefrom, and for no other purpose whatsoever; provided, however, that the

Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential materials as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

11. In the event that any Confidential Material is contained in any pleading, motion exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed under seal. To the extent that such material was originally submitted by a Third Party, the Party including the Materials in its papers shall immediately notify the submitter of such inclusion. Confidential Material contained in the papers shall remain under seal until further order of the Administrative Law Judge; provided, however, that such papers may be furnished to persons or entities who may receive Confidential Material pursuant to Paragraphs 9 or 10. Upon or after filing any paper containing Confidential Material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection of any such material expires, a Party may file on the public record a duplicate copy which also contains the formerly protected material.

12. If counsel plans to introduce into evidence at the hearing any document or transcript containing Confidential Material produced by another Party or by a Third Party, they shall provide ten (10) days advance notice to the other Party or Third Party for purposes of allowing that Party or Third Party to seek an order that the document or transcript be granted in camera treatment. If that Party or Third Party wishes in camera treatment for the document or transcript, the Party or Third Party shall file an appropriate motion with the Administrative Law

Judge. Where in camera treatment is granted, a duplicate copy of such document or transcript with the Confidential Material deleted therefrom may be placed on the public record.

13. If any Party receives a discovery request in another proceeding that may require the disclosure of Confidential Material submitted by another Party or Third Party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of Confidential Material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 C.F.R. §4.11(e), to discovery requests in another proceeding that are directed to the Commission.

14. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 C.F.R. §4.12.

15. The inadvertent production or disclosure of any Discovery Material, which a Producing Party claims should not have been produced or disclosed because of a privilege, will not be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. The inadvertent production of a privileged document shall not in itself be deemed a waiver of any privileged applicable to any other documents relating to the subject matter.

16. This Protective Order shall not apply to the disclosure by a Producing Party or its counsel of its own Confidential Material.

17. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 23, 2008

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

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

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, _____, hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order" governing Discovery Material ("Protective Order") issued by the Commission on October 23, 2008, in connection with the above-captioned Matter. I understand the restrictions on my access to and use of any Confidential Material (as that term is used in the Protective Order) in this Matter, and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidentiality Material include:

   a. that I will use such Confidential Material only for the purpose of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;

   b. that I will not disclose such Confidential Material to anyone, expect as permitted by the Protective Order;

   c. that I will use, store and maintain the Confidential Material in such a way as to ensure its continued protected status; and

   d. that, upon the termination of my participation in this proceeding, I will promptly return all Confidential Materials and all notes, memoranda, or other papers containing Confidential Material, to Complaint Counsel or Respondent's Outside Counsel as appropriate.

4. I understand that if I am receiving Confidential Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential

Material also include the duty and obligation to:

a. maintain such Confidential Material in separate locked room(s) or locked cabinet(s) when such Confidential Material is not being reviewed;

b. return such Confidential Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention, or upon conclusion of this Matter; and

c. use such Confidential Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the FTC Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature

TAB 2

Schur, Neil C.

From: Schur, Neil C.
Sent: Friday, December 12, 2008 2:25 PM
To: 'ericwelsh@parkerpoe.com'
Cc: Lipkowitz, Eugene V.
Subject: RE: In re Polypore
Importance: High

Thank you again for participating in the "meet and confer." We remain hopeful that we can resolve this dispute regarding the unreasonable and extraordinary burden imposed on EnerSys by your client's subpoena. Candidly, we expected to receive a substantive response from you Wednesday or at the latest, yesterday, as discussed, but have not heard from you.

Please let us know as soon as possible whether your client is agreeable to (a) paying EnerSys' attorneys fees incurred in reviewing the documents (or any portion of those fees); or (b) the proposal we outlined on the call. We also need to know your client's position regarding foreign language documents, test results documents (if there are summary/analysis documents), and not sharing the documents or their contents with Mr. Shor or anyone else at Polypore, as well as the various specific requests to which we objected.

We are compiling the list of individuals to whom the initial internal requests for documents were sent and hope to get that to you later this afternoon. To clarify, they are not "custodians" but instead are supervisors of various pieces of EnerSys' business, who then distributed the requests to their subordinates, as discussed Wednesday.

I understand that my colleague Joe Wolfson is handling a document production in response to a Polypore subpoena in this matter. For obvious reasons, we have erected a firewall within the firm, and no one working on one representation can discuss the matter with anyone on the other team.

Finally, your proposal that EnerSys produce the documents without reviewing them is, as expected, unacceptable. EnerSys cannot produce the documents without reviewing them carefully to avoid production of irrelevant, non-responsive information, as well as confidential and proprietary information, attorney-client privileged information, or attorney work product. The fact that business people gathered potentially relevant or responsive documents by no means ensures that the documents gathered are relevant or that the entire document gathered is relevant, as you know. You would not produce documents under such circumstances and, candidly, we think it is unreasonable to propose that solution.

We continue to welcome any creative ideas and remain hopeful that we can resolve these issues amicably and efficiently, without delay or intervention of the Administrative Law Judge.

We look forward to hearing from you.

Regards,

Neil C. Schur
Stevens & Lee, P.C.
1818 Market Street, 29th Floor
Philadelphia, PA 19103
(215) 751-1944 (ph)
(610) 371-7956 (fax)

ncsc@stevenslee.com

http://www.stevenslee.com

From: Welsh, Eric D. [mailto:ericwelsh@parkerpoe.com]
Sent: Wednesday, December 10, 2008 10:59 AM
To: Schur, Neil C.
Subject: In re Polypore

Neil

Thank you for the time you spent with me on the phone today. Obviously we have an number of fundamental disagreements. I will take your proposal to my client, as I understand you will do with ours (although I am not sure of that since you already told me you would not agree to the proposal). To reiterate, I understand that you have compiled approximately 100,000 pages of documents. You have run a search on the documents for privilege. We are willing to take the documents on an agreement that privilege will not be waived by an inadvertent production. I understand there are some high level management strategy documents that contain information your client believes is unrelated to this matter which it wants to redact. We are willing to consider that. I have suggested that you can limit the production by using January 1, 2003 as the cutoff for specification no. 13. I have also suggested, to meet your concern over burden, that we will be prepared to take summary memorandum and email that discuss the status of the testing and qualification in lieu of all of the testing documents themselves. (If such documents do not exist, then we would need all of the documents. I would want the right to follow up on any specific items if the summary documents do not adequately address all of the issues.) We are willing to take the balance of the production that has already been compiled subject to confidentiality worked out between us or by the ALJ.

For our discussion, please provide me with a list of the custodians searched. That may help move our discussions along. Also, please let me know if the custodians provided specific files or if an electronic search was conducted. If the latter, let me know the parameters and the terms used in the search. I may be able to assist in refining that search. If there are documents that can be produced in response to specific requests, we ask that EnerSys do so. We ask that EnerSys begin a rolling production. We can then figure out how to handle the balance.

As I said before, I have had a number of conversations with other third parties and seem to have had great success in dealing with them. In fact, just this morning I had a very good conversation with Joe Wolfson of your office that seemed to be very productive. The discussions with EnerSys have unfortunately started at a completely different point which creates most of our issues. I hope we can work through them but if not, we will address them with Judge Chappel.

I look forward to hearing from you.

Eric Welsh

TAB 3

AFFIDAVIT OF JOHN GAGGE

COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF BERKS :

I, John Gagge, being duly sworn, depose and make the following statement:

1. I am presently employed as the Senior Director, Engineering and Quality Assurance Americas of EnerSys.

2. EnerSys is a global manufacturer of flooded lead acid batteries headquartered at 2366 Bernville Road, Reading, Pennsylvania 19605.

3. Prior to the stock purchase at issue in this case, EnerSys purchased high-performance polyethylene battery separators from both Respondent and Microporous Products L.P.

4. At present, EnerSys purchases high-performance polyethylene battery separators solely from Respondent.

5. Among my duties and responsibilities is the collection and review of documents and electronically stored information that is responsive to subpoenas served on EnerSys, along with Larry Axt and counsel.

6. I have reviewed the Subpoena issued by Respondent to EnerSys in this matter ("Subpoena").

7. I respectfully submit this Affidavit in support of EnerSys' Motion for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party.

8. EnerSys received the Subpoena from counsel for the Federal Trade Commission on November 7, 2008.

9. I, along with Larry Axt and Larry Burkert, both of EnerSys, along with counsel, coordinated EnerSys' gathering of documents that are potentially responsive to the Subpoena.

10. Certain potentially responsive documents were housed outside the United States, and certain potentially responsive electronically stored information was housed outside the United States.

11. Accordingly, Mr. Burkert and I sent a request for documents and information to approximately thirty supervisors and executives worldwide throughout EnerSys, and asked them to pass on the requests for documents and information to their subordinates and to coordinate the collection of potentially responsive documents.

12. EnerSys gathered approximately 200,000 potentially responsive pages.

13. On November 28, 2008, EnerSys sent a drive containing the gathered documents to outside counsel.

14. A typical summary or status report of tests of separators will not reveal or even address the lead time for such testing, but will instead summarize the results of the tests or trends in the results or the status of the testing.

I have read the above statement and swear it is true and correct to the best of my personal knowledge and information.

JOHN GAGGE

Sworn to and subscribed before me

this 15 day of December, 2008

Notary Public

NOTARIAL SEAL
JERRY L. SEYLER; Notary Public
City of Reading, Berks County
My Commission Expires Sept. 14, 2010

TAB 4

Schur, Neil C.

From: Welsh, Eric D. [ericwelsh@parkerpoe.com]
Sent: Friday, December 12, 2008 2:36 PM
To: Schur, Neil C.
Cc: Rikard, Jr., William L.
Subject: FW: In re Polypore

Neil

I have talked with my client and we cannot agree to your proposal. I will not reiterate the points that I have already expressed to you regarding the manner in which you have proceeded in gathering documents for production. I had repeatedly suggested that you discuss with me the manner of your production and issues as to scope or burden before, not after, you had gathered the documents and information. In light of the situation that you now find yourself, I would propose either your client produce the documents per my suggestion made to you on December 10 (outlined below) or alternatively, produce the documents that are identifiable for the specific requests, including the management documents in redacted form, and then provide me with a list of the custodians, with job responsibility descriptions, for the balance that you have gathered. We could then try to agree on search terms for those documents. (I understand you have already searched for privilege.) If this is of interest, let me know and we can discus it.

Also, I await word from you regarding whether your client's documents contain summaries and status reports regarding the testing and qualification of separators/suppliers. I told you that I would be willing to take those documents (instead of a larger production of testing related documents), but noted that if you do not have them, then I will need all of the testing documents. I look forward to hearing from you on this subject. Also, I am willing to try to come to an agreement with you with respect to Mr. Shor and confidentiality. We will not pay for EnerSys' attorney fees. As I expressed before, we will reimburse for reasonable photocopy charges only.

If your client is not interested in either approach discussed above, then I suggest you file your motion next week.

As I said, I have worked well with others that I have served subpoenas on in this matter, including your partner, and remain willing to do so with EnerSys. It appears from my discussions with you, and from other information available to me, that your client has decided to make this as difficult as possible for my client. Time is pressing here and I am running out of latitude in dealing with your client.

I look forward to hearing from you as to the above.

Eric

Eric Welsh
Partner

PARKER POE
PARKER POE ADAMS & BERNSTEIN LLP

Three Wachovia Center | 401 South Tryon Street | Suite 3000 | Charlotte, NC 28202
Phone: 704.335.9052 | Fax: 704.335.9755 | www.parkerpoe.com | vcard | map

From: Welsh, Eric D.

Sent: Wednesday, December 10, 2008 10:59 AM
To: 'ncsc@stevenslee.com'
Subject: In re Polypore

Neil

Thank you for the time you spent with me on the phone today. Obviously we have an number of fundamental disagreements. I will take your proposal to my client, as I understand you will do with ours (although I am not sure of that since you already told me you would not agree to the proposal). To reiterate, I understand that you have compiled approximately 100,000 pages of documents. You have run a search on the documents for privilege. We are willing to take the documents on an agreement that privilege will not be waived by an inadvertent production. I understand there are some high level management strategy documents that contain information your client believes is unrelated to this matter which it wants to redact. We are willing to consider that. I have suggested that you can limit the production by using January 1, 2003 as the cutoff for specification no. 13. I have also suggested, to meet your concern over burden, that we will be prepared to take summary memorandum and email that discuss the status of the testing and qualification in lieu of all of the testing documents themselves. (If such documents do not exist, then we would need all of the documents. I would want the right to follow up on any specific items if the summary documents do not adequately address all of the issues.) We are willing to take the balance of the production that has already been compiled subject to confidentiality worked out between us or by the ALJ.

For our discussion, please provide me with a list of the custodians searched. That may help move our discussions along. Also, please let me know if the custodians provided specific files or if an electronic search was conducted. If the latter, let me know the parameters and the terms used in the search. I may be able to assist in refining that search. If there are documents that can be produced in response to specific requests, we ask that EnerSys do so. We ask that EnerSys begin a rolling production. We can then figure out how to handle the balance.

As I said before, I have had a number of conversations with other third parties and seem to have had great success in dealing with them. In fact, just this morning I had a very good conversation with Joe Wolfson of your office that seemed to be very productive. The discussions with EnerSys have unfortunately started at a completely different point which creates most of our issues. I hope we can work through them but if not, we will address them with Judge Chappel.

I look forward to hearing from you.

Eric Welsh

Eric Welsh
Partner
Ext. 9052

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

STATEMENT OF COUNSEL PURSUANT TO 16 C.F.R. § 3.22(f)

Counsel for the moving party, Neil C. Schur, Esquire and Eugene Lipkowitz, Esquire, have conferred with opposing counsel, Eric D. Welsh, Esquire, in an effort in good faith to resolve by agreement the issues raised by the motion and have been unable to reach such an agreement. Counsel conferred by telephone on December 10, 2008 and by electronic mail (multiple exchanges) on December 10, 12, 13, 15, and 16, 2008. Messrs. Schur and Welsh were the primary participants, although certain electronic mail messages were copied to Mr. Schur's colleague, Mr. Lipkowitz, and Mr. Welsh's colleague, William L. Rikard, Jr., Esquire.

Counsel had also previously spoken by telephone on November 12, 2008 regarding an extension of time to respond to the Subpoena and file a motion to limit the subpoena and for cost reimbursement, as well as a future meet and confer after the extension issues had been resolved.

Counsel were able to resolve disputes regarding Requests 5 and 7 and documents written in a language other than English "for the time being," but were unable to resolve the remaining issues addressed in the foregoing motion, including attorneys' fees and costs as a result of the unreasonable and extraordinary burden

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER

Upon consideration of the Motion of EnerSys for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party, the opposition of Respondent Polypore International, Inc., and oral argument, it is hereby ordered that the motion is GRANTED. It is hereby further ORDERED that:

1. Respondent shall pay EnerSys' attorneys' and paralegals' fees and costs incurred in reviewing the potentially responsive documents EnerSys has gathered in response to Respondent's Subpoena to EnerSys ("Subpoena"), as described in the motion.

2. Respondent shall pay EnerSys the outside vendor charges incurred to facilitate that review and the ultimate production of documents;

3. Within twenty (20) days of the completion of the document production, EnerSys shall submit a detailed fee application specifying such fees and costs;

4. Requests 10, 13-14, and 19-24 are hereby stricken from the Subpoena; and

5. Paragraph 9(e) of the Protective Order dated October 23, 2008 is hereby modified to shield EnerSys' production of documents from disclosure to Respondent's in-house counsel, Michael Shor.

ENTER:

_____
Administrative Law Judge D. Michael Chappell

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER

Upon consideration of the Motion of EnerSys for an Award of Attorneys' Fees and Costs and to Limit Subpoena Served by Respondent Upon Third Party, the opposition of Respondent Polypore International, Inc., and oral argument, it is hereby ordered that the motion is GRANTED. It is hereby further ORDERED that:

1. Respondent shall accept EnerSys' proposal as set forth in its Motion with regard to the review and production of documents in response to Respondent's Subpoena to EnerSys.

2. Respondent shall pay EnerSys the outside vendor charges incurred to facilitate that review and the ultimate production of documents;

3. Within twenty (20) days of the completion of the document production, EnerSys shall submit a detailed fee application specifying such fees and costs;

4. Requests 10, 13-14, and 19-24 are hereby stricken from the Subpoena; and

5. Paragraph 9(e) of the Protective Order dated October 23, 2008 is hereby modified to shield EnerSys' production of documents from disclosure to Respondent's in-house counsel, Michael Shor.

ENTER:

Administrative Law Judge D. Michael Chappell