ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONSE TO JOINT MOTION OF RESPONDENT AND ENERSYS FOR LEAVE OF COURT TO CONDUCT DEPOSITIONS OF ENERSYS EMPLOYEES AFTER THE DISCOVERY DEADLINE

Complaint Counsel does not oppose the Joint Motion of Respondent and Enersys for Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline so long as other discovery deadlines and trial are not delayed. Complaint Counsel is not willing to agree to any delay of trial for any reason, especially in light of the fact that Polypore has recently been initiating monopolostic price increases upon third-party customers.

Complaint Counsel respectfully opposes any delay of trial or extension of other discovery deadlines for any reason. No delay of trial is warranted because Polypore has issued an extremely broad and extensive subpoena to Enersys well after discovery had begun. The subpoenas that Polypore has issued to Enersys and other third parties are significantly more extensive than both the Part 2 document subpoena and document requests issued by Complaint Counsel to Polypore.[1] Complaint Counsel served its document request on Polypore on October 22, 2008. Polypore did not issue its subpoena to Enersys until November, despite more than a

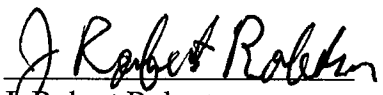
[1]Polypore complained to this Court that Complaint Counsel's document request was "a fishing expedition"seeking "vast quantities of documents." *See* Exhibit A, Respondent's November 3, 2008 Motion for a Protective Order Regarding Discovery at 6. Respondent also characterized Complaint Counsel's discovery request as "onerous" and "burdensome." *Id.* At 9.

month to prepare before discovery even began. Respondent had already noted the need for it to conduct discovery quickly in this matter in its Motion to Reschedule Hearing Date on October 1, 2008, and had apparently already identified the firms from whom it intended to conduct discovery. Exhibit B at pp. 6-7. In view of its recognition that it must conduct discovery quickly, it is unacceptable that Polypore would wait two weeks or more after discovery had begun to issue document subpoenas to those firms. Moreover, Polypore failed to object when Enersys sought additional time to file its motion to limit the subpoena or seek cost reimbursement. See Enersys' Motion to Extend Time in Which to Move to Limit Subpoena Served by Respondent Upon Third Party and to Seek Cost Reimbursement, attached as Exhibit C. During the course of that time, Polypore failed to negotiate and narrow its subpoenas to Enersys in a way that permitted timely discovery.

Polypore issued its extensive and onerous discovery request late, sat on its rights, and now seeks additional time to conduct depositions. Any delay of trial will redound to the detriment of lead-acid battery separator consumers. However, to accommodate Respondent and Enersys, Complaint Counsel is willing to agree to additional time for Polypore to conduct its depositions of Enersys.

Dated: January 15, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2009 I filed *via* hand and electronic mail delivery an original and two copies of the foregoing Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline with:

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

I hereby certify that on January 15, 2009, I served *via* electronic mail and mail delivery a copy of the foregoing Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
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I hereby certify that on January 15, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline with:

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S MOTION FOR A PROTECTIVE ORDER REGARDING DISCOVERY

Pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings ("FTC Rules"), 16 C.F.R. §§ 3.22 and 3.31(d), Respondent Polypore International, Inc. ("Polypore"), by its attorneys, Parker Poe Adams & Bernstein LLP, hereby moves for a protective order to (1) limit the scope of Complaint Counsel's First Set of Interrogatories to Respondent Polypore International, Inc. (the "Interrogatories") and Complaint Counsel's First Set of Document Requests to Respondent Polypore International, Inc. (the "Document Requests"); (2) deny improper discovery demanded beyond the limits set in the Scheduling Order entered on October 22, 2008; (3) limit the depositions currently sought to the extent Complaint Counsel intends to question witnesses based on third party discovery document; and (4) quash, or limit, the depositions of sought of Steve McDonald, Michael Gilchrist, Timothy Riney, S. Tucker Roe and Pierre Hauswald (the "Depositions") – individuals previously questioned at length by Complaint's Counsel as part of its pre-complaint investigation.[1]

INTRODUCTION

After having engaged in what can only be described as unfettered and one-sided discovery of Polypore for over five months, the Federal Trade Commission ("FTC") issued its Complaint against Polypore on September 9, 2008. Polypore does not yet know the full extent of the FTC's prior discovery, as Complaint Counsel has not yet complied with its obligations and produced the

[1] Copies of Interrogatories, Document Requests and Deposition Notices are attached as Exhibits A, B and C, respectively.

EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

information which it obtained from third parties during its investigation.[2] Polypore, of course, is aware of what it provided to the FTC, at considerable cost and expense, leading up to this case:

- Polypore produced over 1.1 million pages of documents to the FTC in response to its discovery requests.
- Polypore responded to 44 CID requests.
- After having produced these documents and having responded to the CID, Polypore made five witnesses available for examination by the FTC in investigational hearings. Two of those witnesses (Messrs. Tucker Roe and Timothy Riney) were deposed over the course of two days and one witness (Mr. Pierre Hauswald) was deposed for nearly 11 hours. The transcripts of the examinations of these witnesses exceed 1660 pages. Each witness was examined on the issues that came to serve as the basis for the allegations of the Complaint.

While Complaint Counsel has chosen to ignore much of what Polypore provided to the FTC in this discovery in crafting its Complaint, the fact remains that the FTC has already engaged in extensive, one-sided discovery of Polypore on the very issues identified in the Complaint.

Despite all of this discovery of Polypore, Complaint Counsel has decided to extend its fishing expedition, seeking vast quantities of documents and responses to oppressive interrogatories and demanding examinations of the same five witnesses that they spent over 46 hours examining only months before on the very same issues set forth in the Complaint. What is even more alarming is the fact that Complaint Counsel has violated the terms of the Administrative Law Judge's rules limiting the number of interrogatories to 50 including subparts. Apparently,

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[2] See Letter of William L. Rikard, Jr., dated October 29, 2008, at p. 2 ("I am concerned with Steve's comment today that he has not yet contacted all third-parties with respect to the disclosure of their documents and information in this matter under the protective order and has no obligation to produce any of these materials to us absent a formal request. It was certainly our expectation, based on the representation made in the initial disclosures made to the Administrative Law Judge, that you would have promptly contacted these third parties once the Protective Order was entered, which was one week ago. In addition, we do take issue with your statement that you are not required to produce the third-party documents in the investigational hearings to us absent a document request. In fact, in the initial disclosures filed by Complaint Counsel with the Administrative Law Judge, Counsel stated "Complaint Counsel **will provide copies of third-party's documents and materials** 10 days after such time as the Administrative Law Judge has entered a protective order in this matter and the third-parties who submitted the documents have been apprised of their rights under the protective order." Complaint Counsel's Initial Disclosures to Respondent Polypore International, Inc., p. 3 (emphasis added).").

Complaint Counsel's strategy is to cause Polypore as much financial pain as possible in the discovery process in order to force capitulation. As noted by Commissioner Rosch, in addressing the proposed changes to the FTC Rules, a litigant is not to be subjected to oppressive proceedings that are unduly expensive and burdensome and outcome determinative due to such excesses:

> First, in merger cases, protracted part 3 proceedings may result in the parties abandoning transactions before their antitrust merits can be adjudicated. . . . Second, in all antitrust cases, protracted Part 3 proceedings may result in substantially increased litigation costs for the Commission and for the clients whose transactions or practices are challenged. More specifically, protracted discovery schedules and pretrial proceedings may be good for the litigators, but they can result in nonessential discovery and motion practice that can be very costly to both the Commission and those clients.[3]

While Commissioner Rosch was addressing the costs and determinative nature of the proceedings in the context of the length of time for Part 3 cases, the principle applies equally to the abusive discovery tactics being employed here by Complaint Counsel. Indeed, in arriving at an agreed-to schedule for this case with Complaint Counsel, Respondent relied on statements made by Complaint Counsel that its discovery of Polypore would be targeted, narrow and specific, "rifle shots," rather than the shotgun approach used by Complaint Counsel here. If Respondent had known that Complaint Counsel intended to redo the extensive discovery already taken, it would have strenuously sought a different schedule than cutting discovery off at February 13, 2009, and holding the hearing in this matter on April 14, 2009.

Given the limited time for discovery under the expedited schedule and consistent with the intent of the proposed FTC rule changes to "improv[e] efficiency and timing of administrative litigation,"[4] subjecting five people to questioning on the same topics with no limitation has no

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[3] Reflections on Procedure at the Federal Trade Commission. Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission. ABA Antitrust Masters Course IV. September 25, 2008.

[4] Id.

EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

place here. Respondent does not suggest that Complaint Counsel's pre-complaint investigation must have encompassed and gathered "all" the details for each and every transaction that might become an evidentiary item in this litigation, only that in an expedited action it is incumbent on all parties and counsel to be as efficient as possible. To the extent information may be needed to "round out, extend, or supply further details" about a transaction or topic such questions may promote efficiency, but a wholesale free-for-all of any and all topics that have previously been exhausted in the pre-complaint investigational hearings is burdensome and wasteful and should have no place in an expedited schedule or under the proposed new rules.[5] Complaint Counsel's deposition of the five previously questioned witnesses should be either denied outright or limited to information that rounds out, extend or supplies further details of specific topics and not to an unlimited deposition of previously-ploughed ground.

Complaint Counsel's written discovery is overbroad, unduly burdensome, harassing, seeks information not reasonably expected to yield information relevant to this matter, and exposes individuals who have already submitted to hours and days of deposition to additional annoyance, oppression and burden. An order limiting the scope of Complaint Counsel's written discovery and depositions is appropriate.

Complaint Counsel has served sweeping document requests and interrogatories on Respondent which are – on their face – dramatically overbroad in violation of the ALJ's October 22, 2008 Scheduling Order, and, if read literally, might call for the production of hundreds of thousands of documents that could have no conceivable relevance to the claims asserted in this action. Literal compliance with the Complaint Counsel's written discovery would require Respondent to review millions of pages of files maintained by individuals employed by dozens of

[5] All-State Indus., et al., 72 F.T.C. 1020, 1023-24 (Nov. 13, 1967).

companies all over the world that are associated or affiliated with or have some relation, however remote, to Polypore. In the context of this litigation, such a task would be Herculean – it is certainly well outside the spirit and intent of the expedited nature of this litigation and the aspiration to reduce "nonessential discovery and motion practice that can be very costly to both the Commission and [the challenged] clients."[6] Further, Complaint Counsel seeks duplicative and burdensome depositions of five individuals who were subject to investigational hearings in the Part II investigation.

DISCUSSION

A. Scope of Discovery

"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." FTC Rules 3.31(c)(1); see FTC v. Anderson, 631 F.2d 741, 745 (D.C. Cir. 1979). The Administrative Law Judge has the authority to limit discovery to the extent it is "unreasonably cumulative or duplicative," "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;" or "the burden and expense of the proposed discovery outweigh its likely benefit." FTC Rules 3.31(c)(1)(i-iii). Further, the ALJ may deny discovery or make any order to protect "any party . . . from annoyance, embarrassment, oppression, or undue burden and expense . . ." FTC Rules 3.31(d).

I. Complaint Counsel's Written Discovery is Overbroad, Unduly Burdensome and Seeks Information Not Relevant to this Matter

The Scheduling Order in this matter entered on October 22, 2008, limits each party to 50 document requests and 50 interrogatories, including subparts. This limitation doubles the standard

[6] See n. 3 supra.

number of interrogatories permissible under the FTC Rules. Rule 3.35. Notwithstanding this generous allowance and clear limitation, in addition to the admonition that "[a]dditional discovery may be permitted only for good cause shown upon application to and approval by the Administrative Law Judge," Complaint Counsel served upon Respondent on the same day the Scheduling Order was entered Interrogatories well in excess of the 50 interrogatory limitation (by one count, the Interrogatories are well in excess of 116).

"The purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial . . ." In re TK-7 Corp., 1990 F.T.C. Lexis 20, *1-2 (1990). A shotgun approach to discovery will not "narrow the issues." Further, Complaint Counsel failed even to ensure that it did not seek duplicative information obtained previously during the investigatory phase. For instance, Interrogatory No. 5 which asks that Polypore, Daramic and Microporous identify all sales by relevant product, in each relevant area, from January 2003 to the present (and projecting forward as possible) with 16 sub-parts requiring further information, is substantially duplicative of the CID Request No. 2 which asks for sales for each relevant product, in each relevant area from January 2003 to the present. The only real differences in the two requests are that Complaint Counsel now wants Respondent to identify the "line" from which the sales came, the product code and the customer's parent. This additional information is irrelevant and certainly does not justify the clearly duplicative discovery sought of Polypore.

Complaint Counsel's excesses are demonstrated by looking at the interplay of their definitions with the interrogatories. Complaint Counsel defines "relevant product" to include 4 products (battery separators for deep cycle, uninterruptible power supply, automotive and motive applications). Complaint Counsel then requests detailed and voluminous information in the guise of a single request for each such "product". See e.g. Interrogatories Nos. 2, 4 (for each product,

and for each of Polypore, Daramic and Microporous), 5 (same), 9, 10, 14, 15, 32. In addition, Complaint Counsel compounds this egregious discovery by asking for the same information for each of 4 "relevant areas," defined as North America, Asia, Europe or the World. See e.g. Interrogatories Nos. 6, 16, 34. This additional burden takes the number of interrogatories well beyond even the outrageous number of 116.

A subpart is to be considered discrete only when it is "logically or factually subsumed within and necessarily related to the primary question." Federal Trade Commission v. Think All Publishing, L.L.C., 2008 WL 687454 (E.D. Texas 2008). The Think All Court went on to explain that where "the first question can be answered fully and completely without answering the second question, then the second question is totally independent of the first and not factually subsumed within [it]." Id.; see also Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684 (D.Nev.1997)). Thus it must be considered a separate and distinct question. Complaint Counsel here has propounded dozens of interrogatories whose subparts can be answered fully and completely separate and apart from the "first" question propounded. This is in violation of the FTC Rules and the Scheduling Order and should not be tolerated.

Under the Scheduling Order Respondent has 20 days to respond to the written discovery propounded upon it. It should not be given the additional burden of having to sift through duplicative questions that are in blatant violation of the limits explicitly set by the Scheduling Order, nor should it be required to determine which 50 of the interrogatories should be answered.

Complaint Counsel should be required to abide by not only the Scheduling Order, but by the implicit limits set by the FTC Rules and Respondent requests that Complaint Counsel be ordered to propound a new set of interrogatories limited to a maximum of 50, including subparts.

II. Complaint Counsel's Definition of "Polypore" and "Microporous" Substantially Increases the Burden of Responding to the Written Discovery

Complaint Counsel has defined "Polypore" in its written discovery as "Respondent, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing." The definition goes on to state that "'Subsidiary,' 'affiliate,' and 'joint venture' refer for this purpose to any person in which there is a partial (25 percent or more) or total ownership or control between the company and any other person."

Microporous is defined with equal breadth as "Microporous Products L.P., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all officers, directors, employees, agents and representatives of the foregoing."

As Complaint Counsel is aware Polypore International, Inc., is currently owned more than 25% by Warburg Pincus. Further, it is parent to four companies which, in turn are parent to, or are affiliated with, 25 companies throughout the world. This does not take into account its affiliation and relationship with its Liquicel and Membrana divisions. The vast majority of these companies have no connection to the issues in the Complaint. Making the definition increasingly absurd, should Polypore be required to respond to the discovery using Complaint Counsel's definition, it would also be responsible for ascertaining whether all of the directors, officers, employees, agents and representatives of these companies have documents or information potentially falling within Complaint Counsel's discovery requests and then, if so, gathering and producing the documents and information no matter how remote to the issues here. Not only would this include thousands of employees, it would include all outside directors, counsel and other "representatives" of each of those companies. Thus, read literally interrogatory number 8, which asks Respondent to "describe the circumstances, the timing of, and all reasons for, the departure of any company employee . . . from employment at Polypore since July 1, 2007," would require Respondent to provide to

Complaint Counsel with the circumstances, timing and reasons for the departure of any employee of Polypore, Daramic, Warburg Pincus, and any of myriad companies all over the world which fall within this expansive definition. Likewise, Respondent would be required to produce documents related to these departures pursuant to document request number 5,

By way of further example, with respect to Complaint Counsel's definition of "Microporous," Microporous was owned prior to the acquisition by Respondent by Industrial Growth Partners, a private equity company that currently owns five portfolio companies.[7] Thus, accepting Complaint Counsel's definition to include IGP as a "predecessor" would, again read literally, require Respondents under interrogatory number 11 to provide the date, list of attendees and matters discussed for every board of directors meeting for IGP, and any of its portfolio companies, not to mention any prior owner (or predecessor) of Microporous, which would include another equity firm, Kelso & Company. Likewise, Respondent would be required under document request number 6 to produce all documents related to these meetings – including notes of each individual director. As with Warburg Pincus, Respondent has no control over IGP or Kelso & Company and cannot respond on their behalf.

Complaint Counsel should not be permitted to impose such onerous and burdensome requests on Respondent. Respondent requests that the Court limit the requests to the following companies: Polypore International, Inc., Daramic LLC and Microporous Products, L.P. Respondent should not have to answer discovery on behalf of its other "parents, subsidiaries, affiliates" or its "predecessors." Each of the relevant companies has been in existence during the

[7] API Heat Transfer, Inc.; Atlas Material Testing Solutions; The Felters Group; Seaboard Wellhead, Inc.; and The TASI Group. See www.igpequity.com/portfolio.html. IGP's former portfolio companies, which includes Microporous, number 12 different companies in as many industries.

time frame at issue, thus there is no reason to go beyond those companies to their predecessors or other affiliated companies.

III. Complaint Counsel's Deposition Notices are Duplicative and Burdensome

As recognized by the Supreme Court of the United States "[i]t is clear from experience that pretrial discovery by depositions . . . has a significant potential for abuse." Seattle Times Co. et al. v. Rhinehart et al., 467 U.S. 20, 28 (1984). Complaint Counsel's desire to take duplicative testimony from 5 individuals who previously submitted to one or more days of testimony during the investigational hearings is cumulative, duplicative, and unduly burdensome. Five of the eight witnesses were deposed at length on the issues underlying the Complaint. Complaint Counsel has advised that they intend to use the transcripts in the hearing in this matter, just as they will use the 1.1 million documents previously produced. Complaint Counsel should not be permitted to engage in such oppressive tactics in proceedings which are intended to be handled in an expeditious manner without imposing undue burden on the litigant.

While discovery is designed to elicit new information, some of which may be cumulative, discovery is not a license to "engage in repetitious, redundant, and tautological inquiries." Pulsecard, Inc. v. Discovery Card Servs., et al., 168 F.R.D. 295 (D. Kan. 1996). The Federal Rules of Civil Procedure,[8] and federal courts, disfavor repeat depositions. See, e.g., Graebner v. James River Corp., 130 F.R.D. 440, 441 (N.D. Cal. 1989)(preventing second deposition despite claim that first deposition was "settlement" deposition and second was "trial" deposition). Re-deposing

[8] Although the Federal Rules may not govern here, the FTC Rule's essentially mirror the Federal Rules and cases under the F.T.C. have noted that "judicial precedents under the Federal Rules provide helpful guidance in resolving discovery disputes in commission proceedings." See, e.g., Dura Lupe Corp., 2000 F.T.C. Lexis 1, at *31 (Jan. 14, 2000); L.G. Balfour Corp., et al., 61 F.T.C. 1491, 1492 (Oct. 5, 1962).

these individuals once more will simply generate hundreds of additional pages of testimony that is repetitive of the testimony previously elicited. This is not only burdensome on the individual defendants, but is an unnecessary waste of the Respondent's and the government's time and money, a result to be avoided. See supra at 3.

To the extent Complaint Counsel seeks to ask the same questions to the same witnesses it can obtain that information from a less burdensome and costly source – the prior testimony. "In making a decisions regarding burdensomeness, a court should balance the burden of the interrogated party against the benefit of the discovery party of having that information." Hoffman v. United Telecommunications, Inc., 117 F.R.D. 436, 438 (D. Kan. 1987). To allow full access to the same individuals does nothing more than increases costs and burden for all parties. Whether discovery is unduly burdensome depends on "the needs of the case, the amount in controversy, limitations on the party's resources, and the importance of the issues at stake in the litigation." Hammerman v. Peacock, et al., 108 F.R.D. 66, 67 (D.D.C. 1985). In this case, requiring these individuals to be deposed a second time on any and all subjects outweighs any putative benefit Complaint Counsel can expect to obtain and strains the resources of all parties.

To the extent such depositions are permitted, they should be limited to topics not previously covered and "new" information or questions related to topics that have previously been covered. It would be inappropriate to require individuals who spent up to two full days being questions in the Part II proceeding to have to submit to the same questions yet again. See, e.g., Johnston Dev. Group v. Carpenters' Local Union No. 1578, 130 F.R.D. 348, 353 (D.N.J. 1990)("recollection of an event witnessed by five other persons" is duplicative).

IV. Deposition's Should be Delayed or Limited until Complaint Counsel Provides the Third Party Documents Previously Produced to Respondent

In its Initial Disclosures Complaint Counsel reveals that it has received documents from twenty (20) third-party entities and individuals during the pre-complaint investigation. Furthermore, Complaint Counsel stated in the initial disclosures that it would "provide copies of the third party's documents and materials ten days after . . . the Administrative Law Judge has entered a protective order in this matter and the third parties have been apprised of their rights under the protective order." Had Complaint Counsel acted expeditiously the ten-day period would have passed by November 3, 2008. However, Complaint Counsel admitted that as of October 30, 2008, not all third parties had been apprised of their rights under the Protective Order. In its response letter of October 31, 2008 to Respondent, Complaint Counsel states all third-parties have now received the notice and their documents will be submitted ten days after each third-party received Complaint Counsel's notice. Assuming some third-parties did not receive notice until at least October 31, 2008, no third-party documents will be produced to Respondent until at least November 10, 2008. Despite this, Complaint Counsel has scheduled several depositions prior to that date, and states that Respondent is not entitled to any of these third-party documents prior to the taking of the seven currently noticed depositions.

The refusal of Complaint Counsel to produce those documents prior to the scheduled depositions is patently unfair to Respondent and the witnesses scheduled to be deposed. Complaint Counsel states that it is "committed to ensuring the fairness of these proceedings," yet it is difficult to imagine how this commitment is advanced by the refusal to allow Respondent's counsel time to review documents from 20 different entities and individuals on which the deponents may be questioned. Even if the documents and information are designated as confidential under the October 23, 2008 Protective Order, Respondent's counsel should still be entitled to see these documents before Complaint Counsel is permitted to engage further in what

has been noticeably one-sided discovery. To permit Complaint Counsel to proceed with examination, especially since it has chosen to delay providing notification to these third parties, provides an unfair advantage to Complaint Counsel that is prejudicial to Respondent and the witnesses. This potential for prejudice, oppression and harassment entitles Respondent to a protective order postponing the depositions until at least seven (7) business days after the third-party documents have been produced, or in the alternative preventing Complaint Counsel from using such documents in any deposition until at least seven (7) business days after the documents to be used have been produced.

CONCLUSION

Complaint Counsel's discovery tactics are unreasonable and inconsistent with the FTC Rules and the Scheduling Order in this case. This overreaching, harassing and overly burdensome discovery seeks documents and information that is not likely to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. For the reasons set forth above, and the interest of judicial efficiency and economy, this Court should limit and deny Complaint Counsel's invalid and improper discovery.

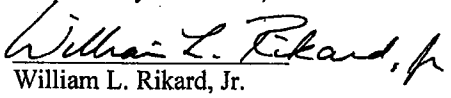
****

Respondent hereby certifies that it has conferred with Complaint Counsel in a good faith attempt to resolve the issues relating to the issues set out in this motion. See letter of William L.

Rikard, Jr., dated October 29, 2008, and Complaint Counsel's response, dated October 31, 2008, attached hereto as Tab 1. While the parties were able to reach agreement on several issues, the issues identified in this motion remain unresolved.

Dated: November 3, 2008

Respectfully Submitted,



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Attorneys for Respondent

EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2008, I caused to be filed via hand delivery and electronic mail delivery an original and one copy of the foregoing ***Motion for Protective Order Regarding Discovery*** and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed 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 November 3, 2008, I served via hand delivery and first-class mail delivery a copy of the foregoing ***Motion for Protective Order Regarding Discovery*** with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
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I hereby certify that on November 3, 2008, I served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Motion for Protective Order Regarding Discovery*** with:

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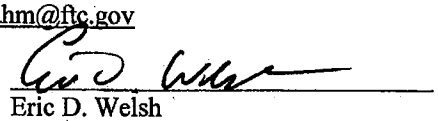

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EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

PROPOSED ORDER

Upon consideration of Respondent's Motion for a Protective Order, and the Court being fully informed, it is this _____ day of _____, 2008, hereby

ORDERED, that the Motion is GRANTED; and it is further ORDERED, that:

1. Complaint Counsel re-serve its First Set of Interrogatories to Respondent Polypore International, Inc., limiting the number per the Scheduling Order in this matter to 50 interrogatories, including subparts;

2. Complaint Counsel limit its definitions in the interrogatories to those parties and related companies that are relevant to the matters at issue in the Complaint, relief sought and Respondent's defenses, and define terms such that they do not expand the information sought or exceed the number of permitted interrogatories beyond the limits set out in the Scheduling Order;

3. The depositions of Steve McDonald, Michael Gilchrist, Timothy Riney, S. Tucker Roe and Pierre Hauswald be [quashed], [or limited to questions regarding issues and topics that were not previously covered in the pre-complaint investigational hearings of those individuals, or are simply intended to supplement or round out previously asked questions or topics of inquiry]; and

4. To the extent Complaint Counsel intends to use any third-party documents in any noticed deposition, for preparation of questions, or to question a deponent, the depositions shall be postponed until seven days after the delivery of those documents to counsel for Respondent.

EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

The Honorable D. Michael Chappell
Chief Administrative Law Judge (Acting)
Federal Trade Commission

PPAB 1495915v3

EXHIBIT A to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MOTION TO RESCHEDULE HEARING DATE

Pursuant to Rule 4.3(b) of the Rules of Practice of the Federal Trade Commission, 16 C.F.R. § 4.3(b), Polypore International, Inc. ("Polypore") moves that the hearing on the Complaint filed in this matter be rescheduled to begin on May 18, 2009. The Complaint states that the hearing on the Complaint will begin on "December 9, 2008, or such other date as determined by the ALJ." Beginning a hearing in this matter on December 9, 2008, only eighty-four (84) days after service of the Complaint, is manifestly unfair and unjust, would materially prejudice Polypore and deprive Polypore of a reasonable opportunity to prepare its defense to this complex matter. For the reasons set forth below, Polypore requests that the hearing on this matter be set to commence on May 18, 2009:

A. Matters Preceding the Issuance of the Complaint

1. The matter grows out of Polypore's purchase of the stock of Microporous Holding Corporation ("Microporous") in a transaction that closed on February 29, 2008. FTC staff first contacted Polypore regarding this matter in March 2008.

2. Throughout the investigative period and the responses to the civil investigative demand (CID), Polypore has worked cooperatively with FTC staff to provide requested information, including the following:

- Polypore provided over one million pages of documents to the FTC.

- Polypore provided answers and supporting exhibits to interrogatories propounded by the FTC.

- Polypore produced five witnesses for investigational hearings, with some hearings taking multiple days to complete.

- During the course of the investigation, Polypore executives traveled to Washington no less than five (5) times for various meetings with FTC staff and with Commissioners.

- Polypore answered numerous inquiries through correspondence and exchanges with FTC staff.

3. During the course of its six and one-half month investigation, FTC staff conducted other investigational hearings and inquiries of third parties about which Polypore has no information at all: neither the transcripts of any hearings, copies of any documents or affidavits, nor information about the inquiries made. Polypore believes FTC staff has obtained affidavits and documents from third parties about which it has no information.[1] Complaint Counsel has indicated that they may identify ten (10) witnesses in their disclosures. At the earliest, disclosures will not be made until mid-October, less than sixty (60) days before the December 9, 2008 hearing, providing insufficient time for Polypore to review the disclosed materials or pursue independent discovery from the entities who provided materials to the FTC.

B. The Issuance of the Complaint

4. On September 9, 2008, the Commission issued the Complaint against Polypore. The Complaint was served on Polypore on September 15, 2008. The Complaint, purporting to assert three claims against Polypore under Section 7 of the Clayton Act and Section 5 of the FTC Act, is striking for its lack of clarity, its vagueness and absence of necessary allegations. Such infirmities will cause Polypore significant work and time to be able to respond to the Complaint,

[1] In Complaint Counsel's Response to Respondent's Motion to Extend Respondent's Time to Respond to Complaint (the "Response to Motion to Extend"), Complaint Counsel has stated its opposition to any delay in the hearing, arguing, in part, that "the case is not complex." Having had the advantage of over six months of investigation in this matter, and crafting its complaint to ignore, among other things, the global nature of the separator market, it is disingenuous, at best, for Complaint Counsel to object to Polypore being provided sufficient opportunity to gather evidence to assert its defense.

assert its defenses, conduct discovery and otherwise prepare to defend itself at the Hearing in this matter. Due to many serious deficiencies in the Complaint, Polypore moved the Court on September 25, 2008 for a more definite statement or clarification of the allegations in Counts II and III of the Complaint. Complaint Counsel has opposed that motion, yet failed to address in any meaningful way in its opposition the points raised by Polypore in its motion for more definite statement or clarification. See Complaint Counsel's Response to Respondent's Motion for a More Definite Statement ("Response to Motion for More Definite Statement"). Among other things, Complaint Counsel fails to address at all the serious issue raised by Polypore in its motion with respect to the pleading standard Complaint Counsel asserts it must meet for its Section 5 FTC Act claims and fails to state whether it proposes to present its monopolization and attempt to monopolize claims under Section 5 of the FTC Act without satisfying the standards required by Section 2 of the Sherman Act. Complaint Counsel also glosses over the deficiencies of its pleading related to its failure to allege monopolies in the supposed UPS, automotive and PE separator markets by simply characterizing the allegations of the Complaint, which do not say what Complaint Counsel suggests (compare Polypore's Motion, pp. 4-5 with the Response to Motion for More Definite Statement, p. 1), and by even referring to some unspecified conversations with Polypore's prior counsel (Id. at 2). Polypore's motion for more definite statement or clarification is pending with the Court.

5. The Complaint, and its multiple vague and deficient allegations, manifest that the case the FTC intends to bring against Polypore is complex. It is evident that the FTC's allegations have broadened substantially beyond the merger concerns which were the heavy and exclusive focus of the discussions between Polypore and the Commissioners leading up to the filing of the Complaint. Indeed, the Complaint stands as an unexpected departure from the Commission's prior approach to this matter.

6. During the multiple meetings between Polypore and the FTC, there were numerous and repeated indications that FTC staff was limiting its inquiry and investigation. On the day the Complaint was voted out, Polypore's CEO was again in Washington to meet with two different Commissioners to answer questions and further explain why this small merger (which does not even trigger pre-merger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976) neither violates Section 7 of the Clayton Act nor harms any consumers. Not once during the meetings on September 9 was anything said to indicate that a complaint would be voted out that very afternoon by the FTC, let alone, that the complaint would include vague allegations purportedly grounded in Section 5 of the FTC Act and set a hearing date only ninety (90) days later. Accordingly, the abrupt change in the Commission's approach to this matter, by itself, requires an extension of time. This case cannot be ready for an efficient, effective hearing on December 9, 2008.

C. Polypore's Preparation of its Defense

7. On September 10, 2008, the undersigned and his firm (collectively "Parker Poe") were retained as trial counsel to represent Polypore with respect to the Complaint in these Part 3 proceedings. To this point, Parker Poe has had only very limited involvement in responding to the FTC investigation. While Parker Poe is working diligently to gain command of the facts and circumstances that the FTC has worked on for six months, it will obviously take it some time to reach this level, let alone move beyond that to conduct adequate discovery and prepare for the hearing. In its Response to Motion to Extend, Complaint Counsel has seriously overstated Parker Poe's prior involvement in this matter. In the investigative process, Hogan & Hartson was primary counsel. Parker Poe acted only in narrowly defined roles to provide very limited assistance to Polypore and Hogan & Hartson. Parker Poe was not involved in the development of positions in response to the FTC inquiry, or in the strategy and tactics of responding to FTC

staff. It was not involved in any investigational hearings and its narrow involvement ended in early June. Parker Poe did not collect, review or produce Polypore's documents. It only forwarded to Hogan & Hartson certain pleadings, transcripts and exhibits and from a pre-existing unrelated arbitration. Complaint Counsel in his Response to Motion to Extend is in error in asserting otherwise. A redacted copy of the May 1, 2008, letter referenced by Complaint Counsel is attached as Exhibit A to confirm Parker Poe's limited role and to illustrate the extent of Complaint Counsel's misrepresentation. Parker Poe also assisted Polypore and Hogan & Hartson in responding to eight interrogatories dealing with sales, product-specific information, development and changes, and certain information concerning Microporous, by gathering basic factual information for those interrogatories.

8. Polypore would like to bring this matter to hearing as soon as practical. Given the seriousness of the allegations in the Complaint, however, Polypore does not believe that it can present its defenses fairly and effectively without the requested extension. As evidence of Polypore's intent to try to move this matter forward expeditiously, Parker Poe initiated, and came to Washington for, an introductory, informal meeting with Complaint Counsel on September 16, 2008. Further, Polypore has moved the Court to schedule the initial scheduling conference in this matter for October 22 or 23, 2008 irrespective of the Court's decision on the motion for more definite statement. Polypore's counsel has also reviewed, revised and on September 25, provided to Complaint Counsel a proposed Protective Order which would govern the use of confidential information from the parties and third parties in this matter. Complaint Counsel has not yet provided any comment on Polypore's revised draft of the Protective Order.

9. Without the requested additional time to prepare its defenses and to conduct vital discovery, Polypore will not be afforded the fundamental right of any litigant: to develop its defenses fairly and fully and to present those defenses effectively and efficiently at a hearing.

The work will take some time, but is critical and will take considerable effort even with the proposed extension. At present, the tasks to prepare for trial include, but may not be limited to:

(a) Identification of the necessary witnesses for trial. At this time, Polypore has identified fourteen (14) of its officers and employees who may have relevant information and are likely witnesses. Five of them already have been the subject of investigational hearings. Substantial work will need to be accomplished to determine the actual witnesses and the scope of their testimony. Assuredly, several of them will have to be defended at depositions taken by Complaint Counsel.

(b) Documents have to be reviewed. At this point, 1.1 million documents have been turned over to the FTC. These documents have not been reviewed by Parker Poe and must be thoroughly reviewed. Complaint Counsel has indicated that the FTC may seek more discovery from Polypore. Polypore believes that the FTC has obtained additional documents from third parties which presumably will be turned over to Polypore in discovery. The quantity of these documents is not known, yet they, too, will have to be reviewed in order to prepare effectively for trial.

(c) Discovery must occur of third parties (customers and competitors). At this time, Polypore does not know whether the customers and competitors will cooperate or whether compulsory process will be necessary to obtain the discovery.

(i) With respect to customers, Polypore has identified at this time twelve (12) domestic customers who may have relevant information. Those customers and their representatives which Polypore may call upon for deposition are located in nine (9) states across the country. The logistics of obtaining documents, scheduling and taking depositions will be substantial and take a considerable amount of time. Polypore cannot predict the amount of

document discovery that will be necessary. There are also foreign customers that Polypore likely will need to obtain discovery from in this matter.

(ii) Polypore has identified at this time eight (8) competitors who may have relevant information. All are foreign enterprises whose main offices are in the countries of the United Kingdom, Japan, China, Thailand and India. Only two of those have substantial presences in the United States. Cooperation will probably not be forthcoming and some form of compulsory process will likely be required. Polypore fully expects that it may have to utilize the Hague Convention to obtain discovery from certain of these international competitors. Compliance with the Hague Convention will take significant time. Depositions under the Hague Convention may be necessary and will likewise add complexity and time.

(d) When disclosures are made by the FTC in mid-October, Polypore will have to determine what discovery it must do with respect to such disclosures. Complaint Counsel has indicated ten (10) witnesses may be identified. The scheduling and taking of those depositions alone will take significant time. Follow-up document requests will likewise take time. Under the current hearing schedule, both of these discovery efforts will have to be done in approximately forty-five (45) days to meet a December 9, 2008 hearing date, an impossible task.

(e) Polypore intends to employ an economist to testify as an expert in this matter. Complaint Counsel has not indicated whether the FTC will use testifying experts. Even if the FTC does not use an expert, it will take significant time for Polypore to work with the expert, for the expert to develop his theories, data and report, and presumably, be deposed by Complaint Counsel. If Complaint Counsel chooses to use an expert, then Polypore will also have to engage in discovery concerning such experts' bases for opinions, theories, data and reports, and depose such expert.

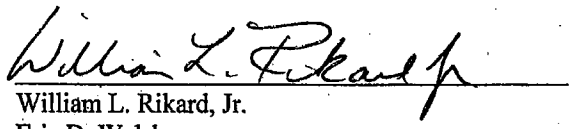
10. Polypore wants this matter to be resolved in an orderly and expeditious manner, but as set forth above, that cannot be done without a fair and full opportunity for Polypore to protect its own interests. At this point, the FTC staff has had a six and one-half month opportunity to gather its information, collate, review and analyze it. The Complaint was only served on September 15, 2008, laying out the claims that the FTC will make in this proceeding. Extending the date for the hearing will not harm consumers who in this case are sophisticated purchasers. Polypore is entitled to full due process in responding to these claims.

11. Finally, it should be noted that the scheduling of this Hearing for December 9, 2008, a mere three months after issuance of the Complaint, is significantly shorter than the period suggested by FTC in its recently released proposed rules. Under the FTC's proposed rules, the time for scheduling a hearing is 5 months after issuance of the complaint for merger cases and 8 months after issuance of a complaint for non-merger cases. This is important to note in light of the fact that this rule change is being proposed because "the Part 3 process has long been criticized as being too protracted." *See FTC Seeks Comments on Proposed Amendments to its Rules of Practice Regarding Adjudicative Proceedings*, September 25, 2008, a true and correct copy of which is attached as Exhibit B. Here, in a case which appears to involve merger and non-merger claims, the extension sought is equal to 8 months from issuance of the current defective Complaint, a time equal to the period proposed by the FTC for non-merger cases.

For the reasons stated, Polypore requests that the hearing be extended until May 18, 2009, and that at the scheduling conference, the parties set forth and agree upon the appropriate discovery schedule that will facilitate and enable the efficient and effective trying of this matter at that time. Polypore requests the opportunity to discuss this motion with the Court at any time it deems appropriate, or at the scheduling conference (which Polypore has requested be set for either October 22 or 23, 2008).

Dated: October 1, 2008

Respectfully Submitted,



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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2008, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Motion to Reschedule Hearing Date***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed on the same day by other means 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 October 1, 2008, I served via hand delivery and first-class mail delivery a copy of the foregoing ***Motion to Reschedule Hearing Date*** with:

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

I hereby certify that on October 1, 2008, I served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Motion to Reschedule Hearing Date*** with:

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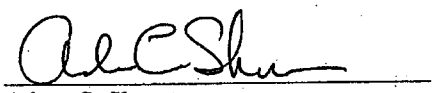

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MOTION TO EXTEND TIME IN WHICH TO MOVE TO LIMIT SUBPOENA SERVED BY RESPONDENT UPON THIRD PARTY AND TO SEEK COST REIMBURSEMENT

EnerSys hereby moves to extend the time in which it may move to limit the Subpoena served upon it by Respondent Polypore International, Inc. ("Respondent" or "Polypore") to and including December 16, 2008. In support thereof, EnerSys attaches as Exhibit A the Affidavit of Larry Axt ("Axt Affidavit") and states the following:

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

2. 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. Axt Affidavit ¶ 3.

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

4. Respondent has directed a Subpoena to EnerSys, a copy of which is attached hereto as Exhibit B (the "Subpoena").

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

6. The Subpoena is returnable on November 17, 2008.

7. The Subpoena requests documents as set forth in 34 paragraphs.

EXHIBIT C to Response to Joint Motion of Respondent and Enersys For Leave of Court to Conduct Depositions of Enersys Employees after the Discovery Deadline