

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)

Polypore International, Inc.)
a corporation.)

) Docket No. 9327

) PUBLIC

**NON-PARTY ENERSYS' SUPPLEMENTAL MOTION
FOR *IN CAMERA* TREATMENT
OF CERTAIN DESIGNATED HEARING EXHIBITS**

Non-Party EnerSys ("EnerSys") respectfully moves for *in camera* treatment of certain additional hearing exhibits that the Federal Trade Commission ("FTC") recently designated for possible introduction in the administrative hearing in this matter, scheduled to commence on May 12, 2009.¹ Specifically, on May 5, 2009, the FTC gave EnerSys formal notice that it had added six EnerSys documents ("Subject Documents") to its exhibit list. The Subject Documents had been previously provided to the FTC² with the understanding that they would be treated as "CONFIDENTIAL" in accordance with the terms of the Protective Order entered by the Court on October 23, 2008. The Subject Documents contain highly confidential and proprietary information that is both secret and material to EnerSys' present and future business, public disclosure of which would harm EnerSys.

As a result, EnerSys respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R.

¹ By this motion, EnerSys respectfully seeks to supplement its prior motion for *in camera* treatment, filed April 9, 2009. EnerSys did not include in that motion the documents at issue herein because the FTC had not yet designated them for possible introduction in the administrative hearing in this matter.

² Because the Subject Documents are communications between EnerSys and Respondent or their respective counsel, Respondent was already in possession of them at the time that EnerSys provided them to the FTC. As a result, EnerSys does not seek to shield disclosure of these documents from Respondent.

§ 3.45(b), granting *in camera* treatment for no less than five (5) years, to the Subject Documents, which are listed in Exhibit 1 attached to this Motion and the proposed Order.

In support of this Motion, EnerSys respectfully refers the Court to the accompanying Declaration of Larry Burkert, Exhibit 2 hereto, and Memorandum of Law.

Dated: May 7, 2009

STEVENS & LEE, P.C.

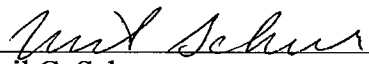
By  _____
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EXHIBIT 1

Exhibits for Which EnerSys Requests *In Camera* Treatment In Its Supplemental Motion

Exhibit Number	Exhibit Title	Date	BEGDOC	ENDDOC
PX2259	Letter to Daramic from Schur re Proposed Daramic Price Increases	2/10/2009		
PX2260	Letter to Schur from Bryson re EnerSys Supply Contracts	2/19/2009		
PX2261	Letter to Bryson from Schur re Proposed Daramic Price Increases	2/20/2009		
PX2262	Letter to Lewis from Shor re EnerSys Supply Contracts	4/2/2009		
PX2263	Letter to Bryson from Schur re Proposed Price Increases	4/6/2009		
PX2264	Letter to Schur from Bryson re EnerSys Supply Contracts	4/13/2009		

EXHIBIT 2

8. While the Subject Documents do not contain cost or price terms, they are extremely recent and analyze, reveal and sometimes even quote the terms of contracts to which the Court has granted *in camera* treatment.

9. If the information contained in the Subject Documents were publicly disclosed, EnerSys would suffer serious competitive injury because its competitors and suppliers could use this non-public information to their advantage and nullify the competitive advantages gained by EnerSys.

10. EnerSys' request that *in camera* treatment for the Subject Documents be maintained for five years is reasonable in light of the commercial realities of the commercial battery industry.

11. Contracts typically continue in force for a number of years and are often renegotiated and renewed with substantial incorporation of the terms of preceding contracts.

12. Under these circumstances, it is uncertain as to when the documents will no longer reflect current pricing and contract terms, or product development and supplier strategy and planning.

13. Moreover, the market is such that even disclosure of terms of contracts no longer in force creates an unreasonable and unnecessary risk of competitive harm to EnerSys such that *in camera* treatment should extend for a period of at least five years, a reasonable estimate of the minimum length of time for the contracts at issue to expire and their terms to become outdated and irrelevant.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
is true and correct.

EXECUTED this 7 day of May, 2009.



LARRY BURKERT

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2009, I filed via overnight courier and electronic mail delivery an original and two copies of the foregoing Non-Party EnerSys' Supplemental Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits 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 May 7, 2009, I delivered via overnight courier and electronic mail delivery two copies of the foregoing Non-Party EnerSys' Supplemental Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits and proposed Order to:

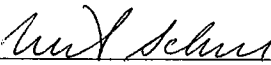
The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on May 7, 2009, I served via overnight courier and electronic mail delivery a copy of the foregoing Non-Party EnerSys' Supplemental Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits and proposed Order on:

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Date: May 7, 2009



Neil C. Schur

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

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

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**NON-PARTY ENERSYS' MEMORANDUM OF LAW
IN SUPPORT OF
SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN DESIGNATED HEARING EXHIBITS**

I. Introduction

Non-Party EnerSys ("EnerSys") respectfully submits this Memorandum of Law in support of its supplemental motion for *in camera* treatment of six hearing exhibits that the Federal Trade Commission ("FTC") recently designated for possible introduction in the administrative hearing in this matter, scheduled to commence on May 12, 2009. Specifically, on May 5, 2009, the FTC gave EnerSys formal notice that it had added six EnerSys documents ("Subject Documents") to its exhibit list.

A listing and description of the Subject Documents for which EnerSys seeks *in camera* treatment is attached to EnerSys' Motion and the proposed Order submitted herewith as Exhibit 1. (The documents themselves are submitted in a separate version of Exhibit 1 to the Court only for *in camera* review). The Subject Documents were provided to the FTC with the understanding that they would be treated as "CONFIDENTIAL" under the October 23, 2008 Protective Order entered by the Court. The information contained in the Subject Documents is secret, commercially sensitive, and material to EnerSys' current and prospective business.

As a result, EnerSys respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment for no less than five (5) years, to the Subject Documents listed in Exhibit 1 attached to EnerSys' Motion and the proposed Order submitted herewith.

II. Standard for In Camera Treatment

EnerSys incorporates by reference the standard for *in camera* treatment set forth in its memorandum of law filed April 9, 2009, as if set forth in full herein.

III. The Subject Documents Meet the Standard for In Camera Treatment

Each of the Subject Documents has been maintained internally by EnerSys in a confidential manner, only being shared with those individuals requiring knowledge of the information contained within the document. Of course, because the Subject Documents listed in Exhibit 1 are communications with Respondent, EnerSys does not request that they be shielded from Respondent, but from public disclosure, including to EnerSys' competitors and other suppliers. The information was not made available to EnerSys' competitors or other outside persons other than Respondent. As such, the Subject Documents were provided to the FTC with the understanding that they would be treated as "CONFIDENTIAL" in accordance with the terms of the Protective Order.

EnerSys respectfully submits that *in camera* treatment is warranted for the Subject Documents because (1) EnerSys will suffer serious competitive harm if the Subject Documents are disclosed to the public; (2) the information contained in the Subject Documents is secret; and (3) the risk of harm is not outweighed by the importance of the information to the matter decided by the Commission.

As set forth in the Declaration of Larry Burkert, attached to EnerSys' Motion as Exhibit 2, the Subject Documents contain commercially proprietary and confidential information

regarding EnerSys' contract and price negotiations with Respondent. While the Subject Documents do not contain cost or price terms, they are extremely recent and analyze, reveal and sometimes even quote the terms of contracts to which the Court has granted *in camera* treatment.¹ Moreover, they reveal price negotiations between EnerSys and Respondent and the current status of those negotiations. All of this information is held in strict confidence by EnerSys. If such information were publicly disclosed, EnerSys would suffer serious competitive injury because its competitors and other suppliers could use this non-public information to their advantage and nullify the competitive advantages gained by EnerSys. In addition, EnerSys is a publicly traded company, and the public disclosure of this confidential non-public information may improperly and unnecessarily influence both stock prices and investor confidence, causing further harm to EnerSys.

Moreover, as a non-party seeking *in camera* treatment for its confidential business information, EnerSys' request should be treated with "special solicitude." *In the Matter of Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* At great expense, EnerSys has cooperated with the discovery demands of both parties to this case, producing tens of thousands of pages of documents and four witnesses for deposition (two of whom were also separately examined under oath in connection with the FTC's investigation of the facts of this matter). The Subject Documents have been made available for use by the FTC and Respondent in accordance with the terms of the Protective Order.

¹ See Order on Non-Parties' Motions for *In Camera* Treatment, dated May 6, 2009.

Disclosing the Subject Documents containing EnerSys' highly confidential business information now will not materially promote the resolution of this matter, nor will these documents lend measurable public understanding of these proceedings. The balance of interests clearly favors *in camera* treatment for the Subject Documents. See *In the Matter of Bristol Meyers Co.*, 90 F.T.C. 455, 456 (1977).

IV. *In Camera* Treatment of the Documents Should Extend For a Five-Year Period

EnerSys' request that *in camera* treatment for the Subject Documents be maintained for five (5) years is reasonable in light of the commercial realities of the commercial battery industry.

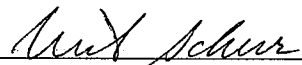
Contracts typically continue in force for a number of years and are often renegotiated and renewed with substantial incorporation of the terms of preceding contracts. Product development, and strategies for suppliers, procurement and pricing strategies are often similarly long-term in nature in this industry. Under these circumstances, it is uncertain as to when the documents will no longer reflect current pricing and contract terms. Moreover, the market is such that even disclosure of terms of contracts no longer in force creates an unreasonable and unnecessary risk of competitive harm to EnerSys such that *in camera* treatment should extend for a period of five (5) years, a reasonable estimate of the minimum length of time for the contracts at issue to expire and their terms to become outdated and irrelevant.

V. Conclusion

Disclosure of the Subject Documents would result in a clearly defined serious injury to EnerSys. Accordingly, for the reasons set forth above and in the Declaration of Larry Burkert, Exhibit 2 to EnerSys' Motion, EnerSys respectfully requests that this Court grant its motion directing *in camera* treatment for the Subject Documents.

Dated: May 7, 2009

STEVENS & LEE, P.C.

By 

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ORDER

Upon consideration of the supplemental motion of EnerSys for *in camera* treatment of certain designated hearing exhibits, it is hereby ordered that the Motion is GRANTED, and the documents identified on Exhibit 1 of EnerSys' Motion, which is attached hereto, shall be afforded *in camera* treatment pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b) for five (5) years from the date of this Order.

ENTER:

Dated: May __, 2009

Administrative Law Judge D. Michael Chappell

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