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.)