ORIGINAL

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

Respondent Polypore International, Inc. ("Polypore") submits its memorandum in opposition to EnerSys' ("EnerSys") Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party.

PRELIMINARY STATEMENT

EnerSys seeks to limit a subpoena, served upon it by Polypore, which seeks documents that go to the central issues raised in the Federal Trade Commission's ("FTC" or "Commission") Complaint (the "Complaint") in this matter. The Complaint contends that Polypore's acquisition of Microporous Products L.P. ("Microporous") led to a monopoly in the alleged deep-cycle, motive, and UPS battery separator markets and led to higher prices and decreased competition in the alleged automotive battery separator market. The Complaint further alleges that there are significant barriers to entry in these markets. The Complaint's allegations are based in large measure on information submitted and put forth by EnerSys -- a customer of Respondent -- in response to the FTC's Civil Investigative Demand ("CID"). EnerSys admits in its own motion that it has cooperated extensively with the FTC in the investigation leading up to the filing of the Complaint. As EnerSys states in its motion:

> "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' . . .". (Memorandum at p. 11).

Now, after providing this one-sided discovery to the FTC, outside of Respondent's presence and without Respondent having the opportunity to examine EnerSys and its allegations in the light of the day with the relevant documents, EnerSys cries foul and attempts to impede Respondent's efforts at obtaining discovery that is balanced on all probative issues.

Polypore's subpoena is tailored to seek documents pertinent to the issues raised by the FTC in the Complaint and to Polypore's defense. Despite its close involvement with the facts that underlie the Complaint's allegations, EnerSys seeks to limit the subpoena, claiming that (1) the subpoena does not seek relevant information; (2) compliance would be overly burdensome; and (3) it should be reimbursed for the costs of compliance. None of the arguments has any merit, and EnerSys' motion should be denied.

In particular, EnerSys improperly seeks reimbursement for its costs in complying with Respondent's subpoena, which it claims could amount to as much as $50,000. (Memorandum at p. 12). EnerSys' request for reimbursement should be summarily rejected as it ignores FTC authority holding that subpoenaed third parties with a potential interest in the litigation (such as EnerSys) are, at most, entitled only to the reimbursement of copying costs – which as EnerSys points out in its supporting memorandum, Respondent has already agreed to pay. (Memorandum at p. 16)(See November 14, 2008 letter of Eric D. Welsh, Esq., attached hereto at Tab A).

FACTUAL BACKGROUND

EnerSys is a global manufacturer of flooded lead acid batteries. (Memorandum at p. 4). Prior to Respondent's acquisition of Microporous, EnerSys purchased polyethylene battery separators from both Respondent and Microporous and, purports to currently purchase polyethylene battery separators solely from Respondent. (*Id.*). As a high-volume consumer of

polyethylene battery separators, EnerSys is an important participant in the battery separator market and stands to be impacted by the outcome of Respondent's proceedings with the FTC.

The subpoena in question originated in an adjudicatory proceeding currently pending before the Commission in which Polypore is alleged to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 45, by its acquisition of Microporous. In order to obtain the information necessary for its defense, Polypore applied to the Commission's Administrative Law Judge for issuance of several subpoenas *duces tecum* to participants in the battery separator industry. On October 24, 2008, one such subpoena was issued to EnerSys, a purchaser of battery separators (*i.e.* a customer), pursuant to the Commission's authority under Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which provides that "the Commission shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation." EnerSys received the subpoena on November 7, 2008. (Memorandum at p. 5).

Counsel for Respondent and counsel for EnerSys had a telephone conversation on Wednesday, November 12, 2008 to discuss any issues EnerSys may have had in regards to the subpoena. (Memorandum at pp. 6-7). At that time, counsel for Respondent explained Respondent's willingness to discuss and resolve any concerns EnerSys may have concerning its compliance with the subpoena – a fact conveniently omitted from EnerSys' memorandum. (*Id.*) Two days later, counsel for Respondent reiterated Polypore's position:

> "Third, I think it important that your client understand our position fully prior to producing documents and making such an application to the Administrative Law Judge in this case, if it chooses to do so. As I mentioned to you, Polypore is willing to discuss the subpoena with you, including any concern that your client may have with respect to its scope, prior to EnerSys' production of documents under the subpoena. As I do not know how EnerSys maintains its documents, and I do not know any specific concerns that EnerSys would have with respect to the subpoena, I cannot address any concerns at this time, including any as to burden, to avoid any difficulties in the future, including through motion practice. I make this comment to you in advance of any application for costs. As I also mentioned

on Wednesday, if you are aware of any applicable authority in the area, please bring it to my attention promptly." (See Tab A).

Respondent's counsel received no response to its November 14, 2008 letter. Having not heard anything further from EnerSys on the subject of the subpoena, Respondent's counsel sent an electronic mail communication to EnerSys' counsel on December 4, 2008 in which Respondent's counsel again indicated Respondent's willingness to discuss any concerns EnerSys may have had with the subpoena requests. (See December 4, 2008 e-mail of Eric D. Welsh, Esq., attached hereto at Tab B). In a response the following day, EnerSys' counsel stated that EnerSys had "been working hard gathering documents" and for the first time suggested a meet and confer to discuss "a number of issues" EnerSys had with the Subpoena. (See December 5, 2008 e-mail correspondence between counsel, attached hereto at Tab C). Thus, despite Respondent's counsel's previous request to discuss the subpoena, including the manner of production and any issues as to scope or burden, ***before***, not after, EnerSys began gathering documents, EnerSys choose to immediately proceed with the gathering of responsive documents without first communicating with Respondent's counsel. (*Id.*)

A meet and confer conference was held on December 10, 2008. During this conversation, counsel for EnerSys indicated for the first time, despite the fact that approximately 100,000 pages of documents had already been compiled, viewed as responsive to the subpoena and then electronically searched for privilege, that EnerSys had concerns regarding the scope of the subpoena and the involvement of Mr. Shor, Polypore's Special Counsel, in the review of documents produced pursuant to the subpoena. For the first time, EnerSys also objected to specific document requests in the subpoena.

Respondent's counsel proposed -- in light of EnerSys' counsel's statement that the compiled documents had been apparently deemed responsive to the subpoena by EnerSys -- that

EnerSys produce the documents it had gathered with an agreement that privilege would not be waived by any inadvertent production. In order to address one of EnerSys' concerns, counsel for Respondent agreed to permit EnerSys to redact irrelevant material from management reports. Respondent's counsel also proposed, in response to EnerSys' claim of burden, that summary memorandum relating to the testing and qualification of products could be produced in lieu of the testing/qualification documents themselves (although Respondent's counsel reserved the right to follow-up on any specific testing/qualification data that was not addressed in the summaries). In subsequent conversations, Respondent's counsel proposed that, as an alternative, EnerSys could produce all documents which were identifiable as responsive to specific subpoena requests, and then, as to the remaining documents, EnerSys could provide a list of the document custodians, with a description of the custodians' job responsibilities, so that targeted searches, based on mutually agreed to search terms, could be performed on the remaining documents in order to target responsive documents. Respondent's counsel also agreed to withdraw requests 5 and 7 of the subpoena and forego the production of foreign-language documents at the present time. (See December 10-16, 2008 e-mail correspondence between counsel attached hereto as Tab D). Respondent's counsel also advised EnerSys that while it disagreed with its position regarding Mr. Shor, Respondent would resolve that issue with EnerSys as part of an agreement to obtain EnerSys' compliance without the need of having this matter before the Administrative Law Judge. EnerSys rejected all proposals made by Respondent's counsel and refused to provide Respondent's counsel with a list of the document custodians and their responsibilities at EnerSys to permit a targeted search to be conducted.[1] Instead, EnerSys filed this Motion on

[1] On December 22, 2008, almost a full week after filing its motion, EnerSys' counsel provided Respondent's counsel with a list of "supervisors" - whom EnerSys identified as having coordinated a portion of the search for responsive documents within each supervisor's business unit and among each supervisor's subordinates. Importantly, however, this recent response from EnerSys fails to identify any document custodian or the respective responsibilities of each custodian. EnerSys' response also suggests a "meet and confer" conference be held in order to resolve EnerSys' "burden", which is somewhat puzzling in light of the fact that EnerSys refused to communicate with Respondent's counsel in advance of gathering documents, has already collected over 100,000 pages of admittedly responsive documents, has refused to produce the responsive documents and has now

December 16, 2008. Respondent cannot afford any further delay from EnerSys, as important deadlines are approaching. Respondent requests, for the reasons stated herein, that EnerSys' motion be denied in its entirety and that EnerSys be ordered to comply with Respondent's subpoena.

ARGUMENT

I. ENERSYS IS NOT ENTITLED TO COST OR LEGAL FEE REIMBURSEMENT

Without citing a single Commission Rule of Practice or a single FTC authority in support of its contention, EnerSys argues that it is entitled to reimbursement for its costs in complying with the subpoena.[2] In support of its position, EnerSys inexplicably relies on case law construing Federal Rule of Civil Procedure 45, despite an abundance of existing FTC authority on the issue. As EnerSys admits, "the Federal Rules of Civil Procedure may be consulted for guidance and interpretation of FTC Rules where no other authority exists." (Memorandum at p. 11)(*emphasis added*). It is well settled, however, that in agency actions "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also In re Matter of N. Tex. Specialty Physicians*, No. 9312, 2004 WL 527337, at *3 (F.T.C. Feb. 4, 2004)(denying cost reimbursement because the subpoena did not create an undue burden on the third party).

Reimbursement of costs in FTC adjudicative proceedings is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be "unreasonable" or

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refused to provide Respondent with a list of document custodians which could potentially target responsive documents in a more efficient manner. EnerSys has failed to comply with Respondent's subpoena and should be ordered to produce all responsive documents immediately.

[2] EnerSys purports to seek reimbursement only for the costs and fees incurred in the review of gathered documents, but in actuality also seeks to be reimbursed for "outside vendor charges incurred to facilitate [the] review and the ultimate production of documents." (Memorandum at p. 17)(*emphasis added*).

"extraordinary." *See In re Int'l Tel. & Tel. Corp.*, Dkt. No. 9000, 1981 FTC LEXIS 75 at * 3 (March 13, 1981); *In re R.R. Donnelley & Sons Co.*, Dkt. No. 9243, 1991 FTC LEXIS 268 at * 2 (June 6, 1991)(holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena"). EnerSys, which had net earnings in excess of 45 million dollars in 2007, has made not made any showing or presented any evidence that its estimated compliance cost of $50,000 is unreasonable.

FTC v. Dresser Indus., Inc., Misc. No. 77-44, 1977 U.S. DIST. LEXIS 16178 at *13 (D.D.C. Apr. 26, 1977) is an illustrative case. In *Dresser*, a third-party refused to comply with a subpoena arguing that the costs necessary to comply with the subpoena were unreasonable – the estimated cost of compliance was estimated by the third party to exceed $400,000. Nevertheless, the court ordered compliance and denied costs because the third party was a participant in the industry in question and $400,000 was not per se unreasonable. *Id.* The court opined that it was "not unmindful of the tremendous impact which compliance with such subpoenas can have upon companies which appear to be innocent bystanders. The cost of effective economic regulation, however, is one which must be shared by all industry, indeed by the entire society." *Id.* at *16.

Even if EnerSys were to make a showing that the cost of compliance was extraordinary, which it has not done, reimbursement would be limited to the cost of copying because EnerSys is a participant in the battery separator industry. FTC authority mandates that "where [a] non-party is in the industry in which the alleged acts occurred and the non-party has [an] interest in the litigation and would be affected by the judgment, only the cost of copying, and no other costs of the search need be reimbursed." *See In re Flowers Indus., Inc.*, Dkt. No. 9148, 1982 FTC LEXIS 96 at * 14 (Mar. 19, 1982); *see also In re Kaiser Aluminum & Chem. Corp.*, Dkt. No. 9080, 1976 FTC LEXIS 68 at *20-21 (Nov. 12, 1976)("Where the public interest is involved, however, and where the non-party is in the industry in which the alleged acts occurred, the non-

party has an interest in the litigation and would be affected by the judgment. There, only the cost of copying need be reimbursed."). EnerSys -- a company that not only has an interest in the litigation but, as Respondent believes and is acknowledged by EnerSys in its motion papers, was a driving force behind the FTC's investigation and subsequent filing of the Complaint against it -- is not even entitled to copying costs, however, as it has not overcome the threshold requirement of showing that the cost of compliance would be extraordinary. Accordingly, EnerSys' request should be denied.

EnerSys attempts to argue that the wealth of authority rejecting cost reimbursement for third parties in agency matters should not apply to EnerSys because a) EnerSys is seeking reimbursement for attorney and/or paralegal review time in advance of beginning its review; and b) the subpoena served by Polypore is allegedly not in furtherance of the FTC's legitimate inquiry or in furtherance of the public interest. EnerSys' "grasping at straws" arguments lack both factual and legal merit and should be rejected.

First, as noted above, EnerSys has not met the threshold showing that the cost of its compliance would be "unreasonable" or "extraordinary." Second, while EnerSys is a non-party to this litigation, it is clearly not a non-party within the battery separator industry and is therefore, at most, entitled to only the cost of copying. *See In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19-21 (holding that "[w]here the public interest is involved . . and . . the nonparty is in the industry" and "has an interest in the litigation" then "only the cost of copying need be reimbursed.")(*citations omitted*). Thus, even if EnerSys could make an "unreasonable" or "extraordinary" cost showing, it would still not be entitled to attorney and paralegal costs incurred in the review of documents, but would instead be limited to recover only its copying costs. *In re Flowers Indus., Inc.*, 1982 FTC LEXIS at * 14.

EnerSys' rationale that a subpoena drafted and served by Respondent (as opposed to the FTC) is not in furtherance of an agency's or the public's interest is also misplaced. The subpoena in question was issued by the FTC, not the Respondent, pursuant to the FTC's authority under Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which provides that "the Commission shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation." Section 3.34 of the Rules of the FTC states: The Secretary of the Commission, upon request of a party, *shall issue* a subpoena . . ." *16 C.F.R. § 3.34 (b)* (*emphasis added*). Moreover, EnerSys overlooks the fact that the public has an interest in acquiring the relevant facts to resolve such economic matters as the present litigation. *See U.S. v. IBM Corp.*, 62 F.R.D. 507, 510 (S.D.N.Y. 1974). EnerSys' attempt in its memorandum to distinguish existing authority on the proposition that those cases involved subpoena's issued by the Commission and not by the Respondent, as it argues is the case here, is factually and legally incorrect. (See Memorandum at p. 15)("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 makes no sense **when a respondent, rather than the agency itself, drafts and issues the subpoena**." (*emphasis in original*). Polypore did not issue the subpoena: the FTC did. Moreover, the suggestion that there should be a double standard if the government issues a subpoena rather than the Respondent is without any basis in the law and would be a clear deprivation of Polypore's due process rights.

It is also important to note, that almost immediately after the FTC issued Respondent's subpoena to EnerSys and the same was served, Respondent's counsel contacted counsel for EnerSys in order to discuss the manner of EnerSys' production and to attempt to address and resolve any issues as to scope or burden that EnerSys may have had. Respondent's counsel's

overtures were repeatedly ignored. Now, after refusing to cooperate or even discuss the matter with Respondent's counsel in advance of gathering documents, EnerSys attempts to "cry uncle" to the purported costs associated with reviewing and producing documents responsive to the subpoena. This is the exact situation Respondent's counsel attempted to avoid by encouraging EnerSys to discuss compliance with the subpoena on the front-end, before EnerSys blindly rushed into its gathering process. As a result, EnerSys is now faced with 100,000 pages of information it does not want to pay to review and, therefore, instead seeks shelter from the Court by seeking the imposition of a "three-phased proposal." An analysis of EnerSys' proposal, however, reveals it as simply another attempt by EnerSys to force Respondent to pay the costs of EnerSys' compliance with the subpoena. The FTC's authority on the reimbursement of a third party's costs in complying with a subpoena is abundant and clear – a third party is not entitled to the cost of compliance unless such costs would be unreasonable or extraordinary. EnerSys has made no such showing and its motion must therefore be denied.

II. POLYPORE'S SUBPOENA IS NOT OVERLY BROAD OR UNDULY BURDENSOME AND SHOULD NOT BE LIMITED BY THE COURT

The FTC's Rules allow Polypore to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of [the] respondent." *16 C.F.R. § 3.31(c)(1).* Discovery should be limited only if the burden outweighs the benefit. *Id.* Moreover, "public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on their defense) be given the opportunity to develop those facts which are essential" to support or undermine the allegations in the pleadings. *In re Gen. Foods.*, Dkt. No. 9085 C, 1978 FTC LEXIS 412 at *6 (April 18, 1978). The applicant for a subpoena need only show that the materials sought are generally or reasonably relevant. *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *4.

Thus the Court's inquiry is whether the subpoena seeks information that is reasonably expected to be "generally relevant to the issues raised by the pleadings." *Id.* at *4. EnerSys misapplies the relevant legal standard and fails to understand the scope or nature of the issues raised in this proceeding. In arguing that the subpoena should be limited, EnerSys ignores the issues raised by the Complaint and fails to place the subpoena in its proper context.

Evaluating the subpoena in the context of the pleadings demonstrates that Respondent's subpoena seeks materials from EnerSys which are relevant, material, and critical to Respondent's defense. Indeed, even a cursory review of the Complaint negates EnerSys' claim that "EnerSys' purchase of battery separators, the price paid, and the dates of purchase" are irrelevant to the issues involved in this litigation. (Memorandum at p. 17). The Complaint contends that Polypore's acquisition of Microporous led to a monopoly in the deep-cycle, motive, and UPS battery separator markets and led to higher pricing and decreased competition in the automotive battery separator market. (Complaint, ¶ 38). The Complaint further contends that there are significant barriers for entry into these markets. (*Id.* at ¶¶ 32-37). For example, the Complaint alleges that the testing and qualification process is lengthy and would prevent even existing battery separator manufacturers from entering other markets for up to two years. (*Id.* at ¶ 33). Additionally, the Complaint alleges that capital requirements prevent new competitors from entering these markets. (*Id.* at ¶ 36). Finally, the Complaint alleges that EnerSys, and other North American battery manufacturers, prefer domestic sources of battery separators and, consequently, battery separator manufacturers from abroad will not find it practical to compete in North America. (*Id.* at ¶¶ 16-17). Respondent's subpoena requests materials from EnerSys that go to the central issues raised in the Complaint, including materials related to market share, pricing, contract requirements, product qualification, and the availability of battery separators from other suppliers. (Subpoena Requests Nos. 1-4, 6, 8, 10, 13, 16-21, 29-30). Respondent

must be able to review the information that forms the basis of the allegations in the Complaint in order to present an effective defense.

EnerSys requests that the Court strike subpoena requests 10, 13-14 and 19-24. Yet, the information sought by these requests is clearly reasonably relevant to the issues in this litigation. For example, Polypore needs information about EnerSys' purchasing and pricing data and the end-products for which EnerSys was purchasing battery separators (Subpoena Request Nos. 10, 13-14) to rebut the FTC's allegation that Polypore has monopolized the alleged battery separator market or the FTC's allegation that Polypore's acquisition of Microporous led to higher prices. Polypore needs information about EnerSys' qualification and testing of products from Respondent's competitors (Subpoena Request Nos. 19-20) to rebut the FTC's allegation that testing and capital requirements prevent entry into the market. Polypore needs information about EnerSys' qualification and testing of products from Microporous (Subpoena Request Nos. 19-20) to rebut the FTC's allegation that Microporous was preparing to actively compete in the SLI and UPS battery separator markets, and was testing its products with customers. Polypore needs information about EnerSys' use of all types battery separator products – including products that are or may be competitive with lead acid battery separators (Subpoena Request Nos. 23-24) to rebut the FTC's allegation that battery separators manufactured for a particular application cannot be effectively used for other applications. And finally, Polypore needs information about EnerSys' dealings with other battery separator manufacturers (Subpoena Request Nos. 21-22) to rebut the FTC's allegation that the acquisition of Microporous removes the only alternative sources of separator supply in several battery separator markets. Polypore must have access in discovery to EnerSys' documents related to these issues in order to prepare its defense.

EnerSys also argues that the subpoena should be limited because it would be overly burdensome to respond to it. In its motion, however, EnerSys fails to set forth any facts

supporting its contention. The burden of showing that a subpoena is unduly burdensome is on the subpoenaed party. *Texaco*, 555 F.2d at 882. This is true even if the subpoenaed party is a non-party. *See In re Flowers Indus., Inc.*, 1982 FTC LEXIS at * 14 . Courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously hinder the normal operations of a business. *Texaco*, 555 F.2d at 882. Broadness alone is not a sufficient justification to refuse enforcement of a subpoena. *Texaco*, 555 F.2d at 882. EnerSys, therefore, must put forth specific evidence that demonstrates such a disruption; a "general, unsupported claim [of burden] is not persuasive." *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19. This is especially true where a third-party, like EnerSys, which is in the same industry that is the subject of this proceeding, stands to benefit depending on the outcome of this proceeding, and therefore has "a special stake in seeing that an informed judgment is rendered." *In re Coca-Cola Bottling Co.*, Dkt. No. 8992, 1976 FTC LEXIS 33 at * 6 (Dec. 7, 1976).

EnerSys has failed to meet its burden and offers up nothing more than unsupported allegations of an alleged "extraordinary burden." This is manifestly insufficient to support a limitation of the subpoena. Indeed, "even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19-20. As Respondent has shown above, its subpoena seeks information relevant to the issues raised in the Complaint. EnerSys has not put forth any evidence which shows that compliance would seriously hinder the normal operations of its business.

Equally important, EnerSys fails to point out that Respondent's counsel offered on multiple occasions to discuss proposals that may limit or eliminate any potential burden of EnerSys' compliance with the subpoena. Such proposals were either ignored or summarily

dismissed by EnerSys. Disappointingly, EnerSys inaccurately construes one such proposal by Respondent's counsel in an attempt to illustrate that the subpoena is overly broad and unduly burdensome. Respondent's subpoena sought the production of "documents relating to any testing or qualification by EnerSys of lead acid battery separators." (Subpoena, Nos. 19-20). As detailed above, such information is particularly relevant to Polypore's defense of the allegations as to the supposed barriers to entry levied against it in the Complaint. While EnerSys now claims that such requests are overbroad, it refused to raise that issue with Respondent's counsel before proceeding to gather documents responsive to those requests – despite being given the opportunity on several occasions to do so. After having gathered documents responsive to these requests, EnerSys, for the first time raised its objection that the review of such documents would be burdensome. In a good faith effort to facilitate the production of the information sought in a manner which could ease the alleged burden on EnerSys, Respondent's counsel offered to accept summaries or reports of the testing/qualification information in lieu of the underlying data itself. (See December 10-16, 2008 e-mail correspondence between counsel, attached hereto at Tab D). Importantly, Respondent's counsel reserved the right to seek EnerSys' complete compliance with the requests, as written, if summary reports were not available or did not contain the necessary testing/qualification data sought by Respondent's subpoena. EnerSys now attempts to argue the Respondent's willingness to accept summary documentation somehow proves that the subpoena is overbroad and unduly burdensome. EnerSys' contention is disingenuous at best.

EnerSys' refusal to negotiate with Respondent's counsel is fatal to its motion to limit the subpoena. "[A] Federal Trade Commission subpoena seeking relevant data will not be quashed on the grounds that a burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise." *In re Gen. Motors Corp.*, Dkt. No. 9077, 1977 FTC LEXIS 18 * 1 (Nov. 25,

1977); *see also In re R.R. Donnelley & Sons Co.*, Dkt. No. 9243, 1991 FTC LEXIS 272 at * 2 (June 12, 1991)(refusing to limit subpoena "in light of counsel's offer to modify some of the subpoena's specifications"). The information sought by Respondent is neither overly broad nor unduly burdensome; instead it is clearly relevant to the allegations of the Complaint and Respondent's defenses thereto. As such, EnerSys' motion to limit the subpoena should be denied and EnerSys should be ordered to comply fully with the Subpoena without further delay.

III. THE PROTECTIVE ORDER ENTERED BY THE COURT IN THIS MATTER SHOULD NOT BE MODIFIED

On October 23, 2008, this court entered a Protective Order Governing Discovery Material (the "Protective Order"). The Protective Order negotiated by the FTC and Polypore explicitly protects third-parties and provides that any materials designated confidential can be used only for purposes of this proceeding and can only be disclosed to a limited group of people associated with this proceeding. Nevertheless, EnerSys objects to the disclosure of information to Michael Shor, Special Counsel for Polypore. (Memorandum at p. 19.) Although EnerSys knows little about Shor's role at Polypore, it objects on the vague grounds that "there is no need for EnerSys' confidential documents to be reviewed by Respondent's in-house counsel, Mr. Shor." (*Id.*) Courts recognize that it is often necessary to protect a competitor's information from the eyes of in-house counsel where counsel is involved in "competitive decision making," but this does not extend to in-counsel with little or no managerial or strategic oversight, nor to Special Counsel that is not employed by Polypore, as is the case here with Mr. Shor. Moreover, EnerSys is a customer, not a competitor of Respondent – a fact EnerSys readily admits. (Memorandum at p. 19).

For both the ALJ and federal courts, an important factor in determining whether to grant in-house counsel access to a competitor's confidential information is whether in-house counsel is

involved in "competitive decision making." *See FTC v. Foster*, 2007 U.S. Dist. LEXIS 55163 at * 15 (April 26, 2007); *Glaxo Inc. v. Genpharm Pharm.*, 796 F.Supp. 872, 874 (E.D.N.C. 1992); *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed.Cir. 1984). "Competitive decision making" is defined as "shorthand for a counsel's activities, associations, and relationship with a client that are such as to involve counsel's advice or participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." *Glaxo*, 796 F.Supp. at 874.

While Shor does hold the title of Special Counsel, he is not actually an employee of Polypore, nor is he involved in "competitive decision making" at Polypore. Shor is employed by Carolina Legal Staffing and since April of 2008 has served as Special Counsel for Polypore. (Decl. of Michael L. Shor at ¶ 2, attached hereto a Tab E). While in the past he has advised Polypore on several contract negotiations, none involved EnerSys and he has not done so since August of 2008 and represents that he will not participate in any negotiations for a period of two years. (*Id.* at ¶¶ 5-7.) Shor's primary role has been to assist the company in responding to the investigation conducted by the FTC and managing the current litigation before the ALJ. (*Id.* at ¶¶ 3, 6.) Shor's previous litigation experience and in-depth understanding of the technical aspects of the battery separator industry are invaluable assets to defense counsel in preparing to appear before the ALJ. Both the technical nature of the information along with the restrictive timeline necessitate Shor's participation in reviewing EnerSys' materials. Moreover, during the Prehearing Scheduling Conference, the ALJ recognized the reasonableness of Polypore's request to grant access to Shor, noting that the scope of the disclosure group in the Protective Order "looked reasonable." (Tr. at p. 6:6-11.) Thus, the Protective Order more than adequately protects the confidentiality of any materials produced by EnerSys and should not be modified by the Court.

CONCLUSION

For the foregoing reasons, Respondent Polypore respectfully moves this court to deny EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party.

Dated: December 23, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2008, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Memorandum in Opposition to EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party***, 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:

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Washington, DC 20580
secretary@ftc.gov

I hereby certify that on December 23, 2008, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing ***Memorandum in Opposition to EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party*** upon:

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 23, 2008, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Memorandum in Opposition to EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party*** upon:

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Tab A

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November 14, 2008

VIA EMAIL AND FIRST CLASS MAIL

Neil C. Schur, Esq.
Stevens & Lee PC
1818 Market Street
29th Floor
Philadelphia, PA 19103

Re: In the Matter of Polypore International, Inc.

Dear Mr. Schur:

I am in receipt of your draft Motion to Extend Time in Which to Move to Limit Subpoena Served by Respondent upon Third Party and to Seek Cost Reimbursement in the above-referenced matter (the "Motion"). I have reviewed the draft Motion and have the following comments.

First, with respect to your request that we consent to the Motion, I have a number of concerns with respect to the specific statements made in the Motion (addressed below). As a result, I would request that the motion be revised in Paragraph 19 to state that Polypore has no objection to the "extension of time requested by this Motion".

Second, as I specifically mentioned to you on the telephone on Wednesday, Polypore does not agree with EnerSys' view that it is entitled to the costs of reviewing and gathering documents for production. Polypore, of course, is willing to reimburse EnerSys for its reasonable costs of photocopying the documents. I understood from our conversation that you were going to specifically note our position in the motion. I did not see that reference and would ask that it be included. I simply do not want it to appear that we have consented to that relief.

Third, I think it important that your client understand our position fully prior to producing documents and making such an application to the Administrative Law Judge in this case, if it chooses to do so. As I mentioned to you, Polypore is willing to discuss the subpoena with you, including any concern that your client may have with respect to its scope, prior to EnerSys' production of documents under the subpoena. As I do not know how EnerSys maintains its documents, and I do not know any specific concerns that EnerSys would have with respect to the subpoena, I cannot address any concerns at this time, including any as to burden, to avoid any difficulties in the future, including through motion practice. I make this comment to you in