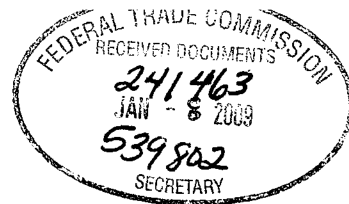

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**Docket No. 9327**
	)	
	)	**PUBLIC DOCUMENT**[1 2]
Polypore International, Inc.	)	
a corporation	)	
	)	

RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE MOORE COMPANY'S MOTION TO LIMIT SUBPOENA *DUCES TECUM* AND FOR COST REIMBURSEMENT AND IN RESPONSE TO THE MOORE COMPANY'S MOTION FOR *IN CAMERA* TREATMENT OF MATERIAL and IN SUPPORT OF RESPONDENT'S CROSS-MOTION TO COMPEL THE MOORE COMPANY TO PRODUCE DOCUMENTS REQUESTED BY SUBPOENA *DUCES TECUM*

Respondent Polypore International, Inc. ("Polypore") submits its memorandum in opposition to The Moore Company's Motion to Limit Subpoena *Duces Tecum* and for Cost Reimbursement and in response to The Moore Company's Motion for *In Camera* Treatment of Material. By it's cross-motion, and pursuant to Federal Trade Commission Rules of Practice section 3.38(a), Respondent's counsel also respectfully moves the Court to compel The Moore Company to produce all documents requested by Respondent's subpoena *duces tecum* directed to The Moore Company and served on November 6, 2008.

PRELIMINARY STATEMENT

The Moore Company seeks to limit a subpoena, served upon it by Polypore, which requests documents that go to central issues raised in the Federal Trade Commission's ("FTC" or

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[1] Respondent's memorandum refers to and contains information identified as "Confidential Material" under the terms of the Protective Order entered in this matter. Such "Confidential Material" has been highlighted in the complete version of Respondent's memorandum and has been redacted and labeled "[Redacted – Subject to Protective Order]" in the public version of Respondent's memorandum.

[2] Respondent's memorandum refers to and contains information subject to The Moore Company's pending Motion for *In Camera* Treatment of Material pursuant to Rule 3.45(b) of the FTC's Rules of Practice. Such information has been highlighted in the complete version of Respondent's memorandum and has been redacted and labeled "[Redacted – Subject to Pending Motion for *In Camera* Treatment]" in the public version of Respondent's memorandum.

"Commission") Complaint (the "Complaint") in this matter and raised by Polypore in defense thereto. 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 alleged markets.

In order to properly defend itself, particularly on the critical issues of "relevant product markets" and/or "relevant geographic markets," Polypore has sought to obtain necessary evidence from a number of third parties, including Amer-Sil, S.A. ("Amer-Sil") – a wholly owned subsidiary of The Moore Company. The Moore Company, in seeking to limit the subpoena, overlooks the fact that its compliance with the subpoena is necessitated by the allegations included in the Complaint and Polypore's defenses thereto. The Moore Company has offered to produce documents only from the time period of 2007 through the date of the subpoena and related only to its North American (1) gross revenue; (2) average sales price; (3) annual production volume; (4) annual production capacity; and (5) customer lists. (Memorandum at p. 6). Such a limited response is insufficient, however, as Respondent's intended defense requires worldwide information both on a transaction-specific and customer-specific basis from January 2003 to the present. Moreover, The Moore Company's motion to limit the subpoena is based on conclusory claims of undue burden which lack any specificity.

Polypore's subpoena is tailored to seek documents pertinent to the issues raised by the FTC in the Complaint and to Polypore's defense. Nevertheless, The Moore Company seeks to limit the subpoena, claiming that (1) the subpoena does not seek relevant information; (2) compliance would be overly burdensome; (3) the subpoena should be limited due to confidentiality concerns; and (4) it should be reimbursed for the costs of compliance. None of

the arguments has any merit, and The Moore Company's motion should be denied. Additionally, for the reasons set forth herein, The Moore Company should be ordered to promptly comply with Respondent's subpoena *duces tecum.*

FACTUAL BACKGROUND

Amer-Sil is a wholly-owned subsidiary of The Moore Company, which is located in Rhode Island. (Amer-Sil Company Profile)(Tab A). [Redacted – Subject to Protective Order]. [Redacted – Subject to Pending Motion for *In Camera* Treatment], Amer-Sil 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 – including both manufacturers of batteries and separators. On October 24, 2008, one such subpoena was issued to The Moore Company, the parent company of Amer-Sil, 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." The subpoena was served on The Moore Company on November 6, 2008. (Memorandum at p. 1). Materials responsive to the subpoena were to be produced for inspection on December 1, 2008.

On November 25, 2008 counsel for The Moore Company sought an extension of time through December 10, 2008 to respond to the subpoena or to file a motion to limit the subpoena.

Counsel's request was agreed to by Respondent's counsel. (Memorandum, Ex. A). On December 10, 2008, The Moore Company's counsel sought and was granted an additional week's extension, through December 17, 2008, to file a motion seeking protection from Respondent's subpoena.[3] *Id.*

From late-November through mid-December, counsel for Respondent and counsel for The Moore Company communicated on multiple occasions in regards to the subpoena. At that time, counsel for Respondent explained Respondent's willingness to discuss and resolve any concerns The Moore Company may have concerning its compliance with the subpoena. *Id.* During these discussions, the main issue raised by counsel for The Moore Company with respect to the subpoena was whether Respondent had jurisdiction over The Moore Company's wholly-owned subsidiary, Amer-Sil. *Id.* The Moore Company's counsel never contested, with any specificity, the relevance of the subpoena requests or the burden to comply with the subpoena, nor did its counsel ever raise any specific concerns about the production of confidential documents under the terms of the Protective Order. *Id.* Instead, The Moore Company took a categorical approach to the type of documents it would be willing to produce and the timeframe from which it would produce such documents. *Id.* In lieu of addressing any concerns as to scope, burden and privilege on a point-by-point basis with Respondent's counsel, counsel for The Moore Company instead took the position that the subpoena was not valid since many of its requests were directed at The Moore Company's wholly-owned foreign subsidiary, Amer-Sil, and as a result, offered only a limited, categorical "compromise" in regards to The Moore Company's obligations under the subpoena. When Respondent could not agree with The Moore Company's proposed "compromise", The Moore Company filed its untimely Motion on

[3] The Moore Company's Motion to Limit Subpoena *Duces Tecum* and For Cost Reimbursement, and a memorandum in support thereof, was ultimately untimely served on the evening of December 23, 2008.

December 23, 2008. By refusing to engage in a meaningful discussion as to any specific concern raised by Respondent's subpoena, The Moore Company's counsel has failed to abide by its "meet and confer" obligation. Respondent cannot afford any further delay from The Moore Company, as important deadlines are approaching. Respondent requests, for the reasons stated herein, that The Moore Company's motion be denied in its entirety and that The Moore Company be ordered to comply with Respondent's subpoena.

ARGUMENT

I. The Moore Company's Motion to Limit Subpoena Duces Tecum and for Cost Reimbursement Should be Denied.

The Moore Company seeks a protective order limiting and delaying Polypore's request for materials that are critical to Polypore's defense in this proceeding. For the reasons set out below, The Moore Company's objections to Respondent's subpoena are without merit and its motion to limit the subpoena should be denied.

A. POLYPORE'S SUBPOENA SEEKS RELEVANT INFORMATION

The Moore Company contends that the subpoena should be limited because it seeks documents that are not relevant to the underlying FTC proceeding. (Memorandum at p. 1). [Redacted – Subject to Pending Motion for *In Camera* Treatment]. In arguing that the subpoena should be limited, The Moore Company ignores the issues raised by the pleadings and fails to place the subpoena in its proper context.

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, <u>or to the defenses of [the] respondent</u>." *16 C.F.R. § 3.31(c)(1) (emphasis*

added). 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.*, 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 (Nov. 12, 1976). In contrast, the subpoenaed party bears "[t]he burden of showing that the request[s] are unreasonable." *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18, 2002). Such a showing is a heavy burden, even when the subpoena is directed at a non-party. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96 at * 15 (Mar. 19, 1982).

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 *14. Plainly, it does and The Moore Company misapplies the relevant legal standard and fails to understand – or utterly ignores - the scope or nature of the issues raised in this proceeding.

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. The Moore Company's position mistakenly ignores Respondent's defenses to the Complaint. Throughout these proceedings Respondent has consistently made its defenses clear:

- Respondent admits that it develops, manufactures and markets battery separators <u>in a global market</u>. (Answer, ¶ 4)(*emphasis added*).
- Respondent has denied the Complaint's allegation that the relevant product areas in which to analyze the transaction are the separator markets for flooded lead-acid batteries in the deep-cycle, motive, automotive and uninterruptible power supply stationary ("UPS") batteries. (Answer, ¶ 5).

- Respondent has also denied that the transaction violates the antitrust laws in an all Polyethylene ("PE") separator market. (Answer, ¶ 6).

- Respondent has denied that the relevant geographic market in which to analyze the effects of this transaction is limited to North America. (Answer, ¶ 14).

- Respondent has also denied that producers of battery separators for motive, UPS, and automotive applications outside of North America are at a cost disadvantage in the supply of these separators to North American customers. (Answer, ¶ 16).

- Respondent has denied the allegation that since the acquisition of Microporous by Daramic, there are just two battery separator companies that supply North America. (Answer, ¶ 16).

- Respondent has repeatedly denied the characterization of "automotive, motive, UPS and all PE markets" as distinct and proper markets. (Answer, ¶ 42).

- Most importantly, as an affirmative defense, Respondent asserted that the relevant product and geographic market definitions alleged in the Complaint fail as a matter of law. (Answer, Third Affirmative Defense; *see also* Resp. Mot. to Dismiss, n. 55 ("Polypore disputes the designations of the markets as alleged by the FTC and will assert its defenses to the market claims as necessary at the hearing before the ALJ")).

Under the FTC's discovery standard, Polypore is entitled to seek evidence which will support these defenses. *16 C.F.R. §3.31(c)(1).* As such, the documents and information sought by Respondent in it subpoena to The Moore Company are not only relevant, but are essential to its defense of the FTC's case.

The two pillars of The Moore Company's "lack of relevancy" argument are that [Redacted – Subject to Pending Motion for *In Camera* Treatment]. The Moore Company's argument misses the mark and fails to grasp the nature and scope of Respondent's defense.

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. [Redacted – Subject to Protective Order]. As The Moore Company points out, a relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced -

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- price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); (Memorandum at p. 9). [Redacted – Subject to Pending Motion for *In Camera* Treatment].

[Redacted – Subject to Pending Motion for *In Camera* Treatment] one of Respondent's central defenses to the Commission's Complaint is that the relevant product market should be defined as to include all lead-acid battery separators (including gel and AGM products) instead of being limited only to the flooded lead-acid battery separators. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Moreover, it is Respondent's fundamental contention that the relevant geographic market is not limited to North America, but is instead a worldwide battery separator market. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

[Redacted – Subject to Protective Order][4].

Even if The Moore Company's characterization of the relevant product and geographic markets was accurate, which it is not, it would still be a illogical to conclude that the subpoena does not seek information reasonably relevant to the allegations of the Complaint and Respondent's defenses thereto. For example, the Complaint alleges that North American battery manufacturers prefer domestic sources of battery separators and, consequently, battery separator manufacturers from abroad do not find it practical to compete in North America. (Complaint at ¶¶ 16-17). [Redacted – Subject to Pending Motion for *In Camera* Treatment].[5] Surely, Respondent is entitled to discovery of Amer-Sil to explore the validity of the FTC's charges.

Finally, the relevance of Amer-Sil's position in the battery separator market is evidenced by the fact that the FTC sought an affidavit from Amer-Sil during the course of its investigation

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[4] [Redacted – Subject to Protective Order].

[5] [Redacted – Subject to Pending Motion for *In Camera* Treatment].

of this matter. (*See* Dauwe FTC Aff.). In fact, several statements contained in the investigative affidavit are contrary to Respondent's assertions. It would be extremely prejudicial to Respondent if it is not able to obtain the information that formed the basis of such statements and allegations which it needs in order to examine the proffered statements' veracity and/or illuminate the statements in their appropriate context if the FTC is to use this affidavit in any way in this case.

[Redacted – Subject to Protective Order]. One of the Commission's allegations in its Complaint is that the length of time necessary for the qualification of products in the battery separator industry serves as a formidable barrier to potential market entrants. (Complaint, ¶ 33). In its defense, Respondent intends to refute this allegation. Without access to the information which formed the basis of the FTC's allegation [Redacted – Subject to Pending Motion for *In Camera* Treatment], Respondent will be hindered in its defense. (*See, e.g.,* Subpoena, ¶ 27). Such a situation is manifestly unjust. The Moore Company's attempt to unilaterally define the "Relevant Product Markets" and "The Relevant Geographic Market" in order to avoid compliance with the subpoena and without regard to Respondent's right to put forth its defense to the FTC's allegations must be rejected. The Moore Company's mischaracterization of the underlying issues in this matter should not allow it to circumvent the FTC's subpoena power. Polypore must have access in discovery to The Moore Company's documents relating to the issues raised in the pleadings in order to properly prepare its defense.

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

The Moore Company also argues that the subpoena should be limited because it would be unduly burdensome for it to comply with the subpoena. In its motion, however, The Moore Company fails to set forth any evidence supporting its contention. The burden of showing that a

subpoena is unduly burdensome is on the subpoenaed party. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977). This is true even if the subpoenaed party is a non-party. *See In re Flowers Indus., Inc.*, 1982 FTC LEXIS at * 14. While courts are "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 . . . is one which must be shared by all industry, indeed by the entire society." *FTC v. Dresser Indus., Inc.*, Misc. No. 77-44, 1977 DIST. LEXIS 16178 at *16 (D.D.C. Apr. 26, 1977).

Courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously hinder the normal operations of a business. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977). Broadness alone is not a sufficient justification to refuse enforcement of a subpoena. *Id.* The Moore Company, therefore, must put forth specific evidence that demonstrates such an undue 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 The Moore Company's wholly-owned subsidiary - Amer-Sil, is in the same industry that is the subject of the proceeding, stands to benefit depending on the outcome of the proceeding, and therefore has "a special stake in seeing that an informed judgment is rendered." *In re Coca-Cola Bottling Co.*, No. 8992, 1976 FTC LEXIS 33 at * 6 (Dec. 7, 1976).

The Moore Company puts forth no specific evidence to show that compliance with the subpoena would be unduly burdensome, [Redacted – Subject to Pending Motion for *In Camera* Treatment] The Moore Company has failed to meet its evidential 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. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Remarkably, counsel for The Moore Company failed to raise any specific issues of scope or burden with Respondent's counsel prior to filing this motion – [Redacted – Subject to Pending Motion for *In Camera* Treatment]. On several occasions, Respondent's counsel expressed to The Moore Company's counsel Respondent's willingness to discuss any concerns The Moore Company may have had with the subpoena requests. The Moore Company's counsel elected to ignore any specific issues The Moore Company had with respect to the subpoena's scope and alleged burden and instead decided to raise such issues for the first time in its motion. The Moore Company's 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.*, No. 9077, 1977 FTC LEXIS 18 * 1 (Nov. 25, 1977); *see also In re R.R. Donnelley & Sons Co.*, 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").

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. There is no evidence to support The Moore Company's contention.

Respondent's subpoena request No. 5 seeks "all documents relating to any <u>communication between</u> Amer-Sil" and various other entities. (Subpoena, No. 5)(*emphasis added*). Presumably, all such communications <u>between</u> Amer-Sil and certain battery manufacturers would be maintained by both parties in the language in which the communication was originally transmitted and would also be similarly stored by, and in the possession of, both

the communicating party and the receiving party. While Respondent has subpoenaed documents from several of the battery manufacturers, there is certainly no assurance that the battery manufacturers maintained all of their files and records. Additionally, any documents "relating to such communication[s]" which were created by Amer-Sil would presumably reside exclusively in the possession of Amer-Sil – and not with another entity. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Respondent's subpoena request No. 6 seeks "all documents constituting or reflecting any actual or potential contract or agreement between Amer-Sil" and various other battery manufacturers. (Subpoena, No. 6). Again, presumably all such contracts and agreements between Amer-Sil and another entity would be maintained by both parties in the language in which the contract or agreement was originally drafted and would also be similarly stored by, and in the possession of, both contracting parties. Also, documents constituting or reflecting any actual or potential contract between Amer-Sil and another entity potentially reside exclusively in the possession of Amer-Sil and accordingly may only be obtained through Respondent's subpoena to The Moore Company – the 100% owner of Amer-Sil. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

The Moore Company's Memorandum sets forth a general, unsupported claim of burden. In fact, The Moore Company's "burden" argument is really nothing more than an extension of its "lack of relevancy" argument – [Redacted – Subject to Pending Motion for *In Camera* Treatment]. As Respondent has shown above, its subpoena seeks information relevant to the issues raised in the Complaint and in Respondent's defense of the FTC's allegations. The Moore Company has not put forth any factual evidence which shows that compliance would seriously hinder the normal operations of its business. There is no evidence detailing any of The Moore Company's unsubstantiated cost and time estimates. Such unsupported and conclusory

allegations must be rejected and The Moore Company's claim of undue burden should be denied. Moreover, 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. (*See* Section III. A., *infra*). As such, The Moore Company's motion to limit the subpoena should be denied and The Moore Company should be ordered to comply fully with the Subpoena without further delay.

C. THE PROTECTIVE ORDER ADDRESSES THE MOORE COMPANY'S CONFIDENTIALITY AND COMMERCIALLY-SENSITIVE INFORMATION CONCERNS

In addition to its relevancy and burden arguments, The Moore Company also contends that Respondent's subpoena should be limited because it requests documents that may contain confidential or commercially sensitive information. (Memorandum at p. 15). In fact, The Moore Company spends several pages of its Memorandum detailing why it considers such information to be confidential. (Memorandum at pp. 15-19). At no point, however, does The Moore Company mention that on October 23, 2008, this Court entered a Protective Order Governing Discovery Material (the "Protective Order") in this matter.[6] Significantly, The Moore Company's Memorandum fails to address whether or not the Protective Order is sufficient to protect its confidentiality concerns, and if it is not, why (or in what manner) the Protective Order allegedly does not adequately protect the interests of The Moore Company or its wholly-owned subsidiary Amer-Sil. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

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

[6] The Protective Order was attached to the subpoena and enclosed in Respondent's counsel's November 6, 2008 service letter to The Moore Company. (*See* Dauwe Decl., Ex. A).

proceeding. The stated purpose of the Protective Order is to "[protect] the interests of the Parties and Third Parties . . against improper use and disclosure of confidential information submitted or produced in connection with this Matter." (Protective Order at p. 1)(Tab E). Although The Moore Company has failed to describe even a single example of how the Protective Order would be insufficient to protect its confidentiality concerns, it argues, in hyperbole, that "<u>no</u> amount of safeguards could adequately protect Amer-Sil's interests if it were to produce the requested information to Polypore." (Memorandum at p. 19)(*emphasis original*). This argument has no merit. *See In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33 at *3-5 (Dec. 7, 1976)("relevant confidential business information may properly be called for in subpoenas issued in Commission proceedings."). Indeed, "the fact that information sought by a subpoena may be confidential does not excuse compliance." *In re Rambus, Inc.*, 2002 FTC LEXIS 90, at *11 (Nov. 18, 2002).

The Moore Company turns to Federal Rule of Civil Procedure 45 to argue that Respondent must show "substantial need" for the requested, but allegedly confidential information. (Memorandum at p. 15). Under the Commission's Rules of Practice, however, "a showing of general relevance is sufficient to justify production of documents containing confidential business information and no further showing of 'need' is necessary." *Kaiser Aluminum & Chemical Corp.*, 1976 FTC LEXIS 68 at *9 (Nov. 12, 1976).

In any event, the Protective Order entered in this matter is more than sufficient to alleviate The Moore Company's confidentiality concerns. Protective orders are customarily issued to safeguard confidential information in Commission proceedings. *See In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33 at * 4 (Dec. 7, 1976); *see also In re Basic Research, LLC A.G. Waterhouse*, No. 9318, 2004 FTC LEXIS 272 at *6 (Aug. 18, 2004)("The provisions of the Protective Order adequately protect the confidential documents of third parties through a number

of safeguards"). Similarly, the Protective Order in this case is sufficient to protect The Moore Company's confidential documents and commercially sensitive information.

The Protective Order defines "Confidential Material" to include "nonpublic trade secret or other research, development, commercial or financial information, the disclosure of which would likely cause commercial harm to the Producing Party or Respondent." (Protective Order at p. 1). Importantly, the Protective Order contains a number of safeguards to adequately protect such Confidential Material. For example, Confidential Material may only be disclosed to a limited number of people associated with this hearing – including the ALJ, court reporters and other court personnel, outside counsel of Respondent and any consultants/experts retained by Respondent to assist in this matter and Respondent's Special Counsel Michael Shor. (Protective Order at p. 7). Importantly, the Protective Order would prohibit any Polypore employee, including its in-house counsel, from access to The Moore Company's confidential information. Additionally, any Confidential Material that is produced may only be used for the purposes of the preparation and hearing of this matter and for no other purpose whatsoever. (Protective Order at p. 7).

Other safeguards include the obligation to file pleadings, motions or other papers containing Confidential Information under seal, and the ability of a Third Party to request in camera treatment of any Confidential Material – as The Moore Company has done for this very motion and the supporting material thereto. (Protective Order at p. 8). The Protective Order also protects against the disclosure of Confidential Material if such Confidential Material is the subject of a discovery request in another proceeding. (Protective Order at p. 9). Additionally, under the Protective Order, any consultant or other person retained by counsel to assist counsel in the preparation of this action is obligated to return all Confidential Material (including all copies thereof or notes made there from) upon the consultants conclusion of participation in this

matter. (Protective Order at p. 9). Finally, the obligation and safeguards of the Protective Order are binding even after the conclusion of this proceeding. (Protective Order at p. 10). Clearly, the stringent Protective Order entered in this matter eradicates any concerns The Moore Company has that compliance with Respondent's subpoena will somehow result in economic repercussions for either The Moore Company or Amer-Sil.

While The Moore Company makes wild and unsupported allegations that Respondent is only seeking such alleged confidential information for a sinister or ulterior purpose [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Respondent's subpoena seeks relevant information which is central to its defense of the Commission's allegations. While some of the information sought by Respondent may be confidential, The Moore Company has not put forth any reason why the Court-ordered Protective Order is inadequate to protect such confidential information. It is clear that the Protective Order contains numerous adequate safeguards to protect The Moore Company's confidential information and as a result the Moore Company's motion to limit Respondent's subpoena based on confidentiality concerns should be denied.

D. THE MOORE COMPANY WAS PROPERLY SERVED WITH THE SUBPOENA

The Moore Company incorrectly argues that Respondent's subpoena is not proper because Respondent has allegedly failed to comply with the prerequisites for issuing a subpoena in a foreign country. Much like The Moore Company's previous arguments, this argument is also without merit. First, the subpoena was properly served on The Moore Company, a domestic corporation, located at 36 Beach Street, Westerly, Rhode Island, and not on a foreign corporation. Second, while several of the subpoena requests seek information from The Moore Company's wholly-owned foreign subsidiary, Amer-Sil, such documents are in the "possession or control" of The Moore Company.

Service of a subpoena upon The Moore Company, a domestic corporation, is the proper method to obtain documents of its wholly-owned subsidiary, Amer-Sil. The fact that the materials requested are situated in a foreign country does not prevent their discovery. *Cooper Indus. v. British Aerospace, Inc.,* 102 F.R.D. 918, 920 (1984).[7] Federal Rule of Civil Procedure 34 requires the production of documents "in the possession, custody, or control of the party on whom the request is served." Fed. R. Civ. P. 34(a). "Control" is construed broadly as "the legal right, authority, or practical ability to obtain the materials sought upon demand." *SEC v. Credit Bancorp, LTD*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000). Significantly, at no point does The Moore Company suggest that the information sought by Respondent's subpoena is beyond its control. (*See generally* Memorandum at pp. 19-25). Instead, The Moore Company attempts to distract the Court's attention by arguing at length that Respondent's subpoena is directed at a foreign company and, as a consequence, contravenes European Union privacy and data protection laws. Such diversionary tactics are nothing more than a misplaced attempt by The Moore Company to avoid the production of information requested by Respondent's validly-issued subpoena and which is within The Moore Company's control.

Courts have routinely found that a parent corporation has a sufficient degree of ownership control over the documents in the possession of its wholly-owned subsidiaries and therefore must produce such documents upon demand. *Dietrich v. Bauer*, Dist. LEXIS 11729 (S.D.N.Y. Aug. 9, 2000), *see also United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). The location of the documents is irrelevant. *Gerling Int'l Ins. v. Comm'r of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988); *see also Marc Rich &*

[7] *See also* Federal Rule of Civil Procedure 45, 1991 Advisory Committee Note (which makes clear "that the person subject to the subpoena is required to produce material in that person's control whether or not the materials are located within the distinct or within the territory within which the subpoena can be served."); Wright & Miller, Federal Practice and Procedure: Civil 2D § 2456 ("Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction").

Co., A.G. v. United States, 707 F.2d 663, 667 (2d Cir. 1983). This principle applies equally to both party and non-party alike. *Addamax Corp. v. Open Software Foundation, Inc.* 148 F.R.D. 462, 468 (D. Mass. 1993).

The appropriate standard "to determine whether a corporation has custody and control over documents located with an overseas affiliate is not limited to whether the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents.'" *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 at *9 (S.D.N.Y. Jan. 11, 1999)(*citations omitted*). This standard applies to third parties as well as parties. *Addamax Corp. v. Open Software Foundation, Inc.* 148 F.R.D. 462, 468 (D. Mass. 1993).

Courts in FTC proceedings have previously relied upon Federal Rule of Civil Procedure 34 and case law interpreting Rule 34 in determining that a corporation's "access to the documents" and "ability to obtain the documents" extends to foreign affiliates of a subpoenaed third party. In *In the Matter of Rambus, Inc.*, the Court ordered a subpoenaed third-party to produce documents in the possession of its foreign parent. *Rambus*, 2002 FTC LEXIS at 16. The Court in *Rambus* relied on a variety of factors to conclude that the subpoenaed third-party, a subsidiary, had sufficient control over the documents of its foreign parent. *Id.* at 4-16. Certainly, if a subsidiary can be ordered to produce the documents of its foreign parent, a domestic parent has the requisite level of control over the documents of its foreign wholly-owned subsidiary and must therefore produce such documents. [Redacted – Subject to Pending Motion for *In Camera* Treatment]. Moreover, The Moore Company has not put forth any evidence from which this Court could conclude that it does not have access to, or the ability to obtain, the documents in the possession of Amer-Sil, its wholly-owned subsidiary. Indeed, there is no evidence that The Moore Company, as the sole owner of Amer-Sil, cannot easily access any

document necessary to respond to the subpoena. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Similarly, The Moore Company's accusation that Polypore has attempted to avoid required FTC procedure is also without basis. First, The Moore Company ignores the fact that several of the subpoenaed requests are directed at The Moore Company itself, or both The Moore Company and Amer-Sil. (Subpoena Request, Nos. 3-4, 6-13, 22-26, 28-34, 38). More importantly, the case relied on in support of the Moore Company's argument, *Laker Airways, Ltd. v. Pan Am*, is distinguishable from the present situation. 607 F.Supp. 324 (S.D.N.Y. 1985). In *Laker Airways*, the subpoena in question sought documents from two foreign parent corporations through their United States branch offices, which were not in existence at the time of the controversy to which the subpoena related. *Id.* at 326. The present scenario is distinguishable because The Moore Company is and has been the sole owner of Amer-Sil and, more importantly, has control of the requested documents.

It is also important to note, however, that the privacy and data protection laws cited by The Moore Company are not applicable to the majority of the information sought by Respondent's subpoena and, moreover, exceptions to the general privacy rules exist which allow for the processing and transfer of the data sought. Consequently, The Moore Company and Amer-Sil can legally process and produce the subpoenaed documents in compliance with Directive 95/46/EC of the European Commission.

Despite The Moore Company's suggestions, much of the information sought by Polypore would not fall into the category of "personal data" because the information sought contains no data "relating to an identified or identifiable person." For example, the subpoena seeks documents regarding products in development, the manufacturing and production facilities owned by Amer-Sil or the Moore Company; any joint ventures or partnerships of which Amer-