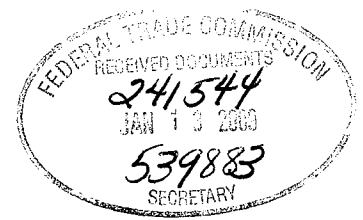


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)
)
)
Polypore International, Inc.)
a corporation)
)

Docket No. 9327

PUBLIC DOCUMENT

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO COMPEL ENTEK INTERNATIONAL LLC TO PRODUCE DOCUMENTS REQUESTED BY SUBPOENA *DUCES TECUM*

Respondent Polypore International, Inc. ("Polypore") respectfully submits this memorandum in support of its Motion to Compel ENTEK International LLC ("ENTEK") to Produce Documents Requested by Subpoena *Duces Tecum*, as amended by agreement between Polypore and ENTEK, in accordance with Commission Rule § 3.38(a)(2).

FACTUAL BACKGROUND

Respondent served a subpoena *duces tecum* on ENTEK on November 10, 2008 (hereinafter "the Subpoena"). (Tab A). The Subpoena originated in an adjudicatory proceeding currently pending before the Federal Trade Commission ("Commission" or "FTC") 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 Products L.P. ("Microporous"). The Subpoena was one of several subpoenas *duces tecum* issued by the Commission's Administrative Law Judge, on behalf of Respondent, and directed to participants in the battery separator industry – including both manufacturers of batteries and separators. Materials responsive to the Subpoena were to be produced for inspection on November 28, 2008.

Counsel for Respondent and counsel for ENTEK were in communication about the Subpoena soon after its service. (See generally January 7, 2009 e-mail of Eric D. Welsh,

Esq.)(Tab B). ENTEK initially raised some objection to the Subpoena and had previously sought to block the FTC's production of documents to Respondent that ENTEK had provided to the FTC during the investigational hearing of this matter.¹ In the weeks that followed, however, counsel for Respondent attempted to negotiate in good faith with counsel for ENTEK in order to discuss and resolve any concerns that ENTEK had concerning its compliance with the Subpoena. (See e-mail correspondence of November 24, 2008, November 25, 2008, December 5, 2008 and December 9, 2008)(Tab C). Indeed, since the Subpoena was first served, Counsel for Respondent and counsel for ENTEK have had numerous telephone conferences, including on November 14, 18, 24, 2008 and December 5, 2008, and have exchanged numerous e-mails in an attempt to move towards the production of the requested documents.

In particular, during the course of the negotiations, ENTEK expressed concern about the disclosure of information to Michael Shor, Esq., Special Counsel for Polypore. In response, Respondent agreed to prohibit Mr. Shor from access to any information produced by ENTEK in response to Respondent's Subpoena. (See December 5, 2008 e-mail from Eric D. Welsh, Esq.)(Tab C). Several other issues were also broached and discussed by Respondent's counsel and ENTEK's counsel during the course of these negotiations. Such issues were ultimately resolved and a substantive discovery agreement was reached in principal on December 11, 2008 which allowed ENTEK to begin the production of documents. (See e-mail correspondence of December 10, 2008 and December 12, 2008)(Tab D). The terms of the agreement in principal reached on December 11, 2008 were memorialized in a letter agreement signed on December 22, 2008 (hereinafter the "Letter Agreement"). (Tab E).

¹ ENTEK filed a Motion for Protective Order on November 5, 2008 seeking to prevent the disclosure of documents initially produced by ENTEK to the FTC in compliance with the Commission's Civil Investigative Demand ("CID"). ENTEK withdrew that motion on November 17, 2008 following an agreement reached between Polypore and ENTEK.

As of the date of this filing, ENTEK has produced only 1094 pages of documents, a small portion of the total documents requested by the Subpoena, with the first installment occurring on January 5, 2009. In fact, ENTEK has made only four substantive productions to Respondent thus far. On January 5, 2009, ENTEK produced a six-page affidavit which had been executed in July 2008 and previously submitted to the FTC. On January 7, 2008, ENTEK produced 70 pages of information related to an ENTEK supply contract. Finally, after counsel for Respondent expressed concern about ENTEK's lengthy delay in production, (*see* January 7, 2009 e-mail from Eric D. Welsh, Esq.)(Tab B), ENTEK produced documents (246 pages) on January 7, 2009 which it had previously produced to the FTC in response to the Commission's CID. Additional documents which had been provided by ENTEK to the FTC in compliance with the Commission's CID were produced in separate submissions to Respondent (458 pages and 194 pages, respectively) on January 9, 2009.

Although ENTEK reached an agreement in principal on December 11, 2008 which resolved all discovery issues and disputes raised in connection with the Subpoena, its production to date, which consists almost entirely of information ENTEK has already produced to the FTC, falls far short of providing all of the information sought by Respondent's Subpoena – and which is necessary for Respondent to adequately defend itself in this proceeding. Moreover, during a telephone conference on January 6, 2009, ENTEK's counsel was unable to provide any commitment as to when Respondent would receive the remainder of ENTEK's production pursuant to the Letter Agreement. (*see* January 7, 2009 e-mail from Eric D. Welsh, Esq.)(Tab B).

Importantly, Respondent has served four subpoenas *ad testificandum* on the following individuals and entities: (a) Mr. Robert Keith (ENTEK's President and Chief Executive

Officer), (b) Mr. Daniel Weerts (ENTEK's Vice President of Sales and Marketing), (c) Mr. Graeme Fraser-Bell (ENTEK's Vice President of International Sales), and (d) ENTEK International, LLC.² (Tab F). On December 30, 2008, ENTEK accepted service of each of the aforementioned subpoenas *ad testificandum*. (See December 30, 2008 e-mail of Darius Ogloza, Esq.)(Tab G). The depositions of Mr. Fraser-Bell and ENTEK International, Inc. were noticed for January 19, 2009, while the depositions of Mr. Keith and Mr. Weerts were noticed for January 20, 2009. Consequently, it is of paramount importance that the documents requested by Respondent's Subpoena be produced immediately in order to allow Respondent to properly review and analyze such documents in preparation for the noticed deposition examinations.

Despite the efforts of Respondent's counsel, and the December 11, 2008 resolution of all discovery disputes related to the Subpoena, ENTEK has continued to delay and stall in its production efforts. Respondent cannot afford any further delay from ENTEK, as important deadlines are approaching, including a discovery cut-off of February 13, 2009, and therefore Respondent is left with no option but to file this motion.

ARGUMENT

Respondent seeks the immediate production of documents and electronic data responsive to its Subpoena. Respondent's Subpoena is tailored to seek documents pertinent to the issues raised by the FTC in the Complaint and to Polypore's defense. Under the FTC's Rules, Respondent has the right 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)*. Moreover, "public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on

² On January 9, 2009, ENTEK served Respondent with a Motion to Quash the Subpoenas *Ad Testificandum* issued to Mr. Fraser-Bell and Mr. Keith.

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).

The factual allegations of the Commission’s Complaint and the Respondent’s defenses to the allegations contained therein make it clear that the information sought by Respondent’s Subpoena is relevant. ENTEK does not challenge the relevance of the discovery. Indeed, ENTEK has agreed to produce documents and provide the requested information to Polypore.

The discovery sought by the Subpoena is necessary and relevant. By way of example, Polypore cannot rebut the FTC’s allegation that it has monopolized any alleged battery separator market without information about its competitor’s market share, geographic scope and product line. (Subpoena, Nos. 5-13, 31)(Tab A). Polypore cannot rebut the FTC’s allegation that its acquisition of Microporous led to higher prices without information about its competitor’s pricing as related to Respondent and other competitors. (Subpoena, Nos. 5, 14-16, 18, 22, 34). Polypore cannot rebut the FTC’s allegation that testing and capital requirements prevent entry into the relevant markets without information about its competitor’s qualification process and capital requirements. (Subpoena, Nos. 3-4, 28, 32). Polypore cannot rebut the FTC’s allegation that battery separators manufactured for a particular application cannot be effectively used for other applications without information about its competitor’s competitive products for certain applications and the end-use of such products. (Subpoena, Nos. 1-2, 17, 19, 23-27, 35).

Polypore cannot rebut the FTC's allegation that battery separator producers outside North America cannot economically compete with Polypore in the United States without information about its competitor's sales and cost data. (Subpoena, No. 5-6, 18-21). And finally, Polypore cannot rebut the FTC's allegation that ENTEK's manufacturing capacity constrains it from expanding production without information about ENTEK's manufacturing capacity here and in the United Kingdom. (Subpoena, Nos. 3-4, 18, 31).

Clearly, the documents sought by Respondent are highly relevant to the issues raised in the pleadings and should be immediately produced. *See In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *6-8 (opining that "[i]nformation in the files of competing companies is frequently crucial in [FTC] proceedings" and such proceedings "would be crippled if neither the Commission nor the party charged could produce the essential industry data"). Moreover, ENTEK has already reached an agreement resolving all discovery disputes related to the Subpoena. (*See Letter Agreement*)(Tab E). Polypore's receipt and review of ENTEK's materials is necessary for its defense and any further delay or limitation on this review will tilt the playing field heavily in favor of the FTC.

Although ENTEK has resolved all discovery issues related to the production of documents pursuant to the Respondent's Subpoena, it has delayed its production, producing belatedly documents that were readily accessible, which had been previously provided to the FTC last July. Indeed, many of the documents sought by the Subpoena were no doubt previously provided to the FTC as part of the thousands of documents submitted by ENTEK in response to the FTC's subpoena during the investigation stage of this proceeding. Polypore needs ENTEK's production so that it can move forward efficiently with depositions of ENTEK's witnesses. Otherwise, Polypore will be forced to proceed with the depositions without the benefit of ENTEK's documents and will then need to leave the depositions open, to be resumed after the


production is complete. Given the current discovery schedule, such an outcome would be necessary, but ultimately not economical to Polypore due to the costs associated with traveling from North Carolina to Oregon twice for these depositions.

CONCLUSION

For the foregoing reasons, Respondent Polypore respectfully moves this Court to enter an order compelling ENTEK to immediately comply with Respondent's subpoena *duces tecum*, as amended by agreement between Polypore and ENTEK.

Dated: January 12, 2009

Respectfully Submitted,



William L. Rikard, Jr.

Eric D. Welsh

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johngraybeal@parkerpoe.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing *Memorandum in Support of Respondent's Motion to Compel ENTEK International LLC to Produce Documents Requested by Subpoena Duces Tecum*, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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

I hereby certify that on January 12, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing *Memorandum in Support of Respondent's Motion to Compel ENTEK International LLC to Produce Documents Requested by Subpoena Duces Tecum* 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 January 12, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing *Memorandum in Support of Respondent's Motion to Compel ENTEK International LLC to Produce Documents Requested by Subpoena Duces Tecum* upon:

J. Robert Robertson, Esq.
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Steven Dahm, Esq.
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

Docket No. 9327

**Polypore International, Inc.
a corporation**

PUBLIC DOCUMENT

TAB A



SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO

ENTEK International LLC
250 N. Hansard Ave.
Lebanon, OR 97355

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

Parker Poe Adams & Bernstein, LLP
Three Wachovia Center
401 S. Tryon Street, Suite 3000
Charlotte, NC 28202

4. MATERIAL WILL BE PRODUCED TO

Polypore International, Inc.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

November 24, 2008 9:30 a.m.

6. SUBJECT OF PROCEEDING

In the Matter of Polypore International, Inc., Docket No. 9327

7. MATERIAL TO BE PRODUCED

See Attached Requests, Instructions and Definitions.

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA

Eric D. Welsh
(704) 335-9052

DATE ISSUED

October 24, 2008

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**SUBPOENA DUCES TECUM ISSUED TO ENTEK INTERNATIONAL LLC
ON BEHALF OF POLYPORE INTERNATIONAL, INC.
FTC DOCKET NO. 9327**

EXHIBIT A

I. REQUESTS

1. All documents describing any product in development by ENTEK to compete with Polypore lead acid battery separators.
2. All documents describing any product in development by any Third Party to compete with Polypore lead acid battery separators.
3. All documents listing or describing any manufacturing or production facility (including any expansion of the same or additions of separator lines) for lead acid battery separators in which ENTEK maintains any ownership interest including without limitation any such facility, whether currently operational or under construction or expansion, in the United States or the United Kingdom.
4. For any facility responsive to Request No. 3, all documents sufficient to reflect (a) the capital expenditure for the construction and start-up or expansion of such facility, (b) the date on which plans for such facility or expansion of such facility were approved, (c) the date on which construction began on such facility, (d) the date of commissioning or startup of such facility, (e) the production capacity of such facility, (f) the type of product(s) produced at such facility, (g) the anticipated end use(s) of the products manufactured at such facility, (h) the technology used at such facility to manufacture lead acid battery separators and (i) the cost of the lead acid battery separators manufactured and sold at such facility, including without limitation profit and loss statements and other documents reflecting the cost of manufacturing and selling such products, including shipping costs.
5. All documents relating to any communication between ENTEK and (a) Johnson Controls, Inc. ("JCI"), (b) Exide Technologies ("Exide"), (c) EnerSys, (d) East Penn Manufacturing Co., Inc. ("East Penn"), (e) Crown Battery Manufacturing Co. ("Crown"), (f) Trojan Battery Co. ("Trojan"), (g) US Battery Manufacturing Co. ("US Battery"), (h) C&D Technologies, Inc. ("C&D"), or (i) any other entity manufacturing batteries for sale in North America, concerning: (i) any actual or potential contract or agreement between such entity and ENTEK for the sale and purchase of lead acid battery separators, (ii) contemporaneous or future prices of lead acid battery separators, (iii) Polypore or (iv) Microporous.
6. All documents constituting or reflecting any actual or potential contract or agreement between ENTEK and (a) JCI, (b) Exide, (c) EnerSys, (d) East Penn, (e) Crown, (f) Trojan, (g) US Battery, (h) C&D, or (i) any other entity manufacturing lead acid batteries for sale in North America, for the sale by ENTEK to such entity of lead acid battery separators.
7. All documents relating to ENTEK's or any other manufacturer's share of any market for lead acid battery separators.

8. All documents discussing ENTEK's or any other manufacturer's share of any market for lead acid battery separators by product end use or other classification used by ENTEK to record market share for the sale of lead acid battery separators.

9. All documents relating to any actual or potential competitor of ENTEK for lead acid battery separators.

10. All documents relating to the geographic scope of competition for battery separators for lead acid batteries.

11. All documents relating to the scope of competition across products for battery separators for lead acid batteries.

12. All documents relating to the level or state of competition in the lead acid battery separator business prior to February 29, 2008.

13. All documents relating to the level or state of competition in the lead acid battery separator business after February 29, 2008.

14. All documents relating to ENTEK's pricing, including any database of pricing transactions, and pricing strategy for lead acid battery separators from January 1, 2003 to February 29, 2008.

15. All documents relating to ENTEK's pricing, including any database of pricing transactions, and pricing strategy for lead acid battery separators after February 29, 2008.

16. All documents sufficient to show or explain the factors used in ENTEK's making any adjustment to its price for lead acid battery separator under any contract with its customers.

17. All documents discussing, describing or referring to any product, either in commercial production or under development, that competes or is expected to compete with any lead acid battery separator manufactured by ENTEK.

18. For each Entek facility that has manufactured or is currently manufacturing lead acid battery separators, all documents discussing, describing or reflecting ENTEK's manufacture and/or sale of lead acid battery separators from such facility including documents reflecting the amount of product sold by dollar, units, square meters, and product type or brand, and the price of all such product sold.

19. For all products responsive to Request No. 17, all documents reflecting the actual or anticipated end use of the product sold by ENTEK and the destination of the shipment of such product.

20. All documents reflecting the identity and location of all customers purchasing lead acid battery separators from each of ENTEK's manufacturing facilities.

