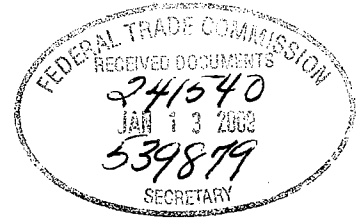


ORIGINAL

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 EXIDE
TECHNOLOGIES TO PRODUCE DOCUMENTS REQUESTED
BY SUBPOENA DUCES TECUM**

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

FACTUAL BACKGROUND

Respondent served a subpoena *duces tecum* on Exide 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 25, 2008.

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

Esq.)(Tab B). Exide did not file any motions or objections with this Court in response to the Subpoena. Since the Subpoena was first served, however, counsel for Respondent attempted to negotiate in good faith with counsel for Exide in order to discuss and resolve any concerns Exide had concerning its compliance with the Subpoena. (See e-mail correspondence of November 20, 2008, November 26, 2008, December 4, 2008, December 22, 2008, and January 5, 2009)(Tab C). In fact, Counsel for Respondent and counsel for Exide have had numerous telephone conferences, including on November 18, 2008, November 25, 2008 and January 5, 2009, and have exchanged numerous e-mails in an attempt to move towards the production of the requested documents. *Id.* Moreover, Respondent agreed to several modifications of the Subpoena in order to allow Exide to begin the production of documents as soon as possible. *Id.* It was the belief of Respondent's counsel that Exide was to have produced all documents sought by the Subpoena no later than the week of January 5, 2009. See January 7, 2009 e-mail of Eric D. Welsh, Esq.)(Tab B). As of the date of this filing, however, Respondent has received only six pages of documents from Exide – which were produced on January 9, 2009. Thus, even though Exide reached an agreement with Respondent on December 4, 2008 which addressed and resolved all discovery issues and disputes raised in connection with the Subpoena, only six documents sought by Respondent's Subpoena – which are necessary for Respondent to adequately defend itself in this proceeding – have been produced. Additionally, while Exide's counsel has represented that Exide's documents have been gathered and are being reviewed by a vendor in California and by counsel in Pennsylvania for privilege, Exide's counsel has been unable to provide any commitment as to when Exide would complete its production of documents requested by the Subpoena. (See January 7, 2009 e-mail from Eric D. Welsh, Esq.)(Tab B).

Significantly, Respondent has served five subpoenas *ad testificandum* on the following individuals and entities: (a) Mr. Pradeep Menon (Exide's Vice President of Global

Procurement), (b) Mr. Douglas Gillespie (Exide's Vice President of Global Procurement), (c) Mr. Alberto Perez (Exide's Director of Commodities), (d) Mr. Gordon Ulsh (Exide's President and Chief Executive Officer), and (e) Exide Technologies (Tab D). The depositions were originally noticed for January 14-16, 2009. By agreement, Respondent and Exide have re-scheduled the depositions for January 21-23, 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, Exide has continued to delay and stall in its production efforts. Respondent cannot afford any further delay from Exide, 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 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 68 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. Exide does not challenge the relevance of the discovery. Indeed, Exide 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 needs information about Exide’s purchasing and pricing data and the end-products for which Exide purchases battery separators (Subpoena Request Nos. 1-2, 4-6, 16, 18, 31-32) to rebut the FTC’s allegation that Polypore has monopolized any alleged battery separator market and/or the FTC’s allegation that Polypore’s acquisition of Microporous led to higher prices. Polypore needs information about Exide’s qualification and testing of products from Respondent’s competitors (Subpoena Request Nos. 3-4, 23-25, 33-34) to rebut the FTC’s allegation that testing and capital requirements prevent entry into any relevant market. Polypore needs information about Exide qualification and testing of products from Microporous (Subpoena Request Nos. 4, 12, 23-25) 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 Exide’s use of all types battery separator products – including products that are or may be competitive with lead acid battery separators (Subpoena Request Nos. 14-16, 19, 27-29) 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 Exide's dealings with other battery separator manufacturers (Subpoena Request Nos. 3-4, 6, 11-16, 21-22, 26-30) to rebut the FTC's allegation that the acquisition of Microporous removes the only alternative sources of separator supply in several alleged battery separator markets.

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 68, at *4 ("The practice of the Commission has been to uphold subpoenas *duces tecum* upon a showing . . . that the requested information is generally relevant to the issues raised by the pleadings."). Moreover, Exide has already reached an agreement resolving all discovery disputes related to the Subpoena. Polypore's receipt and review of Exide'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 Exide 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 document submitted by Exide in response to the FTC's subpoena during the investigation stage of the proceeding. Polypore needs Exide's production so that it can move forward efficiently with depositions of Exide's witnesses. Otherwise, Polypore will be forced to proceed with the depositions without the benefit of Exide'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 Pennsylvania twice for these depositions.

CONCLUSION

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

Dated: January 12, 2009

Respectfully Submitted,



William L. Rikard, Jr.

Eric D. Welsh

PARKER POE ADAMS & BERNSTEIN, LLP

Three Wachovia Center

401 South Tryon Street, Suite 3000

Charlotte, NC 28202

Telephone: (704) 372-9000

Facsimile: (704) 335-9689

williamrikard@parkerpoe.com

ericwelsh@parkerpoe.com

John F. Graybeal

PARKER POE ADAMS & BERNSTEIN, LLP

150 Fayetteville Street

Raleigh, NC 27602

Telephone: (919) 835-4599

Facsimile: (919) 828-0564

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 Exide Technologies 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 Exide Technologies 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 Exide Technologies to Produce Documents Requested by Subpoena Duces Tecum* upon:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
rrobertson@ftc.gov

Steven Dahm, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
sdahm@ftc.gov

Donald J. Russell, Esq.
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
drussell@robbinsrussell.com



Adam C. Shearer
Parker Poe Adams & Bernstein LLP
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 335-9050
Facsimile: (704) 334-4706

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 Exide Technologies 13000 Deerfield Parkway, Building 200 Alpharetta, Georgia 30004	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 25, 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 EXIDE TECHNOLOGIES
ON BEHALF OF POLYPORE INTERNATIONAL, INC.
FTC DOCKET NO. 9327**

EXHIBIT A

I. REQUESTS

1. All documents (including without limitation internal email or other written communication at Exide) relating to any communication between Exide and Polypore regarding (a) any actual or potential contract for lead acid battery separators, (b) any actual or proposed change in Polypore prices and/or (c) any actual or potential increase or decrease in the volume of lead acid battery separators purchased from Polypore.

2. All documents (including without limitation internal email or other written communication at Exide) relating to any communication between Exide and Microporous regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or proposed pricing of lead acid battery separators by Microporous, (c) actual or proposed development and/or testing of lead acid battery separators or (d) Polypore.

3. All documents (including without limitation internal email or other written communication at Exide) relating to any communication between Exide and ENTEK regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or proposed prices for lead acid battery separators by ENTEK, (c) actual or proposed development and/or testing of lead acid battery separators or (d) Polypore.

4. All documents (including without limitation internal email or other written communication at Exide) relating to any communication between Exide and any Third Party other than Polypore, Microporous or ENTEK regarding (a) any actual or potential contract for lead acid battery separators, (b) actual or potential prices for lead acid battery separators, (c) actual or proposed development and/or testing of lead acid battery separators or (d) Polypore.

5. All documents constituting or reflecting any actual or potential contract or agreement between Exide and Polypore for the manufacture and sale by Polypore to Exide of lead acid battery separators.

6. All documents reflecting any discussion or consideration internally at Exide about Exide producing or manufacturing lead acid battery separators whether in response to Polypore's actual or potential acquisition of Microporous, any actual or potential change in price of lead acid battery separators or otherwise.

7. All documents relating to the contract entered into between Exide and Polypore for the purchase and sale of the Exide plant located in Corydon, Indiana (the "Corydon plant"), including without limitation, documents concerning the terms of payment under that contract.

8. All documents relating to the negotiation of the contract entered into between Exide and Polypore for the purchase and sale of the Corydon plant, including without limitation,

documents concerning the options discussed between Polypore and Exide for the terms of payment under that contract.

9. All documents relating to any communication between Exide and Polypore concerning (a) the contract between Polypore and Exide for the purchase and sale of the Corydon plant, (b) the financial condition and prospective business of the Corydon plant at the time of sale, and/or (c) the negotiation of the contract entered into between Exide and Polypore for the purchase and sale of the Corydon plant, including without limitation, documents concerning the options for the terms of payment under that contract.

10. All documents relating to any expression of interest of or submission of any bid by any person other than Polypore in the purchase of the Corydon plant.

11. All documents constituting or reflecting any actual or potential contract or agreement between Exide and ENTEK for the manufacture and sale by ENTEK to Exide of lead acid battery separators.

12. All documents constituting or reflecting any actual or potential contract or agreement between Exide and Microporous for the manufacture and sale by Microporous to Exide of lead acid battery separators.

13. All documents relating to any memorandum of understanding between Exide and Microporous, including without limitation, documents concerning any expiration, extension or amendment to such memorandum of understanding.

14. All documents relating to any consideration by Exide or any Third Party to sponsor, finance or support entry or expansion of a battery separator business in (a) North America or (b) the world.

15. All documents constituting or reflecting any actual or potential contract or agreement between Exide and any Third Party other than ENTEK, Polypore or Microporous for the manufacture and sale by any such Third Party to Exide of lead acid battery separators.

16. All documents or any database reflecting all lead acid battery separators purchased by Exide from any supplier, including but not limited to the specific product(s) purchased, the amount or volume of each such product(s) purchased, the price(s) of the product(s) purchased, the date(s) of purchase, the end use(s) or application(s) of the product purchased and the Exide plant to which such product was shipped.

17. All documents discussing, describing or reflecting any actual or potential ownership interest of Exide in any joint venture or other entity that manufactures led acid battery separators.

18. All documents discussing, describing or reflecting, by dollar amount, units, price, square meters and product type or brand, all battery separators purchased by Exide from any source from January 1, 2000 to the present.

