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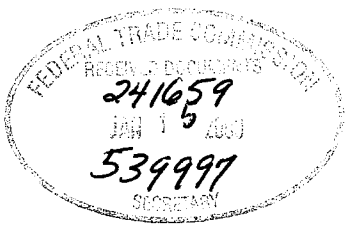

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
POLYPORE INTERNATIONAL, INC., Respondent.	)	Docket No. 9327

ORDER ON NON-PARTY ENERSYS' MOTION FOR ATTORNEYS' FEES AND COSTS, LIMITATION OF THE SUBPOENA, AND MODIFICATION OF THE PROTECTIVE ORDER

I.

On December 16, 2008, non-party EnerSys filed a motion for an order directing Respondent Polypore International, Inc. ("Polypore," "Daramic,"or "Respondent") to compensate EnerSys for certain costs it would incur in responding to the subpoena that Respondent served on EnerSys. EnerSys' motion also seeks to limit the subpoena, by striking nine specific document requests, and to modify the Protective Order to shield EnerSys' production from disclosure to Respondent's special counsel. Respondent filed its Memorandum in Opposition to EnerSys' motion on December 23, 2008.

For the reasons set forth below, EnerSys' motion is DENIED.

II.

EnerSys' motion seeks three types of relief. First, EnerSys seeks an order directing Respondent to compensate it for fees, costs, and charges that it would incur in reviewing documents that are potentially responsive to the subpoena. In the alternative, EnerSys requests an order directing Respondent to participate in a procedure proposed by EnerSys which, EnerSys states, is designed to reduce its burden of complying with the subpoena. Second, EnerSys seeks an order limiting the subpoena by striking requests 10, 13-14, and 19-24. Third, EnerSys seeks modification of the Protective Order to shield EnerSys' production from disclosure to Respondent's special counsel, Michael Shor.

A. Attorneys' Fees and Costs

EnerSys states that it has expended considerable time and resources to comply with Respondent's subpoena by gathering approximately 200,000 potentially responsive documents. EnerSys further states that it will likely spend more than $50,000 to review and produce the requested documents. EnerSys stresses that it is neither a party to this litigation nor a competitor of Polypore; it is, instead, a customer of Polypore and a former customer of Microporous Products L.P. ("Microporous"), whose acquisition by Polypore is challenged in the Federal Trade Commission's ("FTC" or "Commission") Complaint in this matter.

EnerSys argues that, as a non-party, its burden of responding to the subpoena is undue. As a result, EnerSys seeks an order requiring Respondent to pay EnerSys the attorneys' and paralegals' fees and costs and the outside vendors' charges that EnerSys will incur in reviewing the subpoenaed documents prior to their production to Respondent. EnerSys states that it proposed to Respondent a three-phase procedure which, EnerSys asserts, would reduce the burden imposed by the subpoena, but that Respondent rejected that proposal.

Respondent asserts that its subpoena is tailored to seek documents that are relevant to the issues raised by the Complaint and to Respondent's defenses. Respondent further states that its subpoena does not impose an unreasonable or extraordinary burden on EnerSys.

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." *Federal Trade Commission v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). The Commission, in *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 203, 1981 FTC LEXIS 75, at *3 (March 13, 1981), has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *See In re North Tex. Specialty Physicians*, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 203, 1981 FTC LEXIS 75, at *3 (March 13, 1981) (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). EnerSys offered no information regarding its size and resources. According to Respondent, EnerSys had net earnings of more than $45 million in 2007. Regardless of its actual earnings, EnerSys has not demonstrated that its estimated compliance costs of $50,000 for document review are unreasonable.

Moreover, even if the subpoenaed party has shown that its costs of compliance are unreasonable, "where the 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." *In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96, at *16-17 (March 19, 1982).

In this case, EnerSys has not demonstrated that its costs of compliance with the subpoena are unreasonable. Accordingly, EnerSys' request for reimbursement of attorneys' and paralegals' fees and costs and outside vendors' charges that it would incur in reviewing documents that are potentially responsive to Respondent's subpoena is DENIED.

B. Requested Limitation of the Subpoena

The subpoena at issue consists of thirty four document requests. EnerSys seeks an order limiting the subpoena by striking requests 10, 13-14, and 19-24.

These nine requests are as follows:

> 10. All documents or any database reflecting all lead acid battery separators purchased by EnerSys from any supplier, including but not limited to the specific product(s) purchased, the amount or volume of each such product(s) purchased, the price(s) of the product(s) purchased, the date(s) of purchase, the end use(s) or application(s) of the product purchased and the EnerSys plant to which such product was shipped.
>
> 13. All documents discussing, describing or reflecting, by dollar amount, units, price, square meters and product type or brand, all battery separators purchased by EnerSys from any source from January 1, 2000 to the present.
>
> 14. For all product responsive to Request No. 13, all documents reflecting the actual or anticipated end use or application of the product purchased by EnerSys and the destination of the shipment of such product.
>
> 19. All documents relating to any testing or qualification by EnerSys of lead acid battery separators manufactured by Polypore or Microporous.
>
> 20. All documents relating to any testing or qualification by EnerSys of lead acid battery separators produced by any entity other than Polypore or Microporous.
>
> 21. All documents reflecting or discussing any manufacturer of lead acid battery separators.

22. All documents describing, discussing or reflecting by brand name or manufacturer the products comprising lead acid battery separators including those products used for the following end uses or applications: golf car or cart; floor scrubber or sweeper; automotive; motorcycle; truck; train; fork lift; pallet truck; submarine; uninterrupted power supply for hospitals, telephone companies and other uses; motive; industrial; marine; stationary; and/or nuclear power plant.

23. All documents discussing or referring to any type of battery separator, including AGM separators, other than those used in flooded lead acid batteries.

24. All documents describing, discussing or reflecting products that are or might be competitive with lead acid battery separators including those products used for the following end uses or applications: golf car or cart; floor scrubber or sweeper; automotive; motorcycle; truck; train; fork lift; pallet truck; submarine; uninterrupted power supply for hospitals, telephone companies and other uses; motive; industrial; marine; stationary; and/or nuclear power plant.

EnerSys argues that these requests are overly broad and unduly burdensome. EnerSys states, as an example, that the amount, price, and date of EnerSys' purchases of battery separators are irrelevant to whether Respondent harmed competition by acquiring Microporous.

Respondent claims that the documents it seeks are relevant, material, and critical to its defense. Respondent further argues that EnerSys' allegations of undue burden are unsupported and undermined by EnerSys' own unwillingness, according to Respondent, to mitigate any burden by negotiation and compromise.

"Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). An Administrative Law Judge may limit discovery if the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. *Id.* In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d).

The Complaint in this case charges that Polypore's acquisition of Microporous and other conduct by Polypore substantially lessens competition in numerous ways in the deep-cycle, motive, automotive, and UPS markets for flooded lead-acid batteries. Complaint ¶¶ 5, 38. The Complaint further alleges that there are significant barriers to entry into these markets. *Id.* ¶¶ 32-37. The challenged requests in Respondent's subpoena seek materials that go to central issues in this case, such as market definition, market share, pricing, and entry conditions, including product testing and qualification as possible barriers to entry. Thus, the information sought by the challenged requests may reasonably be expected to yield information relevant to the Complaint's allegations, to the proposed relief, or to the Respondent's defenses.

"The burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* (enforcing subpoena served on non-party by the respondent). *See In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("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.").

EnerSys' allegation that Respondent's subpoena imposes an "unreasonable and extraordinary burden" is insufficient to carry its burden of showing why the requested discovery should be denied. EnerSys has not demonstrated that the information sought is overly broad or unduly burdensome. Accordingly, EnerSys' motion to limit the subpoena is DENIED.

C. Modification of the Protective Order

The Protective Order entered in this case on October 23, 2008 limits disclosure of confidential material, but permits disclosure of such material to Michael Shor, Polypore Special Counsel. Protective Order ¶ 9. EnerSys states that many of the requested documents contain confidential information that it considers highly sensitive, such as information regarding pricing, testing, and efforts to find an alternative source of battery separators. EnerSys seeks modification of the Protective Order to shield confidential material from disclosure to Mr. Shor, whom EnerSys describes as "Respondent's in-house counsel."

Respondent argues that the Protective Order adequately protects the confidentiality of any materials EnerSys produces. Respondent states that Mr. Shor is not an employee of Polypore. Respondent further notes that EnerSys is its customer, not its competitor, and that Mr. Shor is not involved in "competitive decision making" at Polypore. Respondent further asserts that Mr. Shor's understanding of the technical aspects of the battery separator industry is an invaluable asset, especially in light of the impending deadlines in this litigation.

Requests to provide in-house counsel with a competitor's confidential information "might properly be denied in a case 'where in-house counsel are involved in competitive decisionmaking,' a term we defined as 'shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's *advice and 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.'" *Matsushita Elec. Indus. Co. v. United States Int'l Trade Comm'n*, 929 F.2d 1577, 1579 (Fed. Cir. 1991) (*quoting United States Steel Corp. v. United States*, 730 F.2d 1465, 1468 at n.3 (Fed. Cir. 1984)). "Access to confidential information may not be denied solely because of an attorney's status as in-house counsel. . . . Rather, the decision turns largely on the specific role of in-house counsel within the business: whether he or she has a part in the type of competitive decision-making that would involve the potential use of the confidential information." *Sullivan Marketing, Inc. v. Valassis Communications, Inc.*, 1994 U.S. Dist. LEXIS 5824, at *5-6 (S.D.N.Y. 1994).

Mr. Shor indicates in his Declaration that he is employed by Carolina Legal Staffing and has served as Special Counsel for Polypore in this matter since April 7, 2008. Declaration of Michael L. Shor ¶ 2. He avers that he has not participated in any contract negotiations for Polypore or Daramic since early August 2008, and that he has agreed to not participate in any such negotiations for a period of two years. *Id.* ¶ 7. He further affirms that he is "not permitted to, and [he] will not, share any confidential material or information with Company [Polypore or Daramic] representatives." *Id.* ¶ 8.

Since Mr. Shor is not in-house counsel and does not appear to be involved in competitive decision-making, EnerSys' request for a protective order shielding its confidential information from Mr. Shor is DENIED.

III.

For the reasons stated above, EnerSys' motion for an award of fees and costs, limitation of Respondent's subpoena, and modification of the Protective Order is DENIED. EnerSys shall produce all responsive documents within ten calendar days.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: January 15, 2009