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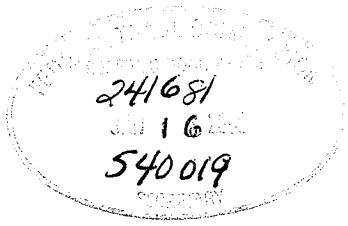
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of	)	**Docket No. 9327**
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	)	
	)	
Polypore International, Inc.	)	
a corporation	)	**Public Document**
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MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO AMEND THE SCHEDULING ORDER

Respondent Polypore International, Inc. ("Polypore") respectfully submits this memorandum in support of its Motion to Amend the Scheduling Order entered on October 22, 2008 (hereinafter the "Scheduling Order"). Respondent's proposal is to extend by one month all remaining deadlines set forth in the Scheduling Order, which would set the commencement date of the hearing on May 14, 2009. Counsel for Respondent conferred with Complaint Counsel in a good faith attempt to resolve by agreement the issues raised by the present motion, but has been unable to reach such an agreement. Complaint Counsel has indicated that they oppose any extension of the Scheduling Order's deadlines, but that they would be willing to work with Respondent on a case-by-case basis to conduct discovery after the deadline has expired. Complaint Counsel's position is inadequate for a variety of reasons. It places an unfair burden on Respondent to obtain agreement from Complaint Counsel on discovery issues and ignores Respondent's right to have a fair opportunity to develop evidence with which to defend itself. Accordingly, Respondent requests that an order be entered extending all deadlines in the Scheduling Order by thirty (30) days and establishing May 14, 2009, as the commencement date of the hearing. Neither Complaint Counsel nor any third party will be prejudiced by this minimal extension of the relevant dates and deadlines.

In support of this motion, Respondent says:

FACTUAL BACKGROUND

1. On February 29, 2008, Polypore and Microporous Products L.P. ("Microporous") finalized a transaction in which Polypore acquired the stock of Microporous Holding Corporation, the parent company of Microporous.

2. In March 2008, the Federal Trade Commission ("FTC" or "Commission") first contacted Polypore regarding its acquisition of Microporous and soon thereafter began an investigation. Over the course of the next six and one-half months, Polypore fully cooperated with the Commission's investigation. It provided answers and supporting exhibits to investigative interrogatories propounded by the FTC, produced witnesses in Washington for extensive investigational hearings, answered numerous inquiries through correspondence and exchanges with FTC staff, and sent executives to Washington on five occasions to discuss issues with staff and members of the Commission.

3. During its investigation, the FTC also collected documents from and conducted investigational hearings of third parties. Polypore, however, did not, nor could it, engage in any formal discovery or review any third-party evidence being compiled by the Commission at that time.

4. On September 9, 2008, the Commission, in stark contrast to the substantial evidence that Polypore's acquisition of Microporous did not lessen competition or tend to create a monopoly, issued a Complaint against Polypore. The Complaint, which among other things wholly ignored the global nature of the separator market, set the hearing date of the Complaint to begin on December 9, 2008.

5. Importantly, the undersigned counsel and his firm ("Parker Poe") were retained to represent Respondent with respect to the Complaint and these proceedings on September 10,

2008. During the investigative process, Parker Poe was not involved in the development of positions in response to the FTC inquiry, and did not collect, review or produce Polypore's documents. (*Motion to Reschedule Hearing Date, October 1, 2008*). Immediately after its retention, Parker Poe began the enormous effort of developing Polypore's positions and has strived to move this proceeding forward effectively and expeditiously, without undue delay and with due regard Polypore's right to develop evidence and defenses to Complaint Counsel's allegations.

6. On October 1, 2008, Respondent filed a Motion to Reschedule Hearing Date and asserted that to begin the hearing only eighty-four days after service of the Complaint would be manifestly unjust and would deprive Respondent of a reasonable opportunity to prepare its defense in this complex matter. (*Motion to Reschedule Hearing, October 1, 2008*). Respondent requested that the hearing begin no earlier than May 18, 2009 in order to allow Respondent sufficient time to develop its defenses fairly and fully and to present those defenses efficiently and effectively at a hearing. (*Id.*)

7. On October 2, 2008, Respondent's counsel received a Draft Scheduling Order from Judge Chappell's office which proposed to set the commencement date of the hearing in this matter on April 14, 2009. Complaint Counsel then filed a statement accepting April 14, 2006, as the hearing date.

8. On October 7, 2008, Judge Chappell granted Respondent's Motion to Reschedule Hearing Date, in part, and set the hearing for April 14, 2008. Importantly, Judge Chappell noted the importance of allowing "sufficient time for the parties to prepare for the administrative trial in this case." (*Order on Motion to Reschedule Hearing Date, October 7, 2008*).

9. In light of the October 7th Order and the Draft Scheduling Order, Respondent's counsel conferred with Complaint Counsel and agreed to a schedule of deadlines based on that

trial date. Respondent's agreement was in part also based on the representation, as articulated by Complaint Counsel, that the discovery sought by Complaint Counsel would be targeted, narrow and specific, given the information it had already developed. For example, Complaint Counsel indicated that they might identify as many as ten (10) witnesses in the disclosures. Respondent's agreement to the date was also based on obtaining third-party discovery in a timely manner and Complaint Counsel's indication that it would produce third-party information in its possession promptly. (*Id.*) These premises underlying Respondent's agreement to the April 14, 2009 hearing date have proven to be inaccurate as the matter has progressed.

10. On October 22, 2008, an agreed upon scheduling order was submitted at the scheduling conference and Judge Chappell issued the Scheduling Order. Complaint Counsel's Initial Disclosures were served and filed the same day and stated that "**Complaint Counsel will provide copies of third-party's documents and materials 10 days after such time as the [ALJ] has entered a protective order in this matter and the third parties who submitted the documents have been apprised of their rights under the protective order.**" [1] At the hearing, Complaint Counsel gave Respondent its Initial Disclosures, identifying scores and scores of witnesses, of which it identified 15 third parties who had submitted documents or other materials to the Commission. **In their preliminary witness list, Complaint Counsel identified 50 witnesses, of which 31 were third parties.**

11. The parties had worked out and agreed to a protective order governing the discovery of material and protecting third party material which was handed to Judge Chappell at the conference and was entered the next day. (*Protective Order Governing Discovery Material, October 23, 2008*). A week later, upon inquiry from Respondent, Complaint Counsel indicated

[1] In an effort to minimize unnecessary duplication and waste, Respondent submits as exhibits ("Tabs") hereto only those documents which have not been previously provided to the Secretary of the Commission.

that it had not yet contacted all third parties and, despite its initial representation, had no obligation to produce third party material absent a formal request. (*Respondent's Motion for a Protective Order Regarding Discovery, November 3, 2008*).

12. In fact, no third party information collected by the FTC was made available to Respondent until November 7, 2008. Thereafter, such information was only produced to Respondent on an incremental, sporadic basis, including productions on November 10, 11, 14, 20 and 21, 2008 and on December 2, 16, 17 and 19, 2008.

13. Also on October 22, 2008, Complaint Counsel served Respondent with Complaint Counsel's First Set of Interrogatories, Complaint Counsel's First Set of Document Requests and eight Notices of Deposition – five of which were directed at individuals previously questioned at length by Complaint Counsel on the very same issues set forth in the Complaint.

14. Complaint Counsel's promise of limited discovery immediately turned into a staggering deluge of discovery, consisting of sweeping document requests and interrogatories. Both required the production of great quantities of information and documents – much of which with no conceivable relevance to the pleadings in the proceeding. (*See Complaint Counsel's First Set of Interrogatories to Respondent Polypore International, Inc., October 22, 2008, [Tab A]; Complaint Counsel's First Set of Document Requests to Respondent Polypore International, Inc., October 22, 2008 [Tab B]*).

15. Respondent sought protection from the FTC's discovery by motion (*Respondent's Motion for a Protective Order Regarding Discovery, November 3, 2008*), but its request was denied. Significantly, in its motion at that time, Respondent pointed out that if it "had known that Complaint Counsel intended to redo the extensive discovery already taken, it would have strenuously sought a different schedule than cutting discovery off at February 13, 2009, and holding the hearing in this matter on April 14, 2009." (*Respondent's Motion for a Protective*

Order Regarding Discovery, November 3, 2008). After entry of the order, Respondent proceeded in the hope that events would occur that would allow the schedule to be met, allowing Respondents the fair opportunity to develop its case. Events, however, have not turned out that way.

16. Respondent has devoted substantial resources in its attempt to comply with Complaint Counsel's document requests and interrogatories. As of January 14, 2009, Respondent has made more than 23 rolling productions of documents pursuant to Complaint Counsel's discovery requests and more remains to be produced. In Response to Complaint Counsel's discovery requests served on October 22, 2008, Respondent has now produced nearly 180,000 documents, exceeding 1.1 million pages. This is in addition to the 1.1 million pages that were produced during the FTC's investigation of this matter. The compilation, review, and production of over 2.2 million pages of documents is a massive undertaking and has already caused Respondent significant financial costs, including tens of thousands of dollars in vendors' fees and costs alone.

17. In order to comply with these discovery requests, Respondent has had to collect paper and electronic records from approximately six physical locations (in four states and three foreign countries). In an effort to meet the deadlines in the scheduling order, Parker Poe has had to utilize numerous attorneys and contract attorneys to review the collected material for responsiveness and privilege.

18. Complaint Counsel has broadened even further their massive discovery requests with Complaint Counsel's Second Set of Interrogatories and Second Set of Document Requests served on Respondent on January 13, 2009, (*See Complaint Counsel's Second Set of Interrogatories to Respondent Polypore International, Inc., January 13, 2009[Tab C];*

Complaint Counsel's Second Set of Document Requests to Respondent Polypore International, Inc., January 13, 2009 [Tab D]).

19. On October 22, 2008, at the conclusion of the scheduling conference, Complaint Counsel served Respondent with eight deposition notices. On Wednesday, November 26, 2008, at 4:18 p.m. (immediately before the Thanksgiving holiday), Complaint Counsel served an additional 24 deposition notices on Respondent. These notices were served without consultation or the courtesy of a telephone call. When challenged about this procedure, Complaint Counsel responded that it was noticing the depositions because they were in Respondent's "preliminary witness" – logic, if followed, would entitle Respondent to notice 31 third parties in Complaint Counsel's witness list, something Respondent has not done. The result has been that valuable time was required to sort through these, reduce the numbers and then work out a complex schedule in multiple locations over an extended period of time – and this, just in defense of depositions Complaint Counsel wants to take without regard to those necessary to Respondent's case.[2]

20. In the midst of Complaint Counsel's massive discovery, Respondent has also had to prepare its own defense, including the identification of necessary witnesses for trial, discovery of third parties, the review of documents produced by third parties and by the FTC, and the preparation for and the taking of necessary depositions to promote its defenses.

21. Compounding the situation, Complaint Counsel's responses to Respondent's First Set of Interrogatories Directed to the FTC have been deficient at best. Counsel for Respondent has specified in writing to Complaint Counsel those deficiencies. If the deficiencies cannot be

[2] After Respondent eliminated people from its preliminary witness list, Complaint Counsel has withdrawn some of those notices.

resolved at the "meet and confer" conference, Respondent will promptly move to compel the Commission to properly comply with its discovery requests.

22. Respondent's discovery is targeted at specific third parties which it believes are likely to possess relevant information which will be vital to Respondent's defense of the Commission's allegations. As a result, Respondent has sought discovery from only a smaller portion of the 31 third parties identified in Complaint Counsel's Preliminary Witness List, including ENTEK International LLC ("ENTEK"), Exide Technologies ("Exide"), Johnson Controls, Inc. ("JCI"), The Moore Company ("The Moore Company"), EnerSys ("EnerSys"), East Penn Manufacturing Company, Inc. ("East Penn"), Hollingsworth & Vose ("H&V") and Trojan Battery Company ("Trojan").

23. Most, if not all, of the identified third parties cooperated extensively with the FTC (and continue to do so) in the investigation leading up to the filing of the Complaint, including the production of documents and witnesses. It is necessary that Respondent also be able to obtain discovery from these third parties in order to examine the third parties' allegations in the light of the day with the relevant documents.

24. Respondent believes the information likely in the possession of the above third parties is critical to Respondent's defense to the allegations of the Commission's Complaint. Further, the information Respondent seeks is necessary for Respondent's economist to be able to formulate opinions and create an expert report. This information includes, but is not limited to, the following:

- purchasing and pricing data needed to fully understand the global market for battery separators, including the relevant suppliers' representative sales positions and pricing;
- testing and qualification data and information about competitors' manufacturing processes needed to evaluate the extent of any alleged barriers to entry in the battery separator market;

- sales data needed to evaluate whether alternative source of separators exist in several alleged battery separator markets and to determine which products may be competitive with lead acid battery separators.

25. Respondent served subpoenas *duces talcum* on these third parties and served subpoenas *ad testificandum* noticing the deposition examination of approximately twenty fact witnesses. As of the date of this filing, no deposition of third parties noticed by Respondent has taken place and only a few third parties have produced documents to Respondent.

26. Respondent's attempts to obtain discovery of third parties has been protracted and difficult. Respondent endeavored to negotiate with and accommodate third parties to the best of its abilities under the confines of the Scheduling Order in order to avoid costly and premature motions practice. For the most part, however, cooperation has not been forthcoming and compulsory process has been required.

ENTEK

27. ENTEK is a direct competitor of Polypore. ENTEK is a leading producer of polyethylene ("PE") battery separators for starting, lighting and ignition (SLI) lead-acid batteries.

28. On November 5, 2008, ENTEK International LLC ("ENTEK") filed a Motion for Protective Order seeking to prevent the disclosure of information to Respondent which was initially produced by ENTEK to the FTC in compliance with the CID. (*Third Party ENTEK International LLC's Motion for Protective Order and Proposed Order, November 5, 2008*).

29. After extensive discussions, ENTEK and Respondent were able to reach a resolution of this matter. (*Stipulation and Proposed Order Regarding Discovery Related to ENTEK International, LLC, November 17, 2008; Order on Non-Party ENTEK's Motion for a Protective Order, November 18, 2008).* Unfortunately, that resolution has proven to be illusory.

30. On November 10, 2008, Respondent served a subpoena *duces tecum* on ENTEK. ENTEK initially raised some objection to the subpoena, but such concerns were ultimately resolved and a discovery agreement was reached in principal on December 11, 2008 which allowed ENTEK to begin the production of documents.

31. As of the date of this filing, however, ENTEK has only produced a small portion of the total documents requested by the subpoena *duces tecum*, with the first installment occurring on January 5, 2009.

32. Despite the efforts of Respondent's counsel, ENTEK has continued to delay and stall in their production efforts. In light of the impending February 13, 2009 discovery cut-off, Respondent was left with no option but to file a motion to compel, which it did on January 13, 2009. (*Respondent's Motion to Compel ENTEK International LLC to Produce Documents Requested by Subpoena Duces Tecum and Proposed Order, January 13, 2009).*

33. Additionally, on December 29, 2008, Respondent served four subpoenas *ad testificandum* and noticed the depositions of 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) a corporate subpoena directed to ENTEK International, LLC.

34. 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.

35. On January 9, however, ENTEK filed a motion to quash the subpoenas *ad testifcandum* directed to Graeme Fraser-Bell and Robert Keith. (*Third Party ENTEK International LLC's Motion to Quash the Subpoenas Ad Testificandum Issues to Graeme Fraser-*

Bell and Robert Keith, January 13, 2009). Respondent is currently drafting a response to ENTEK's motion to quash which will be filed on January 18, 2009.[3] A date has not yet been scheduled for the depositions of ENTEK and Mr. Weerts, and given the current motion practice and impending deadlines, Respondent will be required to make several trips from Charlotte, North Carolina, to Oregon, or elsewhere, for these depositions, at considerable expense, if ENTEK's motions to quash are denied as they should be.

Exide

36. Exide is a purchaser of battery separators. With operations in more than 80 countries, Exide is one of the world's largest producers and recyclers of lead-acid batteries.

37. Respondent served a subpoena *duces tecum* on Exide on November 10, 2008. Exide did not file any motions or objections with this Court in response to the subpoena *duces tecum*. Soon after the subpoena *duces tecum* was first served, 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 *duces tecum*. Respondent agreed to several modifications of the subpoena *duces tecum* in order to allow Exide to begin the production of documents as soon as possible.

38. As of the date of this filing, however, Respondent has received only a handful of pages of documents from Exide – which were first produced on January 9, 2009. Thus, even though Exide reached an agreement with Respondent in early December which addressed and resolved all discovery issues and disputes raised in connection with the subpoena, only a minimal amount of documents sought by Respondent's subpoena *duces tecum* have been produced thus far. Exide's continued delay in their production efforts forced Respondent to file

[3] In light of ENTEK's Motion to Quash the deposition of Mr. Fraser-Bell, Respondent filed a Motion for Leave to Depose Graeme Fraser-Bell. This motion is pending.

a motion to compel on January 13, 2009. (*Respondent's Motion to Compel Exide Technologies to Produce Documents Requested by Subpoena Duces Tecum and Proposed Order, January 13, 2009*). That motion is pending.

39. On December 29, 2008, Respondent also 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) a corporate subpoena directed to Exide Technologies.

40. These depositions were originally noticed for January 14-16, 2009. By agreement, Respondent and Exide have re-scheduled the depositions for January 21-23, 2009. Without the documents requested by Respondent's subpoena, however, Respondent will not have an opportunity to review and analyze such documents in preparation for the depositions and will not be in a position to conduct thorough and comprehensive depositions. Consequently, Respondent will be forced to keep the depositions open pending completion of Exide's production of documents. (*See January 15, 2009 e-mail of Eric D. Welsh, Esq. [Tab E]*).

JCI

41. JCI is a purchaser of battery separators and the largest automotive battery manufacturer in the world.

42. Respondent served a subpoena *duces tecum* on JCI on November 10, 2008. JCI raised certain concerns over the subpoena *duces tecum* with counsel for Respondent in November and December 2008. Through the discussions between counsel for Respondent and JCI, JCI's concerns over the subpoena *duces tecum* were resolved and an agreement was reached with respect to the subpoena *duces tecum* on or about December 9, 2008. JCI did not begin its production, however, until January 5, 2009.

43. On or about December 31, 2008, Respondent also served three subpoenas *ad testificandum* on the following individuals and entities: (a) Mr. Flavio Almedia (JCI's Director of Procurement, Americas), (b) Mr. Rodger Hall (JCI's Vice President, Procurement), and (c) a corporate subpoena directed to JCI. These depositions were originally noticed for January 12-13, 2009.

44. Thereafter, counsel for JCI represented that JCI would not complete its production in advance of the then scheduled date for the JCI depositions. (*Stipulation and Proposed Order Regarding Discovery Related to Johnson Controls, Inc., January 14, 2009*). As a result, counsel for JCI and counsel for Respondent filed a stipulation and proposed order with this Court whereby JCI will produce documents and responses sought by the subpoena *duces tecum* to Respondent no later than January 16, 2009 and the depositions of the JCI witnesses will occur on January 27 and 28, 2009 in Milwaukee, Wisconsin. (*Id.*)

The Moore Company

45. The Moore Company is a direct competitor of Polypore, through its wholly-owned subsidiary, Amer-Sil. Amer-Sil produces microporous polymer/silica separators for industrial lead acid batteries in several of the Complaint's alleged battery separator markets, including the uninterruptible power supply ("UPS") market.

46. On October 24, 2008, Respondent had a subpoena *duces tecum* issued to The Moore Company, the parent company of Amer-Sil. From the time the subpoena *duces tecum* was first served through mid-December, counsel for Respondent and counsel for The Moore Company communicated on multiple occasions in regards to the subpoena *duces tecum* and Respondent's willingness to discuss and resolve any concerns The Moore Company may have had concerning its compliance with the subpoena *duces tecum*.

47. Nevertheless, on December 23, 2008, The Moore Company filed a motion to limit Respondent's subpoena *duces tecum* and sought cost reimbursement. (*Non-Party The Moore Company's Motion to Limit Subpoena Duces Tecum and for Cost Reimbursment, December 23, 2008*). Additionally, The Moore Company moved for *in camera* treatment of the material submitted in support of its motion to limit the subpoena *duces tecum*. (*Non-Party The Moore Company's Motion for In Camera Treatment of Material*).

48. Respondent responded to The Moore Company's motions on January 8, 2009 and additionally moved this Court to compel The Moore Company to produce documents requested by Respondent's subpoena *duces tecum*. (*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, January 8, 2009).* Those motions remain pending and as of the date of this filing, none of documents sought by Respondent's subpoena have been produced by The Moore Company.

49. On December 29, 2008, Respondent also served a corporate subpoena *ad testificandum* on The More Company. The deposition is noticed for January 29, 2009, but to date, The Moore Company has not notified Respondent's counsel whether or not it intends to proceed with a deposition on the date noticed in the subpoena.

EnerSys

50. EnerSys is a purchaser of battery separators. EnerSys is the largest industrial battery manufacturer in the world, operating manufacturing and assembly facilities worldwide for customers in over 100 countries.

51. Respondent served a subpoena *duces tecum* on EnerSys on November 10, 2008. Two days later, Counsel for Respondent and counsel for EnerSys had a telephone conversation to discuss any issues EnerSys may have had in regards to the subpoena *duces tecum*. At that time, counsel for Respondent explained Respondent's willingness to discuss and resolve any concerns EnerSys may have concerning its compliance with the subpoena *duces tecum*.

52. Instead of discussing the subpoena *duces tecum*, including the manner of production, as Respondent's counsel had initially suggested, EnerSys choose to immediately proceed with the gathering of documents. On December 5, 2008, after blindly gathering responsive documents, counsel for EnerSys suggested, for the first time, a "meet and confer" conference to discuss a number of issues EnerSys had with the subpoena *duces tecum*.

53. Thereafter, EnerSys rejected all proposals made by Respondent's counsel and refused to provide Respondent's counsel with a list of the document custodians and their responsibilities at EnerSys in order to allow a targeted search of the documents to be conducted.

54. Instead, on December 16, 2008, EnerSys moved to limit Respondent's subpoena *duces tecum* and sought an award of attorneys' fees and costs. (*EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena served by Respondent on Non-Party, December 16, 2008*). Respondent filed a response to EnerSys' motion on December 24, 2008. (*Respondent's Memorandum in Opposition to EnerSys' Motion for Award of Attorneys' Fees and Costs and to Limit Subpoena Served on Non-Party, December 24, 2008*). EnerSys' motion has been denied by order dated January 14, 2009. EnerSys has not produced a single document

sought by Respondent's subpoena *duces tecum*, although by the terms of the Order, it has ten days to do so.

55. On December 29, 2008, Respondent also served five subpoenas *ad testificandum* on the following individuals and entities: (a) Mr. John Gagge (EnerSys' Director of Engineering and Quality Assurance for the Americas and Asia), (b) Mr. Larry Burkhert (EnerSys' Senior Supply Chain Manager), (c) Mr. John D. Craig (EnerSys' Chief Executive Officer), (d) Larry Axt (EnerSys' Vice President of Procurement and Operations Planning), and (e) a corporate subpoena directed to EnerSys. Respondent's subpoenas *ad testificandum* scheduled depositions in Philadelphia, Pennsylvania on January 26-28, 2009.

56. On January 7, 2009, counsel for EnerSys indicated that given its pending motion regarding the subpoena *duces tecum*, EnerSys had not begun a review of its documents, and Respondent was unlikely to have an opportunity to review EnerSys' documents by the dates of the depositions. (*Joint Motion of Respondent and EnerSys for Leave of Court to Conduct Depositions of EnerSys and EnerSys Employees After the Discovery Deadline, January 14, 2009*).

57. At that time, Respondent indicated its position that EnerSys' failure to produce documents in advance of the depositions would force Respondent to leave the depositions open and to seek its costs in relation to resuming those depositions. (*Id.*) In light of the inefficiencies and unnecessary cost that would result from proceeding with depositions prior to EnerSys' production of documents, as a compromise, Respondent and EnerSys jointly moved this Court to allow Respondent leave to depose EnerSys employees and designees after the Court has decided EnerSys' pending Motion to Limit Subpoena even if that should occur after fact discovery deadline of February 13, 2009. (*Id.*)

58. Complaint Counsel has filed is response to that joint motion, consenting to the relief requested provided that the trial and discovery deadline not be affected. In that response, the FTC makes the wholly unsupportable allegation that Respondent has recently implemented "monopolistic price increases." Complaint Counsel's accusation is factually and legally without basis and is part of Complaint Counsel's continued inappropriate interjection of their views into Polypore's contractual relationship with its customer.

Trojan

59. Trojan is a purchaser of battery separators. It is the world's leading manufacturer of deep cycle batteries for golf carts, renewable energy, floor machine, aerial work platform, marine and recreational vehicle applications.

60. On January 13, 2009, Respondent served a subpoena *duces tecum* on Trojan and a subpoena *ad testificandum* on Trojan's president, Mr. Rick Godber. During a January 14, 2009 telephone call with Complaint Counsel, it became evident to counsel for Respondent that Trojan has raised some objections to Respondent's subpoenas to the FTC, although none has been made to Respondent's counsel. As it has done with counsel for other third parties, Respondent intends to negotiate in good faith with counsel for Trojan in order to discuss and resolve any concerns Trojan has regarding its compliance with the subpoenas. Nevertheless, Respondent's counsel is concerned by Complaint Counsel's apparent communications with Trojan – including apparently notifying Trojan of Respondent's application to the Commission for a subpoena *duces tecum*, in advance of Respondent actually serving the same upon Trojan. In particular, Respondent's counsel is surprised that Complaint Counsel would find it appropriate to actively seek to involve itself in third party discovery disputes or offer its support to Trojan in any effort Trojan may attempt to limit or quash Respondent's subpoenas. The actions of Complaint Counsel are another example of the discovery burdens Respondent is forced to unnecessarily confront.

ARGUMENT

Despite extraordinary efforts at great expense to the company, Polypore cannot effectively meet the deadlines set forth in the Scheduling Order.[4] Respondent has made every effort to avoid unnecessary delay and to ensure that the proceeding has been conducted swiftly. *See FTC Rule 3.1, 16 C.F.R. 3.1.* The Scheduling Order may be modified upon a showing of "good cause." *FTC Rule 3.21, 16 C.F.R. 3.21.* Good cause exists when a deadline in a scheduling order "cannot reasonably be met despite the diligence of the party seeking the extension." *In the Matter of Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, *2 (2002). The extensive discovery in this case, the lack of cooperation from third parties and Complaint Counsel, Complaint Counsel's massive discovery requests and Respondent's need for additional time to prepare its defense constitutes good cause. Moreover, while Complaint Counsel opposes any amendment to the Scheduling Order, Complaint Counsel has had more than six and one-half months to prepare their affirmative case before the Complaint was even filed and delayed by weeks its sharing of this information with Respondent. In contrast, Respondent has had to prepare its defense in approximately half of the time that Complaint Counsel has had to date to prepare its case while, at the same time, responding to exceedingly onerous requests for additional discovery.

Over 1.1 million pages of documents were produced by Polypore to the FTC during the investigational portion of this matter. Substantial additional documents were obtained by the FTC from third parties during the investigational portion of this matter. None of the third party data in possession of the Commission was produced to Respondent until November 7, 2008 and

[4] Respondent has complied with every discovery deadline set forth in the Scheduling Order as of the date of this motion, but is forced to request an amendment which would extend all future deadlines set forth in the Scheduling Order by one month so that Respondent can reasonably and adequately prepare its defense.

has only been provided on a sporadic basis since that time.[5] Thus, since the Complaint was issued, a great deal of time and effort has been expended by Respondent's counsel to thoroughly review these documents and effectively prepare for trial, in an attempt to "catch-up" with Complaint Counsel's six and one-half month head start. Moreover, an additional 1.1 million pages of documents have been produced by Respondent to Complaint Counsel in response to Complaint Counsel's far-reaching discovery requests.

As discussed above, since the issuance of the Scheduling Order on October 22, 2008, Respondent has been moving forward diligently with its discovery of third parties. Nevertheless, discovery in this proceeding has been extensive and time-consuming. Respondent's efforts have included issuing subpoenas *duces tecum* to competitors and customers with operations around the globe, negotiating the scope of the subpoenas to accommodate the third parties and avoid unnecessary and costly motion practice, litigating motions to limit or quash (or alternatively to compel) where agreements could not be reached, collecting, reviewing and analyzing documents, and subpoenaing third party witnesses for deposition.

The extent of third party discovery needed to defend the case and the slow rate at which third parties have been complying with the subpoenas served by Respondent necessitate an extension of time. To date, only one third party has made any substantial production pursuant to a subpoena *duces tecum* issued by Respondent. The other third parties have only recently made small productions or have refused to produce documents at all. Polypore needs this information so that it can move forward efficiently with depositions of witnesses. Additionally, Respondent

[5] In their Response to Joint Motion of Respondent and EnerSys For Leave of Court to Conduct Depositions of EnerSys Employees after the Discovery Deadline, Complaint Counsel contends that Respondent was somehow delinquent in not serving subpoenas on third parties immediately on October 22, 2008 – as Complaint Counsel did by handing their discovery to Respondent's counsel in the courtroom following the hearing before this Court on the Scheduling Order. Respondent submits that serving subpoenas on third parties is somewhat more involved than handing discovery requests to opposing counsel. Second, it certainly is not unreasonable for Respondent to opt to wait for Complaint Counsel to produce the third party documents to it before it served its subpoenas. However, given Complaint Counsel's delay in doing so, however, Respondent could not wait and proceed to serve those subpoenas.

has retained an economist to testify as an expert in this matter. Respondent's expert needs access to the discovery sought from third parties (including their production and/or sales of battery separators) in order to gain a thorough understanding of the market at issue, prepare his report, and be prepared to be deposed by Complaint Counsel. Under the current schedule, Respondent must identify its proposed witnesses and trial exhibits, including designated testimony to be presented by deposition, by February 20, 2009. The process of identifying potential exhibits from the hundreds of thousands of documents produced, preparing them for trial, and authenticating them, which under any circumstances would take a significant amount of effort, has been made even more onerous by the fact that Respondent has still not received the majority of the documents it seeks from third parties.

Moreover, as noted above, none of the deposition examinations noticed by Respondent have been conducted to date. The individual witnesses and enterprises which Respondent intends to call upon for deposition are located in seven states across the country and in several foreign countries (including the United Kingdom, Taiwan and Korea). The logistics of obtaining documents, and scheduling and taking these depositions has taken and will continue to take substantial time. Moreover, only eight of Respondent's noticed depositions have a confirmed date at this point in time. Respondent's counsel is in negotiation with counsel for several of the respective third parties, but no agreement has been reached as to when and where the noticed depositions will occur. As discussed, other third parties have objected to Respondent's subpoenas *ad testificandum* and moved to quash.

The difficulty of taking the necessary third party discovery is compounded by Complaint Counsel's onerous discovery requests. Indeed, Polypore must continue to produce documents, answer interrogatories, defend depositions, and prepare for trial at the same time Respondent is