

3. Exide's motion concerns an imminent threat to the integrity of the Commission's processes and a risk of substantial commercial harm to Exide.

Dated: October 26, 2009

Respectfully submitted,

A handwritten signature in cursive script that reads "Donald J. Russell". The signature is written in black ink and is positioned above a horizontal line.

Donald J. Russell

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Counsel for Exide Technologies

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

PUBLIC

**EXIDE TECHNOLOGIES' REPLY BRIEF IN SUPPORT OF
MOTION TO MODIFY THE PROTECTIVE ORDER**

Respondent's opposition ("Opposition") to Exide's Technologies' Motion To Modify The Protective Order ("Motion") fails to respond *at all* to Exide's central point: that persons who have had access to confidential information about Exide's strategies for negotiating a contract with Daramic (and with Daramic's competitor) should not participate in Daramic's ongoing contract negotiations with Exide, or advise those who are conducting those negotiations. The Commission should not permit its processes to be invoked by Daramic to demand production of confidential information from Exide, then allow Daramic to use that information for its own commercial advantage. The *use* of confidential information in commercial negotiations, not merely the "disclosure" of that information, is improper.

The Opposition does *not* deny that Parker Poe or Michael Shor have participated in or advised Daramic in its negotiations with Exide. Respondent cannot deny that Mr. Shor has done so, because his letter to Exide (Motion, Exhibit 1) clearly constitutes such participation, in direct contravention of his representations to the Commission (see

Motion at 3) and to Complaint Counsel (see Opposition, Exhibit A at 1).¹ And whatever Mr. Shor and Parker Poe may have done in the past, they make no representation in the Opposition that they will refrain from participating in or advising on negotiations in the *future*. Respondent does not even concede that such activity would be improper.

To the limited extent that the Opposition addresses the merits,² it focuses entirely on whether Mr. Shor has seen Exide confidential information in the past. But the Opposition relies on Mr. Shor's letter to Complaint Counsel in which he stated (in May 2009) that in the future, he *will* "continue to have access to the designated [hearing] exhibits of the remaining Permitted Parties" – which are defined in the letter to *include* Exide. Moreover, there can be no dispute that Parker Poe has had, and will continue to have, complete access to confidential Exide information.

In short, the Opposition makes clear that (1) Parker Poe has complete access, and Mr. Shor believes he is entitled to have access, to Exide's confidential information, (2) Parker Poe and Mr. Shor have advised or participated, or may in the future advise or participate, in Daramic's contract negotiations with Exide, and (3) Parker Poe's and Mr. Shor's position is that such conduct is entirely proper and permissible. Under these circumstances, modification of the Protective Order is needed to prevent Respondent's misuse of confidential information for commercial advantage and to protect the integrity of the Commission's processes.

¹ The Opposition describes this letter as a discussion of "Daramic's obligations under the existing contract with Exide" but, as the letter makes clear, Mr. Shor and Daramic were proposing to address those obligations under a *new* contract. Respondent's assertion that Mr. Shor's letter did not disclose any confidential information obtained from Exide is entirely irrelevant; what matters is that the letter clearly evidences Mr. Shor's involvement in ongoing contract negotiations.

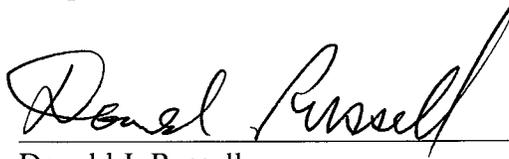
² The Opposition (at 3) implies that the Motion was filed for the purpose of "harassment" and suggests, without explanation, that the timing of the motion two weeks before a hearing was suspicious. There is no harassment here. Exide's concerns about the misuse of confidential information were greatly increased when it became apparent that its ongoing negotiations with Daramic would be a central focus of the re-opened hearing, and that Daramic would seek additional discovery by deposition of up-to-the-minute confidential information, simultaneously with a critical period in the ongoing contract negotiations.

CONCLUSION

Exide's motion to modify the Protective Order should be granted.

Dated: October 26, 2009

Respectfully submitted,



Donald J. Russell

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing Exide Technologies' Motion For Leave To File A Reply Brief In Support Of Its Motion To Modify The Protective Order and Reply Brief In Support Of Motion To Modify The Protective Order, 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:

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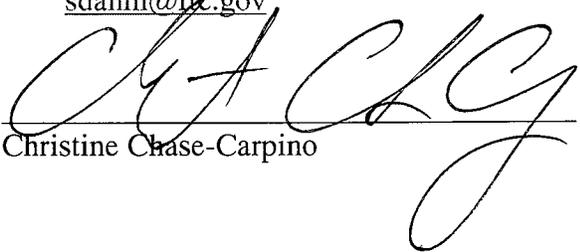
I hereby certify that on October 26, 2009, I caused to be served one copy via electronic mail delivery and two copies via hand delivery of the foregoing Exide Technologies' Motion For Leave To File A Reply Brief In Support Of Its Motion To Modify The Protective Order and Reply Brief In Support Of Motion To Modify The Protective Order upon:

The Honorable D. Michael Chappell
Administrative Law Judge
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I hereby certify that on October 26, 2009, I caused to be served by first class mail delivery and electronic mail delivery a copy of the foregoing Exide Technologies' Motion For Leave To File A Reply Brief In Support Of Its Motion To Modify The Protective Order and Reply Brief In Support Of Motion To Modify The Protective Order upon:

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