

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of Polypore International, Inc. a corporation.)))))))	PUBLIC Docket No. 9327
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**RESPONSE TO RESPONDENT’S MOTION FOR
OFFICIAL NOTICE OF RECENT ACQUISITION OF DOUGLAS BATTERY BY
ENERSYS**

In its request for Official Notice of EnerSys’ recent purchase of Douglas Battery, Respondent suggests the Court make improper inferences based on EnerSys’ related 8K filing. Like its F.R.E. counterpart¹, Rule 3.43(d) of the Federal Trade Commission Rules of Practice has been interpreted to allow taking official notice of facts not subject to reasonable dispute. While the fact that the S.E.C. filing exists is not subject to reasonable dispute, arguments or inferences related to the fact of the filing are, however, subject to dispute.²

By seeking official notice of EnerSys’ 8K, Respondent attempts to bolster its power buyer argument with facts which are not part of the record and therefore not subject to cross examination. As noted by the Administrative Law Judge in the *Rambus* matter cited by respondent, “official notice may not be used as a method to engage in any interpretation of the

¹ F.R.E. 201(b) states “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

² Respondent’s argument that powerful buyers can discipline Daramic in the event of an anticompetitive price increase is disputed by Complaint Counsel and its position has been comprehensively briefed for this Court.

subject matter. . . .” *In re Rambus*, 2003 WL 22064718 (FTC Aug. 27, 2003).

This limited nature of official/judicial notice is well established. In *Kushner v. Beverly Enterprises*, the Eighth Circuit used similar language when a defendant attempted to use judicial notice to further argue its position. *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 832 (8th Cir. 2003). There, the issue was whether the trial judge erred when he refused to judicially notice certain SEC filings the defense had requested. The Circuit Court held that the trial court’s refusal was proper because the documents were offered for the truth of the matters asserted within them, and the facts and inferences that the defense was attempting to establish were in dispute. *Id.*

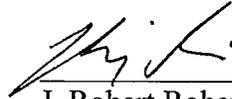
CONCLUSION

Respondent’s motion improperly makes inferences concerning Enersys’ supposed purchasing power based on the mere fact of its 8K filing. As shown above, this is an improper use of Rule 3.43(d) and Respondent’s motion should be denied accordingly. In the event that Your Honor decides to take official notice of the 8k filing, it is Complaint Counsel’s position that such notice should be limited to the fact of the filing, which is not disputed, but exclude all inferences and arguments Respondent has made in reference to this filing.³

³ In so far as Respondent presents an issue material to the power buyer argument it promoted at trial, it is worthwhile to highlight for Your Honor that EnerSys’ purchase of Douglas battery has done nothing to alter the competitive landscape for industrial battery separators in North America. Thus, any inference to the contrary is completely refuted by the evidence in this case. For example, both EnerSys and Douglas Battery testified that Daramic was the only available supplier of industrial separators (e.g. motive and UPS) for flooded lead acid battery manufacturers in North America. (*See* Axt, Tr. 2101; Craig, Tr. 2611; Douglas, Tr. 4076). Moreover, every industrial battery manufacturer (large and small) called before Your Honor testified that [REDACTED] industrial separators for flooded lead acid batteries. (*See* Gillespie, Tr. 5829, *in camera* (Exide); Balcerzak, Tr. 4127-4128 (Crown Batteries); Craig, Tr. 2611 (EnerSys); Lesiter, Tr. 4027-4028 (East Penn); Benjamin, Tr.

Dated: January 22, 2010

Respectfully submitted,



JRR

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3522, 3526, 3533 (Bulldog Battery). EnerSys' acquisition of Douglas does absolutely nothing to change this crucial fact.

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I filed via hand and electronic delivery an original and two copies of the foregoing Complaint Counsel's Response to Respondent's Motion for Official Notice of Recent Acquisition of Douglas Battery by EnerSys with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580

I hereby certify that on January 22, 2010, I filed via hand and electronic mail delivery two copies of the foregoing Complaint Counsel's Response to Respondent's Motion for Official Notice of Recent Acquisition of Douglas Battery by EnerSys with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580
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I hereby certify that on January 22, 2010, I filed via electronic and first class mail delivery a copy of the foregoing Complaint Counsel's Response to Respondent's Motion for Official Notice of Recent Acquisition of Douglas Battery by EnerSys with:

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