



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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_____)

Docket No. 9327

PUBLIC DOCUMENT

**RESPONDENT'S RESPONSE TO COMPLAINT COUNSEL'S MOTION TO COMPEL
PRODUCTION OF DISCOVERY RESPONSES**

Respondent Polypore International, Inc. ("Polypore") hereby submits its memorandum in opposition to Complaint Counsel's Motion to Compel Discovery Responses. In its Motion, Complaint Counsel seeks to compel Respondent to respond to written discovery requests including 14 additional interrogatory requests, 12 additional document requests, and 19 requests for admission in five business days or less. Complaint Counsel fails to cite any Federal Trade Commission rule that supports his unilateral written discovery. For the reasons set forth below, Respondent respectfully requests that the Court deny Complaint Counsel's motion in its entirety.

INTRODUCTION

On October 15, 2009, the Honorable D. Michael Chappell entered an Order granting Respondent's Second Motion to Reopen the Hearing Record and Setting Hearing Schedule (hereinafter referred to as the "Order") to allow the reception of additional evidence limited to Respondent's proffer as set forth in the Order. The Order sets the commencement date for the hearing for November 4, 2009, two weeks from today. The Order also provides for certain limited deposition discovery for that half-day hearing but significantly sets forth no right to serve

written discovery or to serve subpoenas seeking production of documents from third parties. The Order also sets forth the deadlines for completing the limited depositions, exchanging witness and exhibit lists, exchanging objections to such lists, filing stipulations with the Court, filing objections to testimony or exhibits, filing *in camera* motions, and filing post-hearing supplemental briefs and proposed findings of fact. With this schedule, the “Order provides Complaint Counsel with pre-hearing procedures to ensure that Complaint Counsel is capable of effective rebuttal.” Order, p. 7.

Without first seeking leave from this Court, Complaint Counsel, on October 16, 2009, served their Third Set of Interrogatories and Third Set of Document Requests on Respondent. The Interrogatories, without authority, demand that Respondent provide objections and answers by October 23, 2009 – only five (5) days after service of the requests. The Document Requests similarly, without authority, demand that Respondent provide objections and produce all responsive documents (including hard copy and electronic information) by October 23, 2009. Furthermore, Complaint Counsel served their First Set of Requests for Admissions on October 19, 2009 (along with Complaint Counsel’s Third Set of Interrogatories and Third Set of Document Requests, defined herein as the “written discovery”). Yet, even though only serving the Request for Admissions on Respondent on October 19, Complaint Counsel still, without authority, demands that Respondent respond and serve objections to those Requests by October 23, 2009 – only four (4) days after service. Respondent’s counsel has advised Complaint Counsel of its objections to this written discovery. Simultaneously with this response, Respondent has served its initial objections to Complaint Counsel’s written discovery. See Attachment A hereto.

ARGUMENT

First, Complaint Counsel cites no authority, other than a strained reading of the Order, to support his unilateral written discovery of Respondent. Complaint Counsel acknowledged that he had no authority for seeking this discovery. In a conference call with Respondent's counsel on October 19, 2009, Respondent noted to Complaint Counsel that the Order does not permit Complaint Counsel's written discovery. Without missing a beat, Complaint Counsel retorted: "That's fine, if you won't give us your documents, we won't give you ours." Complaint Counsel made a similar statement at the end of that conference call as well. Not a word was uttered by Complaint Counsel or his staff during that call about any purported justification under the Federal Trade Commission rules or the Order for this discovery.

In his motion, Complaint Counsel does not contend that the Order explicitly provides the right to the parties to conduct written discovery in advance of the November 4 hearing. Rather, Complaint Counsel attempts to create an argument that the Order "clearly contemplates that Complaint Counsel will conduct [his written] discovery," because the Order "explicitly provides for an exchange of exhibit lists." Motion, p. 3. Yet, Complaint Counsel ignores several relevant parts of the Court's Order which contradict its "contemplation" argument. In fact, this Court, in addressing Complaint Counsel's prior prejudice argument, which was asserted in response to Respondent's Second Motion to Reopen the Hearing Record, noted that unlike with Respondent's First Motion to Reopen, which the Court denied in part on a showing of prejudice to Complaint Counsel, no such prejudice exists here:

No such prejudice exists here, where, as set forth below, Complaint Counsel will be allowed to conduct cross-examination and provide briefing and argument on the evidence described in the proffer.

Order, p. 6. Of course, Complaint Counsel ignores that no mention is made of a right to written discovery here. Moreover, the Order continues to state that:

All depositions, witness and exhibit lists, offers of evidence, and post-hearing supplemental briefs and proposed findings of fact shall be limited to the proffered evidence.

Order, p. 7. Again, Complaint Counsel ignores that no mention is made of document requests, interrogatories, requests for admission or subpoenas *duces tecum*.

Moreover, Complaint Counsel fails to explain how the Order “contemplates” serving requests for admissions and interrogatories, which actually violate the limitations imposed by the Court in its Scheduling Order in any event. *See* Scheduling Order dated October 22, 2008 (limiting Complaint Counsel’s interrogatories to 50). Exchanging exhibit lists has nothing to do with interrogatories or requests for admission. This non-sequitur aptly demonstrates the reaching nature of Complaint Counsel’s argument. Complaint Counsel is simply not entitled to written discovery under the Order and is not prejudiced by not having it, since Complaint Counsel can “conduct cross-examination and provide briefing and argument on the evidence described in the proffer.” Order, p. 6.

Finally, Complaint Counsel fails to mention the relationship it has maintained with Exide throughout the course of this litigation. Complaint Counsel has previously obtained information and documentation from Exide that has not been voluntarily offered by Exide to Respondent. Complaint Counsel has access to information from Exide that Respondent does not have in its possession or have any knowledge of. For example, Complaint Counsel obtained the Declaration of Douglas Gillespie which it submitted in its Response to Respondent’s Second Motion to Reopen the Hearing Record. Complaint Counsel has shown repeatedly an ability to

obtain documents and information from Exide, and there are no facts indicating that they are not pursuing the same course here today.

Permitting Complaint Counsel to interpret the Court's Order to provide for written discovery is extraordinarily prejudicial to Respondent. Respondent has not been presumptuous to interpret the Court's Order to provide for something which is not explicitly stated and for that reason has not served written discovery on Complaint Counsel. In addition, Respondent has not sought the issuance of a subpoena *duces tecum* from the Secretary to serve on Exide. Rather, Respondent only obtained a subpoena *ad testificandum* from the Secretary on October 16, 2009, which it then served on Exide for the deposition of Douglas Gillespie. That deposition is scheduled to occur on Thursday, October 22, 2009, at 1:00 p.m. in Atlanta, Georgia. Respondent will be greatly prejudiced if Complaint Counsel is permitted to engage in unilateral written discovery while Respondent does not have the benefit of such discovery from either Exide or Complaint Counsel in advance of Mr. Gillespie's deposition.

Complaint Counsel's demand for responses and document production in the span of five (5) days is without any basis in the FTC Rules. Under the FTC Rules, when written discovery is permitted, Respondent would have 30 days to respond. *See* 16 C.F.R. §3.32(a), 16 C.F.R. §3.35(2), 16 C.F.R. §3.37(b). Although this Court's Scheduling Order entered October 22, 2009 shortens that time, Respondent would still have twenty (20) days to respond under the Scheduling Order. Complaint Counsel has unilaterally taken it upon himself to rewrite the rules of the FTC, as well as this Court's Order, to demand that Respondent produce documents, and provide responses to interrogatories and requests for admission, and to do so in five days or less.

Complaint Counsel contends that the written discovery is not burdensome (Motion, p. 4), yet the first sentence of its motion reveals just how burdensome its requests are: "Complaint

Counsel respectfully moves the Court to compel Respondent to produce *all* documents identified . . .” Motion, p. 1 (*emphasis added*). Since Complaint Counsel uses an extremely broad definition of “documents,” which includes, among other things, electronically maintained documents (*see e.g.* Document Requests, Definition D), Complaint Counsel’s supposed non-burdensome written discovery would require not only written responses, objections and production of hard copy documents on 12 different subjects in five days, but would also require the production of all electronic data. From past practice with Complaint Counsel, such a task is neither simple nor easy. During the initial discovery period in this proceeding, Complaint Counsel submitted only thirteen (13) document requests to Respondent. In response to these previous requests, Respondent had to search the electronic and paper files of thirty (30) custodians and ultimately produced over 1.5 million pages of documents. If Respondent is required to respond to Complaint Counsel’s additional document requests, Respondent will have to collect data from numerous custodians, process and review the data to determine responsiveness, review the data for privilege, and produce any responsive, non-privileged documents. Given the breadth of Complaint Counsel’s document requests, this undertaking would last well into November – clearly beyond the hearing date and schedule contemplated in the Order Setting Hearing Schedule.

In addition, Complaint Counsel requests Respondent to “state all facts regarding conversations, meetings or emails between Daramic and Exide from June 12, 2009, to the present, related to any negotiations relating to Daramic supplying Exide with flooded lead-acid battery separators in 2010 and beyond and identify: a) who was present; b) each topic of discussion and c) all exchanges of information.” *See* Interrogatory No. 53. As demonstrated by the foregoing interrogatory, much of the discovery requested by Complaint Counsel is overly

broad, unduly burdensome, impermissibly vague or ambiguous, or requires unreasonable efforts or expense on the part of Respondent to respond. The undue burden imposed by these interrogatories is further evidenced by Complaint Counsel's sweeping definition of "relating to" which means "in whole or in part constituting, containing, concerning, discussing, describing analyzing, identifying or stating" (Interrogatory, Definition O).

Complaint Counsel also contends that the discovery requests are "tailored" to the four proffers. Complaint Counsel's contention is wrong. For example, Complaint Counsel's requests reach back to the period prior to the close of the record. *See e.g.* Request for Production, Instruction No. C: ("Unless otherwise specified, provide documents from March 13, 2009, to the present.") Complaint Counsel's interrogatories seek information regarding Daramic price increases for *all* of its customers. *See* Interrogatory No. 54. Complaint Counsel's Request for Admission seeks an admission to a tired topic heard repeatedly during the hearing which occurred in May 2007. *See* Request for Admission No. 8 ("Admit that Respondent structured its response to {
}."). These written discovery requests, which often retread old ground, exceed the Court's imposed limitation on the scope of the deposition discovery.

The Order limits the proffer of new evidence to four topics. Moreover, the Order sets forth very tight deadlines leading up to the hearing on November 4, 2009. Even without the many problems identified above, requiring Respondent to respond to Complaint Counsel's additional discovery requests is unduly burdensome and oppressive, and would require Respondent to devote significant time, effort and resources to search numerous custodians for responsive information and documents. For example, Complaint Counsel seeks a large number

of documents, including all documents discussing negotiations with Exide, pricing and cost documentation, detailed financial documents about the { } documents and notes from every member of the Polypore Board of Directors, and the latest version of the AFS database. These requests would require Respondent to glean large volumes of information from its computer systems and employees as well as review this information for relevance and privilege – not an easy task and certainly not a quick one.

Finally, requiring Respondent to respond to Complaint Counsel's written discovery is would cause Respondent to devote its resources in such a manner that it would not be able to effectively prepare for the hearing on November 4, 2009. If Respondent must respond to Complaint Counsel's discovery requests, then in the interests of justice, the right must be reciprocal, Respondent must be afforded the right to serve a subpoena *duces tecum* on Exide, Respondent must be afforded the right to retake Mr. Gillespie's deposition related to Exide's and/or Complaint Counsel's documents, and the hearing must be delayed in order to provide Respondent and Respondent's counsel adequate time to engage in this discovery and prepare for the hearing.

In its Second Motion to Reopen the Hearing Record, Respondent moved for a proffer of specific, limited evidence. The Court's Order recognizes and allows the receipt of new evidence on a limited basis, and sets forth a simple and straightforward schedule leading up to the hearing. By serving written discovery, Complaint Counsel is ratcheting up what is supposed to be a simple and specific proffer of evidence. Moreover, it appears the Court already considered the possibility of additional written discovery by entering an Order which does not provide for written discovery, but rather provides for depositions. Given the short timeframe set forth in the

Order, the proffer of new evidence ought to be kept simple and straightforward both in terms of additional discovery and in terms of the length of the hearing.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Complaint Counsel's Motion to Compel Production of Discovery Responses.

Dated: October 23, 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) 334-4706

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 October 23, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Response to Complaint Counsel's Motion to Compel Production of Discovery Responses [Public]*** 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 October 23, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing ***Respondent's Response to Complaint Counsel's Motion to Compel Production of Discovery Responses [Public]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

I hereby certify that on October 23, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Response to Complaint Counsel's Motion to Compel Production of Discovery Responses [Public]*** 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



Adam C. Shearer
PARKER POE ADAMS & BERNSTEIN LLP
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 372-9000
Facsimile: (704) 334-4706

EXHIBIT A

**ATTACHMENT TO RESPONDENT'S RESPONSE TO
COMPLAINT COUNSEL'S MOTION TO COMPEL
DISCOVERY RESPONSES**

**POLYPORE INTERNATIONAL, INC.
A CORPORATION**

DOCKET NO. 9327

