ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	**Docket No. 9327**
	)	
	)	**PUBLIC DOCUMENT**[1] [2]
Polypore International, Inc.	)	
a corporation	)	
	)	

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*

Respondent Polypore International, Inc. ("Polypore") submits its 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. By it's cross-motion, and pursuant to Federal Trade Commission Rules of Practice section 3.38(a), Respondent's counsel also respectfully moves the Court to compel The Moore Company to produce all documents requested by Respondent's subpoena *duces tecum* directed to The Moore Company and served on November 6, 2008.

PRELIMINARY STATEMENT

The Moore Company seeks to limit a subpoena, served upon it by Polypore, which requests documents that go to central issues raised in the Federal Trade Commission's ("FTC" or

[1] Respondent's memorandum refers to and contains information identified as "Confidential Material" under the terms of the Protective Order entered in this matter. Such "Confidential Material" has been highlighted in the complete version of Respondent's memorandum and has been redacted and labeled "[Redacted – Subject to Protective Order]" in the public version of Respondent's memorandum.

[2] Respondent's memorandum refers to and contains information subject to The Moore Company's pending Motion for *In Camera* Treatment of Material pursuant to Rule 3.45(b) of the FTC's Rules of Practice. Such information has been highlighted in the complete version of Respondent's memorandum and has been redacted and labeled "[Redacted – Subject to Pending Motion for *In Camera* Treatment]" in the public version of Respondent's memorandum.

"Commission") Complaint (the "Complaint") in this matter and raised by Polypore in defense thereto. The Complaint contends that Polypore's acquisition of Microporous Products L.P. ("Microporous") led to a monopoly in the alleged deep-cycle, motive, and UPS battery separator markets and led to higher prices and decreased competition in the alleged automotive battery separator market. The Complaint further alleges that there are significant barriers to entry in these alleged markets.

In order to properly defend itself, particularly on the critical issues of "relevant product markets" and/or "relevant geographic markets," Polypore has sought to obtain necessary evidence from a number of third parties, including Amer-Sil, S.A. ("Amer-Sil") – a wholly owned subsidiary of The Moore Company. The Moore Company, in seeking to limit the subpoena, overlooks the fact that its compliance with the subpoena is necessitated by the allegations included in the Complaint and Polypore's defenses thereto. The Moore Company has offered to produce documents only from the time period of 2007 through the date of the subpoena and related only to its North American (1) gross revenue; (2) average sales price; (3) annual production volume; (4) annual production capacity; and (5) customer lists. (Memorandum at p. 6). Such a limited response is insufficient, however, as Respondent's intended defense requires worldwide information both on a transaction-specific and customer-specific basis from January 2003 to the present. Moreover, The Moore Company's motion to limit the subpoena is based on conclusory claims of undue burden which lack any specificity.

Polypore's subpoena is tailored to seek documents pertinent to the issues raised by the FTC in the Complaint and to Polypore's defense. Nevertheless, The Moore Company seeks to limit the subpoena, claiming that (1) the subpoena does not seek relevant information; (2) compliance would be overly burdensome; (3) the subpoena should be limited due to confidentiality concerns; and (4) it should be reimbursed for the costs of compliance. None of

the arguments has any merit, and The Moore Company's motion should be denied. Additionally, for the reasons set forth herein, The Moore Company should be ordered to promptly comply with Respondent's subpoena *duces tecum*.

FACTUAL BACKGROUND

Amer-Sil is a wholly-owned subsidiary of The Moore Company, which is located in Rhode Island. (Amer-Sil Company Profile)(Tab A). [Redacted – Subject to Protective Order]. [Redacted – Subject to Pending Motion for *In Camera* Treatment], Amer-Sil is an important participant in the battery separator market and stands to be impacted by the outcome of Respondent's proceedings with the FTC.

The subpoena in question originated in an adjudicatory proceeding currently pending before the Commission in which Polypore is alleged to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 45, by its acquisition of Microporous. In order to obtain the information necessary for its defense, Polypore applied to the Commission's Administrative Law Judge for issuance of several subpoenas *duces tecum* to participants in the battery separator industry – including both manufacturers of batteries and separators. On October 24, 2008, one such subpoena was issued to The Moore Company, the parent company of Amer-Sil, pursuant to the Commission's authority under Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which provides that "the Commission shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation." The subpoena was served on The Moore Company on November 6, 2008. (Memorandum at p. 1). Materials responsive to the subpoena were to be produced for inspection on December 1, 2008.

On November 25, 2008 counsel for The Moore Company sought an extension of time through December 10, 2008 to respond to the subpoena or to file a motion to limit the subpoena.

Counsel's request was agreed to by Respondent's counsel. (Memorandum, Ex. A). On December 10, 2008, The Moore Company's counsel sought and was granted an additional week's extension, through December 17, 2008, to file a motion seeking protection from Respondent's subpoena.[3] *Id.*

From late-November through mid-December, counsel for Respondent and counsel for The Moore Company communicated on multiple occasions in regards to the subpoena. At that time, counsel for Respondent explained Respondent's willingness to discuss and resolve any concerns The Moore Company may have concerning its compliance with the subpoena. *Id.* During these discussions, the main issue raised by counsel for The Moore Company with respect to the subpoena was whether Respondent had jurisdiction over The Moore Company's wholly-owned subsidiary, Amer-Sil. *Id.* The Moore Company's counsel never contested, with any specificity, the relevance of the subpoena requests or the burden to comply with the subpoena, nor did its counsel ever raise any specific concerns about the production of confidential documents under the terms of the Protective Order. *Id.* Instead, The Moore Company took a categorical approach to the type of documents it would be willing to produce and the timeframe from which it would produce such documents. *Id.* In lieu of addressing any concerns as to scope, burden and privilege on a point-by-point basis with Respondent's counsel, counsel for The Moore Company instead took the position that the subpoena was not valid since many of its requests were directed at The Moore Company's wholly-owned foreign subsidiary, Amer-Sil, and as a result, offered only a limited, categorical "compromise" in regards to The Moore Company's obligations under the subpoena. When Respondent could not agree with The Moore Company's proposed "compromise", The Moore Company filed its untimely Motion on

[3] The Moore Company's Motion to Limit Subpoena *Duces Tecum* and For Cost Reimbursement, and a memorandum in support thereof, was ultimately untimely served on the evening of December 23, 2008.

December 23, 2008. By refusing to engage in a meaningful discussion as to any specific concern raised by Respondent's subpoena, The Moore Company's counsel has failed to abide by its "meet and confer" obligation. Respondent cannot afford any further delay from The Moore Company, as important deadlines are approaching. Respondent requests, for the reasons stated herein, that The Moore Company's motion be denied in its entirety and that The Moore Company be ordered to comply with Respondent's subpoena.

ARGUMENT

I. The Moore Company's Motion to Limit Subpoena Duces Tecum and for Cost Reimbursement Should be Denied.

The Moore Company seeks a protective order limiting and delaying Polypore's request for materials that are critical to Polypore's defense in this proceeding. For the reasons set out below, The Moore Company's objections to Respondent's subpoena are without merit and its motion to limit the subpoena should be denied.

A. POLYPORE'S SUBPOENA SEEKS RELEVANT INFORMATION

The Moore Company contends that the subpoena should be limited because it seeks documents that are not relevant to the underlying FTC proceeding. (Memorandum at p. 1). [Redacted – Subject to Pending Motion for *In Camera* Treatment]. In arguing that the subpoena should be limited, The Moore Company ignores the issues raised by the pleadings and fails to place the subpoena in its proper context.

The FTC's Rules allow Polypore to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of [the] respondent." *16 C.F.R. § 3.31(c)(1) (emphasis*

added). Discovery should be limited only if the burden outweighs the benefit. *Id.* Moreover, "public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on their defense) be given the opportunity to develop those facts which are essential" to support or undermine the allegations in the pleadings. *In re Gen. Foods.*, No. 9085 C, 1978 FTC LEXIS 412 at *6 (April 18, 1978). The applicant for a subpoena need only show that the materials sought are generally or reasonably relevant. *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *4 (Nov. 12, 1976). In contrast, the subpoenaed party bears "[t]he burden of showing that the request[s] are unreasonable." *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18, 2002). Such a showing is a heavy burden, even when the subpoena is directed at a non-party. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96 at * 15 (Mar. 19, 1982).

Thus the Court's inquiry is whether the subpoena seeks information that is reasonably expected to be "generally relevant to the issues raised by the pleadings." *Id.* at *14. Plainly, it does and The Moore Company misapplies the relevant legal standard and fails to understand – or utterly ignores - the scope or nature of the issues raised in this proceeding.

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. The Moore Company's position mistakenly ignores Respondent's defenses to the Complaint. Throughout these proceedings Respondent has consistently made its defenses clear:

- Respondent admits that it develops, manufactures and markets battery separators in a global market. (Answer, ¶ 4)(*emphasis added*).

- Respondent has denied the Complaint's allegation that the relevant product areas in which to analyze the transaction are the separator markets for flooded lead-acid batteries in the deep-cycle, motive, automotive and uninterruptible power supply stationary ("UPS") batteries. (Answer, ¶ 5).

- Respondent has also denied that the transaction violates the antitrust laws in an all Polyethylene ("PE") separator market. (Answer, ¶ 6).

- Respondent has denied that the relevant geographic market in which to analyze the effects of this transaction is limited to North America. (Answer, ¶ 14).

- Respondent has also denied that producers of battery separators for motive, UPS, and automotive applications outside of North America are at a cost disadvantage in the supply of these separators to North American customers. (Answer, ¶ 16).

- Respondent has denied the allegation that since the acquisition of Microporous by Daramic, there are just two battery separator companies that supply North America. (Answer, ¶ 16).

- Respondent has repeatedly denied the characterization of "automotive, motive, UPS and all PE markets" as distinct and proper markets. (Answer, ¶ 42).

- Most importantly, as an affirmative defense, Respondent asserted that the relevant product and geographic market definitions alleged in the Complaint fail as a matter of law. (Answer, Third Affirmative Defense; *see also* Resp. Mot. to Dismiss, n. 55 ("Polypore disputes the designations of the markets as alleged by the FTC and will assert its defenses to the market claims as necessary at the hearing before the ALJ")).

Under the FTC's discovery standard, Polypore is entitled to seek evidence which will support these defenses. *16 C.F.R. §3.31(c)(1).* As such, the documents and information sought by Respondent in it subpoena to The Moore Company are not only relevant, but are essential to its defense of the FTC's case.

The two pillars of The Moore Company's "lack of relevancy" argument are that [Redacted – Subject to Pending Motion for *In Camera* Treatment]. The Moore Company's argument misses the mark and fails to grasp the nature and scope of Respondent's defense.

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. [Redacted – Subject to Protective Order]. As The Moore Company points out, a relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced -

- price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); (Memorandum at p. 9). [Redacted – Subject to Pending Motion for *In Camera* Treatment].

[Redacted – Subject to Pending Motion for *In Camera* Treatment] one of Respondent's central defenses to the Commission's Complaint is that the relevant product market should be defined as to include all lead-acid battery separators (including gel and AGM products) instead of being limited only to the flooded lead-acid battery separators. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Moreover, it is Respondent's fundamental contention that the relevant geographic market is not limited to North America, but is instead a worldwide battery separator market. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

[Redacted – Subject to Protective Order][4].

Even if The Moore Company's characterization of the relevant product and geographic markets was accurate, which it is not, it would still be a illogical to conclude that the subpoena does not seek information reasonably relevant to the allegations of the Complaint and Respondent's defenses thereto. For example, the Complaint alleges that North American battery manufacturers prefer domestic sources of battery separators and, consequently, battery separator manufacturers from abroad do not find it practical to compete in North America. (Complaint at ¶¶ 16-17). [Redacted – Subject to Pending Motion for *In Camera* Treatment].[5] Surely, Respondent is entitled to discovery of Amer-Sil to explore the validity of the FTC's charges.

Finally, the relevance of Amer-Sil's position in the battery separator market is evidenced by the fact that the FTC sought an affidavit from Amer-Sil during the course of its investigation

[4] [Redacted – Subject to Protective Order].

[5] [Redacted – Subject to Pending Motion for *In Camera* Treatment].

of this matter. (*See* Dauwe FTC Aff.). In fact, several statements contained in the investigative affidavit are contrary to Respondent's assertions. It would be extremely prejudicial to Respondent if it is not able to obtain the information that formed the basis of such statements and allegations which it needs in order to examine the proffered statements' veracity and/or illuminate the statements in their appropriate context if the FTC is to use this affidavit in any way in this case.

[Redacted – Subject to Protective Order]. One of the Commission's allegations in its Complaint is that the length of time necessary for the qualification of products in the battery separator industry serves as a formidable barrier to potential market entrants. (Complaint, ¶ 33). In its defense, Respondent intends to refute this allegation. Without access to the information which formed the basis of the FTC's allegation [Redacted – Subject to Pending Motion for *In Camera* Treatment], Respondent will be hindered in its defense. (*See, e.g.,* Subpoena, ¶ 27). Such a situation is manifestly unjust. The Moore Company's attempt to unilaterally define the "Relevant Product Markets" and "The Relevant Geographic Market" in order to avoid compliance with the subpoena and without regard to Respondent's right to put forth its defense to the FTC's allegations must be rejected. The Moore Company's mischaracterization of the underlying issues in this matter should not allow it to circumvent the FTC's subpoena power. Polypore must have access in discovery to The Moore Company's documents relating to the issues raised in the pleadings in order to properly prepare its defense.

B. POLYPORE'S SUBPOENA IS NOT OVERLY BROAD OR UNDULY BURDENSOME AND SHOULD NOT BE LIMITED BY THE COURT

The Moore Company also argues that the subpoena should be limited because it would be unduly burdensome for it to comply with the subpoena. In its motion, however, The Moore Company fails to set forth any evidence supporting its contention. The burden of showing that a

subpoena is unduly burdensome is on the subpoenaed party. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977). This is true even if the subpoenaed party is a non-party. *See In re Flowers Indus., Inc.*, 1982 FTC LEXIS at * 14. While courts are "not unmindful of the tremendous impact which compliance with such subpoenas can have upon companies which appear to be innocent bystanders. The cost of effective economic regulation . . . is one which must be shared by all industry, indeed by the entire society." *FTC v. Dresser Indus., Inc.*, Misc. No. 77-44, 1977 DIST. LEXIS 16178 at *16 (D.D.C. Apr. 26, 1977).

Courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously hinder the normal operations of a business. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977). Broadness alone is not a sufficient justification to refuse enforcement of a subpoena. *Id.* The Moore Company, therefore, must put forth specific evidence that demonstrates such an undue disruption; a "general, unsupported claim [of burden] is not persuasive." *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19. This is especially true where a third-party, like The Moore Company's wholly-owned subsidiary - Amer-Sil, is in the same industry that is the subject of the proceeding, stands to benefit depending on the outcome of the proceeding, and therefore has "a special stake in seeing that an informed judgment is rendered." *In re Coca-Cola Bottling Co.*, No. 8992, 1976 FTC LEXIS 33 at * 6 (Dec. 7, 1976).

The Moore Company puts forth no specific evidence to show that compliance with the subpoena would be unduly burdensome, [Redacted – Subject to Pending Motion for *In Camera* Treatment] The Moore Company has failed to meet its evidential burden. This is manifestly insufficient to support a limitation of the subpoena. Indeed, "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." *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19-20. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Remarkably, counsel for The Moore Company failed to raise any specific issues of scope or burden with Respondent's counsel prior to filing this motion – [Redacted – Subject to Pending Motion for *In Camera* Treatment]. On several occasions, Respondent's counsel expressed to The Moore Company's counsel Respondent's willingness to discuss any concerns The Moore Company may have had with the subpoena requests. The Moore Company's counsel elected to ignore any specific issues The Moore Company had with respect to the subpoena's scope and alleged burden and instead decided to raise such issues for the first time in its motion. The Moore Company's refusal to negotiate with Respondent's counsel is fatal to its motion to limit the subpoena. "[A] Federal Trade Commission subpoena seeking relevant data will not be quashed on the grounds that a burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise." *In re Gen. Motors Corp.*, No. 9077, 1977 FTC LEXIS 18 * 1 (Nov. 25, 1977); *see also In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 272 at * 2 (June 12, 1991)(refusing to limit subpoena "in light of counsel's offer to modify some of the subpoena's specifications").

[Redacted – Subject to Pending Motion for *In Camera* Treatment]. There is no evidence to support The Moore Company's contention.

Respondent's subpoena request No. 5 seeks "all documents relating to any communication between Amer-Sil" and various other entities. (Subpoena, No. 5)(*emphasis added*). Presumably, all such communications between Amer-Sil and certain battery manufacturers would be maintained by both parties in the language in which the communication was originally transmitted and would also be similarly stored by, and in the possession of, both

the communicating party and the receiving party. While Respondent has subpoenaed documents from several of the battery manufacturers, there is certainly no assurance that the battery manufacturers maintained all of their files and records. Additionally, any documents "relating to such communication[s]" which were created by Amer-Sil would presumably reside exclusively in the possession of Amer-Sil – and not with another entity. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Respondent's subpoena request No. 6 seeks "all documents constituting or reflecting any actual or potential contract or agreement between Amer-Sil" and various other battery manufacturers. (Subpoena, No. 6). Again, presumably all such contracts and agreements between Amer-Sil and another entity would be maintained by both parties in the language in which the contract or agreement was originally drafted and would also be similarly stored by, and in the possession of, both contracting parties. Also, documents constituting or reflecting any actual or potential contract between Amer-Sil and another entity potentially reside exclusively in the possession of Amer-Sil and accordingly may only be obtained through Respondent's subpoena to The Moore Company – the 100% owner of Amer-Sil. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

The Moore Company's Memorandum sets forth a general, unsupported claim of burden. In fact, The Moore Company's "burden" argument is really nothing more than an extension of its "lack of relevancy" argument – [Redacted – Subject to Pending Motion for *In Camera* Treatment]. As Respondent has shown above, its subpoena seeks information relevant to the issues raised in the Complaint and in Respondent's defense of the FTC's allegations. The Moore Company has not put forth any factual evidence which shows that compliance would seriously hinder the normal operations of its business. There is no evidence detailing any of The Moore Company's unsubstantiated cost and time estimates. Such unsupported and conclusory

allegations must be rejected and The Moore Company's claim of undue burden should be denied. Moreover, the information sought by Respondent is neither overly broad nor unduly burdensome; instead it is clearly relevant to the allegations of the Complaint and Respondent's defenses thereto. (*See* Section III. A., *infra*). As such, The Moore Company's motion to limit the subpoena should be denied and The Moore Company should be ordered to comply fully with the Subpoena without further delay.

C. THE PROTECTIVE ORDER ADDRESSES THE MOORE COMPANY'S CONFIDENTIALITY AND COMMERCIALLY-SENSITIVE INFORMATION CONCERNS

In addition to its relevancy and burden arguments, The Moore Company also contends that Respondent's subpoena should be limited because it requests documents that may contain confidential or commercially sensitive information. (Memorandum at p. 15). In fact, The Moore Company spends several pages of its Memorandum detailing why it considers such information to be confidential. (Memorandum at pp. 15-19). At no point, however, does The Moore Company mention that on October 23, 2008, this Court entered a Protective Order Governing Discovery Material (the "Protective Order") in this matter.[6] Significantly, The Moore Company's Memorandum fails to address whether or not the Protective Order is sufficient to protect its confidentiality concerns, and if it is not, why (or in what manner) the Protective Order allegedly does not adequately protect the interests of The Moore Company or its wholly-owned subsidiary Amer-Sil. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

The Protective Order negotiated by the FTC and Polypore explicitly protects third-parties and provides that any materials designated confidential can be used only for purposes of this proceeding and can only be disclosed to a limited group of people associated with this

[6] The Protective Order was attached to the subpoena and enclosed in Respondent's counsel's November 6, 2008 service letter to The Moore Company. (*See* Dauwe Decl., Ex. A).

proceeding. The stated purpose of the Protective Order is to "[protect] the interests of the Parties and Third Parties . . against improper use and disclosure of confidential information submitted or produced in connection with this Matter." (Protective Order at p. 1)(Tab E). Although The Moore Company has failed to describe even a single example of how the Protective Order would be insufficient to protect its confidentiality concerns, it argues, in hyperbole, that "no amount of safeguards could adequately protect Amer-Sil's interests if it were to produce the requested information to Polypore." (Memorandum at p. 19)(*emphasis original*). This argument has no merit. *See In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33 at *3-5 (Dec. 7, 1976)("relevant confidential business information may properly be called for in subpoenas issued in Commission proceedings."). Indeed, "the fact that information sought by a subpoena may be confidential does not excuse compliance." *In re Rambus, Inc.*, 2002 FTC LEXIS 90, at *11 (Nov. 18, 2002).

The Moore Company turns to Federal Rule of Civil Procedure 45 to argue that Respondent must show "substantial need" for the requested, but allegedly confidential information. (Memorandum at p. 15). Under the Commission's Rules of Practice, however, "a showing of general relevance is sufficient to justify production of documents containing confidential business information and no further showing of 'need' is necessary." *Kaiser Aluminum & Chemical Corp.*, 1976 FTC LEXIS 68 at *9 (Nov. 12, 1976).

In any event, the Protective Order entered in this matter is more than sufficient to alleviate The Moore Company's confidentiality concerns. Protective orders are customarily issued to safeguard confidential information in Commission proceedings. *See In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33 at * 4 (Dec. 7, 1976); *see also In re Basic Research, LLC A.G. Waterhouse*, No. 9318, 2004 FTC LEXIS 272 at *6 (Aug. 18, 2004)("The provisions of the Protective Order adequately protect the confidential documents of third parties through a number

of safeguards"). Similarly, the Protective Order in this case is sufficient to protect The Moore Company's confidential documents and commercially sensitive information.

The Protective Order defines "Confidential Material" to include "nonpublic trade secret or other research, development, commercial or financial information, the disclosure of which would likely cause commercial harm to the Producing Party or Respondent." (Protective Order at p. 1). Importantly, the Protective Order contains a number of safeguards to adequately protect such Confidential Material. For example, Confidential Material may only be disclosed to a limited number of people associated with this hearing – including the ALJ, court reporters and other court personnel, outside counsel of Respondent and any consultants/experts retained by Respondent to assist in this matter and Respondent's Special Counsel Michael Shor. (Protective Order at p. 7). Importantly, the Protective Order would prohibit any Polypore employee, including its in-house counsel, from access to The Moore Company's confidential information. Additionally, any Confidential Material that is produced may only be used for the purposes of the preparation and hearing of this matter and for no other purpose whatsoever. (Protective Order at p. 7).

Other safeguards include the obligation to file pleadings, motions or other papers containing Confidential Information under seal, and the ability of a Third Party to request in camera treatment of any Confidential Material – as The Moore Company has done for this very motion and the supporting material thereto. (Protective Order at p. 8). The Protective Order also protects against the disclosure of Confidential Material if such Confidential Material is the subject of a discovery request in another proceeding. (Protective Order at p. 9). Additionally, under the Protective Order, any consultant or other person retained by counsel to assist counsel in the preparation of this action is obligated to return all Confidential Material (including all copies thereof or notes made there from) upon the consultants conclusion of participation in this

matter. (Protective Order at p. 9). Finally, the obligation and safeguards of the Protective Order are binding even after the conclusion of this proceeding. (Protective Order at p. 10). Clearly, the stringent Protective Order entered in this matter eradicates any concerns The Moore Company has that compliance with Respondent's subpoena will somehow result in economic repercussions for either The Moore Company or Amer-Sil.

While The Moore Company makes wild and unsupported allegations that Respondent is only seeking such alleged confidential information for a sinister or ulterior purpose [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Respondent's subpoena seeks relevant information which is central to its defense of the Commission's allegations. While some of the information sought by Respondent may be confidential, The Moore Company has not put forth any reason why the Court-ordered Protective Order is inadequate to protect such confidential information. It is clear that the Protective Order contains numerous adequate safeguards to protect The Moore Company's confidential information and as a result the Moore Company's motion to limit Respondent's subpoena based on confidentiality concerns should be denied.

D. THE MOORE COMPANY WAS PROPERLY SERVED WITH THE SUBPOENA

The Moore Company incorrectly argues that Respondent's subpoena is not proper because Respondent has allegedly failed to comply with the prerequisites for issuing a subpoena in a foreign country. Much like The Moore Company's previous arguments, this argument is also without merit. First, the subpoena was properly served on The Moore Company, a domestic corporation, located at 36 Beach Street, Westerly, Rhode Island, and not on a foreign corporation. Second, while several of the subpoena requests seek information from The Moore Company's wholly-owned foreign subsidiary, Amer-Sil, such documents are in the "possession or control" of The Moore Company.

Service of a subpoena upon The Moore Company, a domestic corporation, is the proper method to obtain documents of its wholly-owned subsidiary, Amer-Sil. The fact that the materials requested are situated in a foreign country does not prevent their discovery. *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (1984).[7] Federal Rule of Civil Procedure 34 requires the production of documents "in the possession, custody, or control of the party on whom the request is served." Fed. R. Civ. P. 34(a). "Control" is construed broadly as "the legal right, authority, or practical ability to obtain the materials sought upon demand." *SEC v. Credit Bancorp, LTD*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000). Significantly, at no point does The Moore Company suggest that the information sought by Respondent's subpoena is beyond its control. (*See generally* Memorandum at pp. 19-25). Instead, The Moore Company attempts to distract the Court's attention by arguing at length that Respondent's subpoena is directed at a foreign company and, as a consequence, contravenes European Union privacy and data protection laws. Such diversionary tactics are nothing more than a misplaced attempt by The Moore Company to avoid the production of information requested by Respondent's validly-issued subpoena and which is within The Moore Company's control.

Courts have routinely found that a parent corporation has a sufficient degree of ownership control over the documents in the possession of its wholly-owned subsidiaries and therefore must produce such documents upon demand. *Dietrich v. Bauer*, Dist. LEXIS 11729 (S.D.N.Y. Aug. 9, 2000), *see also United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). The location of the documents is irrelevant. *Gerling Int'l Ins. v. Comm'r of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988); *see also Marc Rich &*

[7] *See also* Federal Rule of Civil Procedure 45, 1991 Advisory Committee Note (which makes clear "that the person subject to the subpoena is required to produce material in that person's control whether or not the materials are located within the distinct or within the territory within which the subpoena can be served."); Wright & Miller, Federal Practice and Procedure: Civil 2D § 2456 ("Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction").

Co., A.G. v. United States, 707 F.2d 663, 667 (2d Cir. 1983). This principle applies equally to both party and non-party alike. *Addamax Corp. v. Open Software Foundation, Inc.* 148 F.R.D. 462, 468 (D. Mass. 1993).

The appropriate standard "to determine whether a corporation has custody and control over documents located with an overseas affiliate is not limited to whether the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents.'" *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 at *9 (S.D.N.Y. Jan. 11, 1999)(*citations omitted*). This standard applies to third parties as well as parties. *Addamax Corp. v. Open Software Foundation, Inc.* 148 F.R.D. 462, 468 (D. Mass. 1993).

Courts in FTC proceedings have previously relied upon Federal Rule of Civil Procedure 34 and case law interpreting Rule 34 in determining that a corporation's "access to the documents" and "ability to obtain the documents" extends to foreign affiliates of a subpoenaed third party. In *In the Matter of Rambus, Inc.*, the Court ordered a subpoenaed third-party to produce documents in the possession of its foreign parent. *Rambus*, 2002 FTC LEXIS at 16. The Court in *Rambus* relied on a variety of factors to conclude that the subpoenaed third-party, a subsidiary, had sufficient control over the documents of its foreign parent. *Id.* at 4-16. Certainly, if a subsidiary can be ordered to produce the documents of its foreign parent, a domestic parent has the requisite level of control over the documents of its foreign wholly-owned subsidiary and must therefore produce such documents. [Redacted – Subject to Pending Motion for *In Camera* Treatment]. Moreover, The Moore Company has not put forth any evidence from which this Court could conclude that it does not have access to, or the ability to obtain, the documents in the possession of Amer-Sil, its wholly-owned subsidiary. Indeed, there is no evidence that The Moore Company, as the sole owner of Amer-Sil, cannot easily access any

document necessary to respond to the subpoena. [Redacted – Subject to Pending Motion for *In Camera* Treatment].

Similarly, The Moore Company's accusation that Polypore has attempted to avoid required FTC procedure is also without basis. First, The Moore Company ignores the fact that several of the subpoenaed requests are directed at The Moore Company itself, or both The Moore Company and Amer-Sil. (Subpoena Request, Nos. 3-4, 6-13, 22-26, 28-34, 38). More importantly, the case relied on in support of the Moore Company's argument, *Laker Airways, Ltd. v. Pan Am*, is distinguishable from the present situation. 607 F.Supp. 324 (S.D.N.Y. 1985). In *Laker Airways*, the subpoena in question sought documents from two foreign parent corporations through their United States branch offices, which were not in existence at the time of the controversy to which the subpoena related. *Id.* at 326. The present scenario is distinguishable because The Moore Company is and has been the sole owner of Amer-Sil and, more importantly, has control of the requested documents.

It is also important to note, however, that the privacy and data protection laws cited by The Moore Company are not applicable to the majority of the information sought by Respondent's subpoena and, moreover, exceptions to the general privacy rules exist which allow for the processing and transfer of the data sought. Consequently, The Moore Company and Amer-Sil can legally process and produce the subpoenaed documents in compliance with Directive 95/46/EC of the European Commission.

Despite The Moore Company's suggestions, much of the information sought by Polypore would not fall into the category of "personal data" because the information sought contains no data "relating to an identified or identifiable person." For example, the subpoena seeks documents regarding products in development, the manufacturing and production facilities owned by Amer-Sil or the Moore Company; any joint ventures or partnerships of which Amer-

Sil or the Moore Company is a party; any contracts between Amer-Sil and specified battery manufacturers; Amer-Sil's market share for lead acid battery separators; the geographic scope of competition in the battery separator industry; the level or state of competition in the battery separator industry; the pricing strategy for lead acid battery separators; manufacturing data relating to lead acid battery separators; the anticipated end-uses of the products sold by Amer-Sil; and customers purchasing lead acid battery separators from Amer-Sil. (*See, e.g.,* Subpoena Requests, No. 1-4, 6-34, 38). In fact, only four subpoena requests seem to seek information which would potentially fall into the definition of "personal data." (Requests Nos. 5, 35, 36, and 37). Yet, those requests seek documents transmitted to the FTC or companies located outside of the European Union. The Moore Company makes no attempt to explain how such documents would be subject to the Directive. Indeed, taken to its logical conclusion, if read as broadly as The Moore Company suggests, then The Moore Company itself violated the terms of the Directive when it produced the affidavit to the FTC and would further violate the Directive in providing documents pursuant to its proposed "compromise."

Additionally, as The Moore Company points out, the Directive carves out an exception which permits the processing and the export of personal data where it is necessary for the purpose of, or in connection with, any legal proceedings. (Memorandum at p. 22). Not surprisingly, The Moore Company goes on to argue that this exception should not apply in the instant matter. *Id.* The Moore Company's authority for its position is unpersuasive, at best. The Moore Company, relies on an advisory opinion of the Working Party ("an independent European advisory party") which comments on the application and compatibility of the Directive with internal whistle blowing protection schemes. *See* Article 29 Data Protection Working Party, Opinion 1/2006 on the Application of EU Data Protection Rules to Internal Whistleblowing Schemes in the Fields of Accounting, Internal Accounting Controls, Auditing Matters, Fight

Against Bribery, Banking and Financial Crime (*emphasis added*). Since whistle-blowing often implicates specific individuals and their personal data in relation to fraud, bribery, or corruption, it makes sense that the Directive may conflict with such whistle blower protections.

This advisory opinion, however, is inapplicable in the present situation. First and foremost, this is an advisory opinion and therefore is not binding law. Second, Polypore does not request any information which would incriminate any individual or reveal personal information, as would information sought in connection with discovery regarding corruption, fraud, or bribery – the principle aims of litigation in connection with whistle-blowing. Polypore instead requests routine business information which does not interfere with the privacy rights of any employee at Amer-Sil. Consequently, in a non whistle-blowing situation, the processing and transfer of the data is permitted as an exception to the Directive where it is necessary to comply with a legal obligation of the collector. Directive, art. 6, para. 2(a) & art. 26, para. 1(d).

The Moore Company has done no more than throw convoluted arguments at this Court based upon inapplicable advisory opinions and articles which have no binding authority. Respondent's subpoena simply seeks information necessary for furthering its proceedings before the Commission. The Moore Company has made no showing that it does not have control over the documents held by Amer-Sil and should therefore be compelled to produce such documents.

E. COSTS

The Moore Company concludes by requesting that an Order be entered requiring Respondent to reimburse The Moore Company for the reasonable costs incurred in complying with the subpoena. (Memorandum at p. 25). It is well settled, however, that in agency actions "some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also In re Matter of N. Tex. Specialty Physicians*, No. 9312, 2004 WL

527337, at *3 (F.T.C. Feb. 4, 2004)(denying cost reimbursement because the subpoena did not create an undue burden on the third party). Reimbursement of costs in FTC adjudicative proceedings is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be "unreasonable" or "extraordinary." *See In re International Tel.&Tel. Corp.*, 1981 LEXIS 75 at * 3 (March 13, 1981); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268 at *1 (June 6, 1991)(holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena"). [Redacted – Subject to Pending Motion for *In Camera* Treatment]. *See FTC v. Dresser Indus., Inc.*, Misc. No. 77-44, 1977 U.S. DIST. LEXIS 16178 at *13 (D.D.C. Apr. 26, 1977)(in which the court ordered compliance and denied costs even though the estimated cost of compliance by the third party was estimated to exceed $400,000.00 partly because the third party was a participant in the industry in question.).

Even if The Moore Company were to make a showing that the cost of compliance was extraordinary, reimbursement would be limited to the cost of copying because Amer-Sil is a participant in the battery separator industry. FTC authority mandates that "where [a] 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. *See In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at * 14 (Mar. 19, 1982); *see also In re Kaiser Aluminum & Chemical Corp.*, 1976 FTC LEXIS 68 at *20-21 (Nov. 12, 1976)("Where the public interest is involved, however, and where the non-party is in the industry in which the alleged acts occurred, the non-party has an interest in the litigation and would be affected by the judgment. There, only the cost of copying need be reimbursed."). Here, The Moore Company is not even entitled to copying costs, however, as it has not overcome the threshold requirement of showing that the cost of compliance would be

extraordinary.[8] The FTC's authority on the reimbursement of a third party's costs in complying with a subpoena is abundant and clear – a third party is not entitled to the cost of compliance unless such costs would be unreasonable or extraordinary. The Moore Company has made no such showing and its motion for costs must therefore be denied.

As illustrated above, The Moore Company's arguments in support of its motion to limit the subpoena and for costs are without legal or factual merit and, accordingly, The Moore Company's motion must be denied.

II. Polypore Takes No Position On The Moore Company's Motion for *In Camera* Treatment of Material.

The Moore Company, in its Motion for *In Camera* Treatment of Material, seeks *in camera* treatment of it Motion to Limit Subpoena *Duces Tecum* and To Seek Cost Reimbursement, its Memorandum of Law in support thereof, and the accompanying declaration of Guy Dauwe, all of which are dated December 23, 2008. Respondent takes no position with respect to the Moore Company's Motion for *In Camera* Treatment of Material.

III. The Moore Company's Should be Ordered to Produce All Documents Responsive to Respondent's Subpoena *Duces Tecum.*

Respondent seeks the immediate production of documents and electronic data responsive to its subpoena *duces tecum*. Counsel for Respondent has attempted to negotiate with counsel for The Moore Company in order to reach a resolution on The Moore Company's compliance with Respondent's subpoena. Respondent and The Moore Company have been unable to resolve the dispute and Respondent therefore respectfully petitions this Court for an Order requiring immediate compliance.

[8] Particularly where, as here, the complaining party failed to raise with any specificity the purported scope or burden issues in advance of filing a motion to limit the subpoena and seek costs.

A. POLYPORE'S SUBPOENA SEEKS RELEVANT INFORMATION

As discussed at length above, the factual allegations of the Commission's Complaint and the Respondent's defenses to the allegations contained therein make it clear that the information sought by Respondent's subpoena *duces tecum* is relevant. By way of example, Polypore cannot rebut the FTC's allegation that it has monopolized the battery separator market without information about its competitor's market share, geographic scope and product line. (Subpoena, Nos. 7-13). Polypore cannot rebut the FTC's allegation that its acquisition of Microporous led to higher prices without information about its competitor's pricing as related to Respondent and other competitors. (Subpoena, Nos. 5, 14-15, 21). Polypore cannot rebut the FTC's allegation that testing and capital requirements prevent entry into the market without information about its competitor's qualification process and capital requirements. (Subpoena, Nos. 27, 31). Polypore cannot rebut the FTC's allegation that battery separators manufactured for a particular application cannot be effectively used for other applications without information about its competitor's competitive products for certain applications and the end-use of such products. (Subpoena, Nos. 1-2, 16, 18, 24-26, 30, 34). Polypore cannot rebut the FTC's allegation that battery separator producers outside North America cannot economically compete with Polypore in the United States without information about its competitor's sales and cost data. (Subpoena, No. 5-6, 17, 19-20). And finally, Polypore cannot rebut the FTC's allegation that Amer-Sil's manufacturing capacity constrains it from expanding production without information about Amer-Sil's manufacturing capacity. (Subpoena, Nos. 3-4). Polypore's receipt and review of The Moore Company's materials is necessary for its defense and any further delay or limitation on this review will tilt the playing field heavily in favor of the FTC.

The FTC's own investigative efforts demonstrate the relevance of Amer-Sil in the battery separator market. [Redacted – Subject to Protective Order]. Certainly, Respondent is also

entitled to seek discovery of this information in order to challenge and probe these bare and conclusory assertions. The FTC's Rules allow Respondent to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of [the] respondent." *16 C.F.R. § 3.31(c)(1).* The documents sought by Respondent are highly relevant to the issues raised in the pleadings and should be immediately produced. *See In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *6-8 (opining that "[i]nformation in the files of competing companies is frequently crucial in [FTC] proceedings" and such proceedings "would be crippled if neither the Commission not the party charged could produce the essential industry data").

B. POLYPORE'S SUBPOENA IS NOT OVERLY BURDENSOME

As noted above, there is no merit to The Moore Company's claim of undue burden. "[T]he public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on their defense) be given the opportunity to develop those facts which are essential" to support or undermine the allegations in the pleadings. *In re Gen. Foods.*, No. 9085 C, 1978 FTC LEXIS 412 at *6 (April 18, 1978). A subpoena "seeking relevant data will not be quashed on the grounds that the burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise." *General Motors Corp.*, 1977 FTC LEXIS 18 at *1 (Nov. 25, 1977). The Moore Company bears the burden of showing that compliance with the subpoena imposes an unreasonable burden:

> The burden of showing that the request is unreasonable is on the subpoenaed party. 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. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

The Moore Company has not and cannot meet its burden. [Redacted – Subject to Pending Motion for *In Camera* Treatment]. Such unsupported allegations are clearly insufficient to support a limitation of the subpoena. The Moore Company's alleged, but unsupported, cost information and the allegation that the requested information can be obtained from U.S. battery manufacturers is also unpersuasive. "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." *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS at *19-20. As previously described, the subpoena seeks information relevant to the issues raised in the pleadings and should be complied with forthwith.

CONCLUSION

For the foregoing reasons, Respondent Polypore respectfully moves this Court to deny The Moore Company's Motion to Limit Subpoena *Duces Tecum* and for Cost Reimbursement and additionally, enter an order compelling The Moore Company to immediately comply with Respondent's subpoena *duces tecum*.

Dated: January 8, 2009

Respectfully Submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***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***, 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 January 8, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing ***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*** upon:

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

I hereby certify that on January 8, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***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*** upon:

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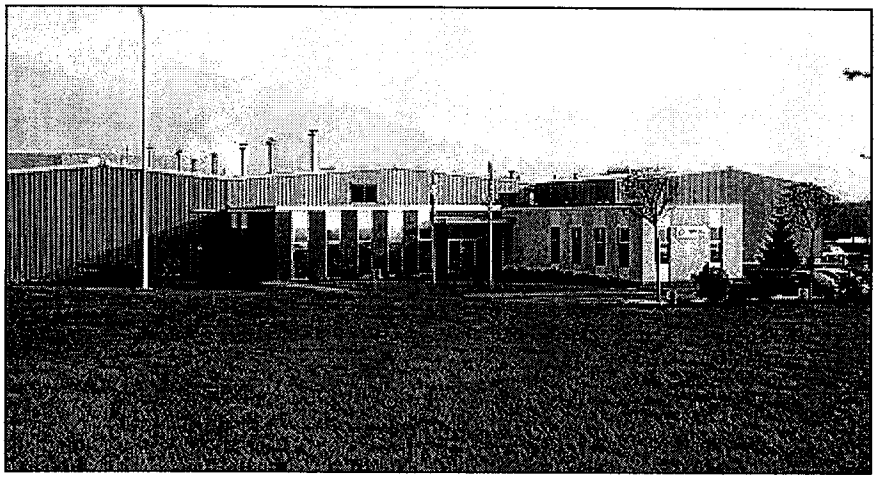
Tab A

AMER-SIL S.A.

AMER-SIL S.A. was founded in 1970 to produce high-quality microporous PVC/Silica separators to be used in Industrial Lead Acid batteries. Its production facilities and offices are located near Kehlen in the Grand Duchy of Luxembourg, in the heart of Europe.



AMER-SIL S.A. has acquired a well deserved reputation for top product quality and excellent service over the past thirty years. It was accredited with an ISO 9002 certification in 1994, followed by ISO 9001 certification in 1997 and its Quality/Service Departments have been audited by major Battery Companies.

AMER-SIL S.A. Maintains its position as the leading European Industrial Battery Separator supplier and markets its products worldwide.

AMER-SIL S.A. is a wholly owned subsidiary of THE MOORE COMPANY, headquartered in Westerly, R.I., USA.

Coordinates

Amer-Sil S.A. Luxembourg:

Zone industrielle
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LUXEMBOURG
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Sales representatives:

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AMER-SIL S.A. is member of the following international organisations:

Battery Council International

ALABC

EUROBAT

Tab B

TAB B

[Redacted – Subject to Protective Order]

Tab C

TAB C

[Redacted – Subject to Protective Order]

Tab D

TAB D

[Redacted – Subject to Protective Order]

Tab E

COPY

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

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

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the Parties and Third Parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

For purposes of this Protective Order, the following definitions apply:

1. "Confidential Material" shall mean all Discovery Material that is confidential or proprietary information produced in discovery. Such material is referred to in, and protected by, section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); section 21 of the Federal Trade Commission Act, 15 U.S.C. § 57b-2, the FTC Rules of Practice, Sections 4.9, 4.10, 16 C.F.R. §§ 4.9, 4.10; and precedents thereunder. Confidential Material shall include non-public trade secret or other research, development, commercial or financial information, the disclosure of which would likely cause commercial harm to the Producing Party or to Respondent. The

following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Material: strategic plans (involving pricing, marketing, research and development, product road maps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer, or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Material. Discovery Material will not be considered confidential if it is in the public domain.

2. "Document" means the complete original or a true, correct, and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced. "Document" includes, but is not limited to, any writing, letter, envelope, telegraph, e-mail, meeting minute, memorandum, statement, affidavit, declaration, transcript of oral testimony, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, printout, microfilm index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, and any other data compilation from which information can be obtained, and includes all drafts and all copies of such Documents and every writing or record that contains any commentary, notes, or marking whatsoever not appearing on the original.

3. "Discovery Material" includes without limitation deposition testimony, exhibits, interrogatory responses, admissions, affidavits, declarations, Documents, tangible thing or

answers to questions produced pursuant to compulsory process or voluntarily in lieu thereof, and any other Documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

4. "Commission" shall refer to the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

5. "Polypore" means Polypore International, Inc., and its predecessors, divisions, and subsidiaries, and all persons acting or purporting to act on its behalf.

6. "Respondent" means Polypore.

7. "Party" means the Commission or Polypore.

8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Matter and its employees, directors, officers, attorneys and agents.

9. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Material to any of the Parties. With respect to Confidential Material of a Third Party that is in the possession, custody or control of the FTC, or has been produced by the FTC in this matter, the Producing Party shall mean the Third Party that originally provided such material to the FTC. The Producing Party shall mean the FTC for purposes of any Document or Discovery Material prepared by, or on behalf of, the FTC.

10. "Matter" means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Any Document or portion thereof submitted by Respondent or a Third Party during the Federal Trade Commission ("FTC") investigation preceding this Matter or during the course of proceedings in this Matter that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as Confidential Material for purposes of this Protective Order. For purposes of this Protective Order, the identity of a Third Party submitting such Confidential Material shall also be treated as Confidential Material where the submitter has requested in writing such confidential treatment.

2. The Parties and any Third Parties, in complying with informal discovery requests, disclosure requirements, discovery demands or formal process in this Matter may designate any responsive document or portion thereof Confidential Material, including documents obtained by them from Third Parties pursuant to discovery or as otherwise obtained.

3. The Parties, in conducting discovery from Third Parties, shall provide to each Third Party a copy of this Protective Order so as to inform each such Third Party of his, her or its rights herein.

4. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes Confidential Material as defined in Paragraph 1 of the Definitions of this Protective Order. All deposition transcripts

shall be treated as Confidential Material.

5. If any Party seeks to challenge the Producing Party's designation of material as Confidential Material, the challenging Party shall notify the Producing Party and all other Parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation by providing the challenging Party and all other Parties a written statement of the reasons for the designation within five (5) business days of receiving notice of the confidentiality challenge. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Materials, absent a written agreement with the Producing Party or order of the Commission providing otherwise.

6. If any conflict regarding a confidentiality designation arises and the Parties and Producing Party involved have failed to resolve the conflict via good-faith negotiations, a Party seeking to disclose Confidential Material or challenging a confidentiality designation may make written application to the hearing officer for relief. The application shall be served on the Producing Party and the other Parties to this Matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The Producing Party and any other Party shall have five (5) business days after receiving a copy of the motion to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the hearing officer of the propriety of a requested disclosure or change in designation.

7. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Confidential Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to Persons not otherwise entitled to access under the terms of this Protective Order. If Confidential Material is produced without the designation attached, the material shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondent's Counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked materials.

8. Material produced in this Matter may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL-FTC Docket No. 9327" or any other appropriate notice that considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL-FTC Docket No. 9327" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. The foregoing designation of "CONFIDENTIAL-FTC Docket No. 9327" shall not be required for confidentiality to apply to documents and information previously produced voluntarily or pursuant to a Civil Investigative Demand or subpoena during the investigational phrase preceding this Matter for which confidential treatment was requested. Masked or otherwise redacted copies of documents may be produced where the portions deleted

contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

9. Confidential Material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the commission as experts or consultants for this proceeding, (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter, (c) court reporters in this matter, (d) outside counsel of record for Respondent, its associated attorneys and other employees of its law firm(s), provided they are not employees of Respondent, (e) Michael Shor, Polypore Special Counsel, (f) anyone retained to assist outside counsel in the preparation of hearing of this proceeding including consultants, provided they are not affiliated in any way with Respondent and have signed Exhibit A hereto, (g) any witness or deponent who may have authored or received the information in question; (h) any individual who was in the direct chain of supervision of the author at the time the Discovery Material was created or received, except that this provision does not permit disclosure of Industrial Growth partner or Warburg Pincus International documents to Polypore or former Microporous personnel who would not otherwise have had access to the Discovery Material; (i) any employee or agent of the entity that created or received the Discovery Material; (j) anyone representing the author or recipient of the Discovery Material in this Matter; and (k) any other Person(s) authorized in writing by the Producing Party.

10. Disclosure of confidential material to any person described in Paragraph 9 of this Protective Order shall be only for the purposes of the preparation and hearing of this Matter, or any appeal therefrom, and for no other purpose whatsoever; provided, however, that the

Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential materials as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

11. In the event that any Confidential Material is contained in any pleading, motion exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed under seal. To the extent that such material was originally submitted by a Third Party, the Party including the Materials in its papers shall immediately notify the submitter of such inclusion. Confidential Material contained in the papers shall remain under seal until further order of the Administrative Law Judge; provided, however, that such papers may be furnished to persons or entities who may receive Confidential Material pursuant to Paragraphs 9 or 10. Upon or after filing any paper containing Confidential Material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection of any such material expires, a Party may file on the public record a duplicate copy which also contains the formerly protected material.

12. If counsel plans to introduce into evidence at the hearing any document or transcript containing Confidential Material produced by another Party or by a Third Party, they shall provide ten (10) days advance notice to the other Party or Third Party for purposes of allowing that Party or Third Party to seek an order that the document or transcript be granted in camera treatment. If that Party or Third Party wishes in camera treatment for the document or transcript, the Party or Third Party shall file an appropriate motion with the Administrative Law

Judge. Where in camera treatment is granted, a duplicate copy of such document or transcript with the Confidential Material deleted therefrom may be placed on the public record.

13. If any Party receives a discovery request in another proceeding that may require the disclosure of Confidential Material submitted by another Party or Third Party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of Confidential Material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 C.F.R. §4.11(e), to discovery requests in another proceeding that are directed to the Commission.

14. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 C.F.R. §4.12.

15. The inadvertent production or disclosure of any Discovery Material, which a Producing Party claims should not have been produced or disclosed because of a privilege, will not be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. The inadvertent production of a privileged document shall not in itself be deemed a waiver of any privileged applicable to any other documents relating to the subject matter.

16. This Protective Order shall not apply to the disclosure by a Producing Party or its counsel of its own Confidential Material.

17. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 23, 2008

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

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

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, _____, hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order" governing Discovery Material ("Protective Order") issued by the Commission on October 23, 2008, in connection with the above-captioned Matter. I understand the restrictions on my access to and use of any Confidential Material (as that term is used in the Protective Order) in this Matter, and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidentiality Material include:

   a. that I will use such Confidential Material only for the purpose of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;

   b. that I will not disclose such Confidential Material to anyone, expect as permitted by the Protective Order;

   c. that I will use, store and maintain the Confidential Material in such a way as to ensure its continued protected status; and

   d. that, upon the termination of my participation in this proceeding, I will promptly return all Confidential Materials and all notes, memoranda, or other papers containing Confidential Material, to Complaint Counsel or Respondent's Outside Counsel as appropriate.

4. I understand that if I am receiving Confidential Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential

Material also include the duty and obligation to:

a. maintain such Confidential Material in separate locked room(s) or locked cabinet(s) when such Confidential Material is not being reviewed;

b. return such Confidential Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention, or upon conclusion of this Matter; and

c. use such Confidential Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the FTC Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature