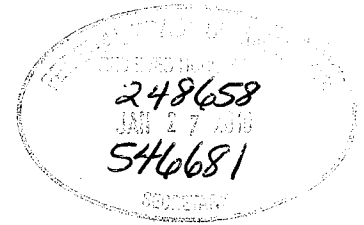


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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of )  
)  
)

POLYPORE INTERNATIONAL, INC., )  
Respondent. )  
)  
)

Docket No. 9327

**ORDER ON RESPONDENT'S MOTION FOR OFFICIAL NOTICE**

**I.**

On January 21, 2010, Respondent submitted a Motion for Official Notice of Recent Acquisition of Douglas Battery by EnerSys ("Motion"). Complaint Counsel submitted a response on January 22, 2010 ("Response"). Having fully considered Respondent's Motion and Complaint Counsel's Response, and as more fully set forth below, the Motion is GRANTED.

**II.**

Respondent moves for official notice "of a recent acquisition by EnerSys as announced in a filing made by EnerSys" with the Securities and Exchange Commission ("SEC"). Motion at 1. Specifically, Respondent states that "[o]n January 14, 2010, EnerSys filed a Form 8-K with the SEC, attaching a press release discussing EnerSys' recent purchase of the industrial battery business from Douglas Battery . . . . A copy of EnerSys' Form 8-K is attached hereto as Exhibit A." *Id.* Respondent asserts that the requested official notice is permitted under Commission Rule 3.43(d), Motion at 1, and that "EnerSys' purchase of Douglas Battery's industrial battery business, as announced on January 14, 2010, is not subject to reasonable dispute" because the accuracy of EnerSys' SEC filings cannot reasonably be questioned. Motion at 2. Respondent further argues that the referenced acquisition is relevant to consolidation in the battery manufacturing industry and "EnerSys' size and position therein as a power buyer." *Id.*

Complaint Counsel does not dispute that the SEC filing has been made. Complaint Counsel does, however, object to Respondent's inferences and arguments based upon the filing. Response at 1. According to Complaint Counsel, such inferences and arguments exceed the scope of official notice, and to the extent Respondent's Motion seeks official notice of such inferences and arguments, Complaint Counsel requests that the Motion be denied. Response at 2.

### III.

#### A. General Principles

As a general rule, “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision” in an administrative adjudication. 5 U.S.C. § 556(e); *see also* Commission Rule 3.51(c)(1) (“An initial decision shall be based on a consideration of the whole record relevant to the issues decided . . .”), 16 C.F.R. § 3.51(c)(1). Commission Rule 3.43(d) permits consideration of a fact outside the record in limited circumstances, stating: “When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.” 16 C.F.R. § 3.43(d); *see also* 5 U.S.C. § 556(e) (“When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”).

Official notice and its “close parallel,” judicial notice, “permit a court or agency to take notice of an adjudicative fact ‘not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (quoting Fed. R. Evid. 201(b)).

#### B. Official Notice of Public Documents

Applying the foregoing principles, the Commission has held that “[m]atters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and ‘records and reports of administrative bodies.’” *In re S.C. State Bd. of Dentistry*, No. 9311, 2004 FTC LEXIS 289, at \*18 & n.4 (July 28, 2004), quoting in part *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (taking official notice of statutes, regulations, Board minutes, and a press release issued by Office of the Governor, in evaluating motion to dismiss). Accordingly, the Commission has taken official notice of SEC filings, *In re Chicago Bridge & Iron Co. N.V.*, No. 9300, 2005 FTC LEXIS 70, at \*40 (May 10, 2005) (taking official notice of SEC form 10-K filing to find that certain entities had been sold), publicly filed consent orders, *In re Telebrands*, No. 9313, 2005 FTC LEXIS 178, at \*99 (Sept. 19 2005), and U.S. Census data. *In re Avnet, Inc.*, No. 8775, 1973 FTC LEXIS 125, at \*132 (Feb. 16, 1973). Federal court cases have also taken judicial notice of SEC filings. *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000). In *Oran*, the court reasoned that official notice of “properly-authenticated public disclosure documents filed with the SEC” is permissible because such documents are “required by law to be filed with the SEC and no serious questions as to their authenticity can exist.” 226 F.3d at 289, citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276 (11th Cir. 1999); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

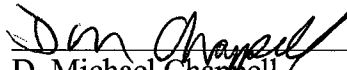
In the instant case, Complaint Counsel does not dispute the existence of the Form 8-K filing that is the subject of Respondent's Motion. Accordingly, pursuant to the foregoing authorities, official notice will be taken that a Form 8-K filing was made by EnerSys with the SEC announcing the purchase of certain assets and assumption of certain liabilities of Douglas Battery. Official notice will not be taken, however, of the inferences and arguments Respondent makes in connection with the SEC filing. The law is clear that official notice is not an appropriate vehicle to draw inferences or determine arguments. *In re Rambus, Inc.*, No. 9302, 2003 FTC LEXIS 135, at \*5 (Aug. 27, 2003). As the court explained in *York v. AT&T*, 95 F.3d 948, 958 (10th Cir. 1996) regarding judicial notice under Federal Rule of Evidence 201: "Judicial notice is appropriate where a matter is 'verifiable with certainty.' . . . It replaces the evidentiary procedure that would otherwise be necessary to establish 'adjudicative facts' that are generally known or 'capable of accurate and ready determination' by resort to reliable sources." *See also* Commentary to Fed. R. Evid. 201 ("When a Trial Judge draws inferences from a writing, the Judge is not taking judicial notice; she is engaging in factfinding and Rule 201 does not apply."). Therefore, official notice regarding the Form 8-K will specifically exclude all inferences and arguments Respondent has made in reference to the 8-K filing.

#### IV.

Having fully considered Respondent's Motion for Official Notice and Complaint Counsel's Response, and for all the foregoing reasons, it is hereby ORDERED:

Official notice is hereby taken that a Form 8-K Current Report was filed by EnerSys with the SEC, announcing: "On January 14, 2010, EnerSys issued a press release announcing the purchase of certain assets and assumption of certain liabilities, of the Douglas Battery Manufacturing Company." Respondent's inferences and arguments made in reference to the 8-K filing are excluded from the official notice taken under this Order.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: January 27, 2010