

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
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)
)
Polypore International, Inc.)
a corporation)
)
_____)

Docket No. 9327

**OPPOSITION OF EXIDE TECHNOLOGIES, INC. TO
RESPONDENT'S MOTION TO COMPEL**

Litigants file some discovery motions because they need the Court's intervention; they file others to strike a pose. Respondent's motion to compel¹ is one of the latter.

Exide Technologies, Inc. ("Exide") has already produced a substantial response to the subpoena issued by the Respondent ("Daramic"), and is working diligently to complete its compliance at the earliest practicable date. But Daramic's subpoena could be described, with virtually no exaggeration, as a demand for *every* document and computer file relating to separators in Exide's possession. Daramic filed its motion to compel less than seven weeks after the scope of the subpoena was resolved between the parties. Daramic has demanded a complete response to its extraordinarily broad subpoena after this very brief period – a period that encompassed the Thanksgiving holiday, a complete shutdown of Exide for a two week period over the Christmas and New Year holidays, Martin Luther King's birthday and Inauguration Day, and the involvement of critical Exide personnel and counsel in preparing for and participating in

¹ Respondent's Motion To Compel Exide Technologies To Produce Documents Requested By A Subpoena *Duces Tecum*

depositions noticed by Daramic. As we explain below, Exide has devoted extraordinary efforts to identify, review, and produce the documents demanded by Daramic, and will continue to do so. But Daramic cannot reasonably complain about the time required to complete this production, when it is the breadth of its own subpoena that has required such a massive and time-consuming effort for compliance.

FACTUAL BACKGROUND

Exide is one of the world's largest producers of lead acid batteries and, consequently, is one of the world's largest purchasers of separators, which are an essential component of those batteries. For many years, Exide has been, and currently still is, Daramic's largest customer. Since 1999, Exide has purchased the vast majority of the separators used in its batteries from Daramic, pursuant to a long term contract that limits Exide's ability to purchase from other sources.

After Daramic's acquisition of Microporous in early 2008, the FTC issued a comprehensive subpoena to Exide, seeking documents relating to virtually every issue relevant to an antitrust analysis of the acquisition. In response to that subpoena, Exide produced more than 27,000 pages of documents to the FTC. In addition, the FTC conducted an investigational hearing to obtain the testimony of the executive in charge of Exide's global procurement (the individual within Exide who is the most knowledgeable about the company's consideration of separator suppliers). That hearing lasted nearly ten hours, and resulted in a 299 page transcript.

After the FTC instituted this proceeding, the documents that Exide previously had produced to the FTC, as well as the transcript of the investigational hearing, were provided to Daramic. That material undoubtedly should have sufficed to give Daramic

virtually all the discovery it reasonably needed from Exide. Daramic nonetheless chose to issue an extraordinarily broad subpoena that could be described, with little exaggeration, as a demand for every document in Exide's possession relating to separators. Exide recognizes that the documents requested by the subpoena are potentially relevant to this proceeding (although the *importance* of the documents is quite a different question). For that reason, Exide did not, and does not, contest Daramic's right to issue such a subpoena. But if Daramic wants to call the tune, it must pay the piper; if Daramic chooses to issue an extraordinarily broad subpoena, it must accept that a necessary consequence of that choice will be the need for a reasonable time to identify, collect, and review an extraordinarily large number of documents. Exide's efforts to respond have been more than reasonable.

Exide received the subpoena on November 11, 2009 and immediately sent it to the company's antitrust counsel, who promptly reviewed it and conferred with the company to begin to identify the types and locations of potentially responsive material and to identify possible modifications of the subpoena that might be required. On November 18, 2008, Exide's counsel proposed various modifications to the subpoena, but Daramic's counsel was unwilling to accept or reject any of Exide's proposals at that time. Exide waited one week, until November 25, 2008, before obtaining Daramic's agreement to proposed subpoena modifications.

In the meantime, Exide began its compliance effort. The company assigned personnel to the task of subpoena compliance, identified potential custodians of responsive material, and determined where such material was located. In order to ensure a timely, thorough, and efficient response, the company decided to contract with

litigation support vendors. It identified third party vendors who could perform the requisite data processing, solicited proposals from them, and evaluated those proposals. By December 1, 2008, the company had negotiated a Statement Of Work and contracted with Guidance Software to image files stored on each custodian's personal computer and on each of the servers identified as a potential site of responsive material. This imaging began on December 4, 2008 and required twelve days – until December 16 – to complete. Roughly 375 gigabytes of data were collected, from multiple locations.

A second vendor, ACT Litigation, was hired to process the data. ACT loaded the data on its computers and generated a catalog of it, a task that was completed by December 18, 2008, and promptly began processing the data to identify potentially responsive material. The processing involved, among other things, the identification of potentially responsive documents by searching for “key words” (e.g., separator or Daramic), and the elimination of duplicate files. This processing by ACT Litigation required substantially more time than the company anticipated, because of the large volume of data that had to be processed. (Moreover, ACT Litigation's work spanned the Christmas and New Year holidays which, we presume, ACT's employees celebrated.) The processing was not completed until January 19, 2009.

At that point, ACT Litigation had a database containing more than 84,200 documents that had been identified as *potentially* responsive to the subpoena. After documents are identified as potentially responsive to the subpoena, they must be reviewed to determine whether they are *actually* responsive and whether they are (or are not) privileged. To make those judgments, each document must be reviewed

individually. The review requires evaluation by an attorney and, in many cases, by the document custodian. This review is underway now.

Exide did not merely sit back and do nothing while waiting for the completion of the data processing that was previously described. Exide was able to obtain and review some documents, albeit a relatively small number, before that processing was complete. These documents were promptly produced to Daramic on a rolling basis as review was completed. As of January 19, 2009, Exide had produced approximately 3,130 documents to Daramic. Exide has indicated to Daramic that it will continue to devote substantial resources in order to complete its production as soon as is practicable, and that it will continue to provide a rolling production as documents are ready for production. Exide has also offered to prioritize its review and production of documents (*e.g.*, by custodian or date).

As the foregoing description indicates, Exide has devoted substantial resources to subpoena compliance. Five attorneys have devoted a substantial majority of their time to subpoena compliance. Two other attorneys have devoted significant amounts of their time to this project. The company estimates that the document custodians have, on average, devoted at least 37.5 hours to subpoena compliance, and will devote still more time in order to complete the document production. The company estimates that it will pay its outside vendors more than \$171,500 for their work in responding to the subpoena.

ARGUMENT

Exide's efforts to respond to Daramic's subpoena have been more than reasonable, and Daramic's reckless accusation that Exide "has continued to delay and stall in its production efforts" (Memorandum at 3) is entirely false. That charge comes

less than seven weeks after the date on which Daramic provided its first substantive response to Exide's proposal to modify the scope of the subpoena. During almost all of that seven week period, Exide's subpoena compliance efforts have been in the hands of third party vendors that were hired for the precise purpose of *expediting* a thorough and efficient identification of responsive documents. Those vendors had no incentive to "delay" or "stall" and Exide is not aware of *any* reason to believe they did so. Rather, the time required is a necessary consequence of the magnitude of the task at hand. It is Daramic, not Exide, that dictated the size of that task and, as a direct result, the time needed to complete it.

Exide has worked diligently to comply with the subpoena and will continue to do so even without the Court's intervention. However, even with extraordinary efforts by Exide, the schedule for compliance that Daramic seeks (*i.e.*, complete production as early as January 30, 2009) is a virtual impossibility. Exide hopes that it will be able to complete production by the second half of February, but that estimate assumes (perhaps with undue optimism) that no unanticipated problems will arise.

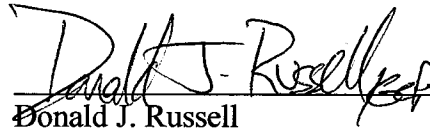
Because there is no real dispute between the parties that Exide will produce the requested documents, because Exide has put forth reasonable, good faith efforts to comply with the subpoena, and because Exide will continue to work diligently to complete its document production at the earliest practicable time, the Court should deny Daramic's motion to compel.

CONCLUSION

For the foregoing reasons, Respondent's Motion To Compel should be denied.

Dated: January 22, 2009

Respectfully submitted,



Donald J. Russell

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Counsel for Exide Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing Opposition Of Exide Technologies To Respondent's Motion To Compel, 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, N.W., Rm H-135
Washington, D.C. 20580
secretary@ftc.gov

I hereby certify that on January 22, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight mail delivery of the foregoing Opposition Of Exide Technologies To Respondent's Motion To Compel upon:

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

I hereby certify that on January 22, 2009, I caused to be served by first class mail delivery and electronic mail delivery a copy of the foregoing Opposition Of Exide Technologies To Respondent's Motion To Compel upon:

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