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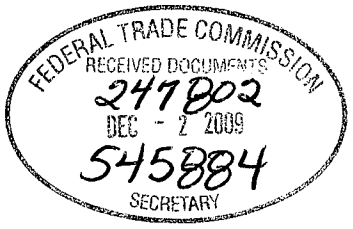

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S POST-TRIAL BRIEF FOR REOPENED HEARING

Counsel for Respondent:

William L. Rikard, Jr.
Eric D. Welsh
Deborah L. Edney
Adam C. Shearer
Brian R. Weyhrich
PARKER POE ADAMS & BERNSTEIN LLP
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 372-9000
Facsimile: (704) 335-9689
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

John F. Graybeal
PARKER POE ADAMS & BERNSTEIN LLP
150 Fayetteville Street
Raleigh, NC 27602
Telephone: (919) 835-4599
Facsimile: (919) 828-0564
johngraybeal@parkerpoe.com

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I. INTRODUCTION

The hearing on November 12, 2009 showed that competition in the production and sale of battery separators in North America is healthy and vigorous. Although there are disputes between Complaint Counsel and Respondent about many things, there can be no basis for disagreement on that fundamental point. The point is a crucial one, of course, because the ultimate issue pending before this Court is whether Polypore's acquisition of Microporous Products L.P. ("Microporous") is likely "to substantially lessen competition." With the acquisition having occurred almost two years ago, the lack of adverse effects was clear and visible in the testimony and documents presented on November 12.

Before considering the November 12 evidence, however, it is important to note that, regardless of that evidence, the acquisition had utterly no effect in the SLI market segment alleged by Complaint Counsel. As was established by the evidence presented at the initial hearing, Microporous was neither an actual competitor nor an uncommitted entrant in that segment. {

}. As a result, the FTC's Section 7 case as regards this segment is an empty shell. What the November 12 evidence illuminates is the intense competition in this market segment driven by powerful buyers that {

}.

The evidence also served to remind the Court that {

}.

{

}.

The overreaching by the FTC in this matter is pervasive, but was nowhere more evident than in Complaint Counsel's opening statement when he, without any basis and contrary to all available law on the subject, told the Court that a buyer would have to have {

} to be considered a power buyer. (Robertson, Tr. 5627). As set out below, there is simply no

support for such an incorrect and outrageous statement, and it is a continuation of the overzealous conduct of Complaint Counsel in this matter.[1]

In fact, it would be hard to imagine a story of more vigorous competition. It remains to be seen whether the result of this competition will be good for consumers, {

}.

This memorandum will recap the evidence recently presented and will then show that: (1) the acquisition of Microporous by Polypore had no effect on competition in the FTC's alleged auto (SLI) market segment because Microporous was neither an actual participant in the market nor an uncommitted entrant; (2) the evidence adduced at the main hearing and supplemented on November 12 shows indisputably that competition in this segment is intense and shows no signs of abating; (3) all the evidence also shows that the conditions for coordinated interaction do not exist in this alleged segment; and (4) the presence of powerful buyers like { } and others – indeed, a highly concentrated industry on the buyer side – assures that coordinated interaction cannot occur.

II. PROCEDURAL BACKGROUND

By Order dated October 15, 2009, this Court reopened the hearing record in this proceeding to allow the acceptance of new and additional evidence related to the following four proffers:

1. After the close of the record, Exide decided to move { } its PE separator purchases for { } to another supplier, and in the span of less than three months, Exide has placed orders from Daramic in excess of { } of PE separators, all requested to be delivered by year end. This amount exceeds any reasonable forecast provided by Exide, is inconsistent with past order patterns and, based on Exide's { }, amounts to approximately { } worth of PE separator[s]. Douglas Gillespie of

[1] Although Complaint Counsel is incorrect in his assertion, if he were correct and taking the reverse of his point, then his statement thoroughly defeats the FTC's claim that Daramic is a monopolist either in the alternative PE Market or SLI market that the government has alleges as Daramic does not now, even remotely, { } – either in North America or Worldwide.

Exide has admitted to Respondent that Exide's recent purchase orders equate to { } worth of PE separator purchases from Daramic.

2. With Exide's purchase orders for more than { } of PE separators from Daramic, Exide does not intend to and will not purchase any additional PE separators from Daramic in either { }.

3. In light of Exide's apparent decision not to purchase PE separators from Daramic in { }, Daramic will likely have to { }.

4. If Daramic is able to retain any small amount of business from Exide in { }, or thereafter, which appears unlikely, Daramic will only be able to obtain such sales through a { }.

On November 12, 2009, the parties appeared before this Court and presented new evidence related to the above proffers.

III. FACTS AND BACKGROUND

A. The 1999 Contract and Negotiations for New Contract

{

}. (PX0728, *in* camera). {

}. (RX01675, *in camera*). At this time {

}.

{

}. (RX01721, *in camera;* Seibert, Tr. *5646-48, in camera*). {

}. (Toth, Tr. 5751, *in*

camera).{

}. (RX 1721-002, in camera; Seibert, Tr. 5648, *in camera*).

From Daramic's perspective, {

}. (Toth, Tr. 5749-50, *in camera*).

{

}. (FOF 14; Seibert, Tr. 5648-49, *in camera*; Toth, Tr. 5749-50, *in camera*). {

}. (Seibert, Tr. 5682-83, *in camera*; RX 1724, *in camera).*

Importantly, {

}. (Seibert, Tr. 5649, *in camera*, 5658, *in camera*; RX 1667-002, *in camera*; RX 1668-002, *in camera*; RX 1669-002, *in camera*; RX 1713, *in camera*; RX 1718, *in camera*; RX 1714, *in camera*). {

}. (Seibert, Tr. 5668, *in camera).* {

}. (Seibert, Tr. 5650, *in camera*; RX 1665, *in camera*).

{

} (RX 1665-001, *in camera*). {

}. (Seibert, Tr. 5650-51, *in camera*, 5697, *in camera*, 5669-70, *in camera*; RX1665-002-1665-003, *in camera*.). Further, {

}. (Seibert, Tr. 5650-51, *in camera*, 5697, *in camera*, 5669-70, *in camera*; RX1665-002-1665-003, *in camera*).[2] {

}.

Notwithstanding {

}. (RX 1713, *in camera*; RX 1667, *in camera*; Seibert, Tr. 5665, *in camera*). {

}. (RX 1713-003; Seibert, Tr. 5657, *in camera*). {

}.

It was transparent through {

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[2] {

}. (RX01665 at 003, *in camera*).

{

{ }. (Gillespie, Tr. 2934, *in camera*; FOF 1514).

}. (Toth, Tr. 5737-39, 5741 *in camera*; Seibert, Tr. 5645, *in camera*). {

}. (Toth, Tr. 5739-40, *in camera*).

{

}. (Seibert, Tr. 5651-53, *in camera*, 5655, *in camera*; RX 1617, *in camera*). {

}. (Seibert, Tr. 5652, *in camera*).

{ }. (Seibert, Tr. 5652, *in camera*). {

}. (RX 1667-002, *in camera*; Seibert, Tr. 5658, *in camera)*. {

}. (Gillespie, Tr. 5858, *in camera.*). {

}. (RX 1667-002; Seibert, Tr. 5670, *in camera*). {

}. (Toth, Tr. 5740-41, *in camera*).

{

}. (RX1668, *in camera*; RX1669, *in camera*; Seibert, Tr. 5660, *in camera,* Seibert, Tr. 5734, *in camera*). {

}.

{

}. (Toth, Tr. 5741-42, *in camera*). {

}.

(Toth, Tr. 5742, 5744 *in camera*). {

} (Toth, Tr. 5742-43, *in camera*). {

}. (Toth, Tr. 5742-43, *in camera*)(RX01712 at 001, *in camera*). {

}. (Toth, Tr. 5743-44, *in camera*). {

}. (Toth, Tr. 5743-44, *in camera*). Ultimately, {

}. (RX01704, *in camera*). {

}. (Toth, Tr. 5745, *in camera*).

{

}. (Toth, Tr. 5746, *in camera*). {

}. (Toth, Tr. 5746-50, *in camera*). {

}

(Toth, Tr. 5747-48, *in camera*). {

}. (Toth, Tr. 5749-50, *in camera*). {

}. Toth Tr., 5749-50, in camera).

{

}.

(Seibert, Tr. 5662-63, *in camera*, 5666, *in camera*; RX 1714-002, *in camera*; RX 1718-002, *in camera*.) {

}. (Toth, Tr. 5751-52, 5755 *in camera*). {

}. (Toth, Tr. 5756, 5758 *in camera*). {

}. (Toth, Tr. 5756-59 *in camera*). {

}. (Toth, Tr. 5760-61 *in camera*).

{ }. (RX01714, *in camera*; Toth, Tr. 5761-62 *in camera*). {

}. (RX01714, *in camera*; Toth, Tr. 5761-62 *in camera*). However, {

}. (RX01687 at 002, *in camera*)(Toth, Tr. 5761-62 *in camera*). {

}. (Toth, Tr. 5761-62 *in camera*). {

} (Toth, Tr. 5762-63 *in camera*; RX01693, *in camera*). { }. (Toth, Tr. 5762-63 *in camera*; RX01693, *in camera*; RX01712, *in camera*).

{

}. (RX01712, *in camera*; Toth, Tr. 5762-63 *in camera*). {

}. (RX01681, *in camera*; Toth, Tr. 5763-64, *in camera*). {

}.

B. { }

{

}.

{

)}. (FOF 1529). {

}. (FOF 1529).

{

}. (FOF 1541). {

}. (FOF 1541, 1547).

{

}. (FOF 1531, 1532). Tellingly, {

}. (FOF 1532). {

}. (FOF 1532). {

}.

(FOF 1531).

{

}. {

}. (FOF

1533). {

}. (FOF 1535). Comparatively, {

}. (FOF 1534). Thus, {

}. (FOF 1533).

{

}. (FOF 1540). {

}. Gillespie's explanations, however, as offered to this Court, are not even remotely plausible. Gillespie is simply not a credible witness. (FOF 1540). For example, {

}. (FOF 1548). However, according to Exide's second quarter results, Exide's free cash has declined 129% from last year, which Gillespie does not dispute, and its sales of transportation and industrial batteries is down 29% and 26%, respectively. (FOF 1548). Far from being flush with cash or in a perfect financial position {

}, Exide's latest financial statements show a business struggling in a recession. (FOF 1548).

The facts, however, speak much louder and more truthfully than Mr. Gillespie's words: {

}. (FOF 1538). {

}. (FOF 1539). {

}. (FOF 1549, 1552). {

}.

C. { }

Exide's recent actions make clear that it is using its leverage and power to {

}. The evidence shows that {

}. (Gillespie, Tr.3022, *in camera*; 5830-31, *in camera*). {

}. (Gillespie, Tr. 5826, *in* camera).[3]

Although Mr. Gillespie denied at the November 12, 2009 hearing that {

}, his words are flatly contradicted by his testimony in the May hearings. (Gillespie, Tr. 5825-26, *in camera*; Gillespie, Tr. 3022-24, 3041, *in camera*). In May, {

}. (Gillespie, Tr. 3022-24, 3041, *in camera*). He further testified in May that {

} (Gillespie, Tr. 3034), {

} (Gillespie, Tr. 3024, *in camera* (emphasis supplied)). Accordingly, {

}.[4] Mr. Gillespie is not

---

[3] As noted above, {

}. (FOF 1552). Contrary to Gillespie's testimony, {

}.

[4] Mr. Gillespie's total lack of candor is plain when this prior testimony is compared to his testimony on November 12, 2009. There, his testimony was that {

}. (Gillespie, Tr. 5823, *in* camera). His prior testimony is clear – {

a credible witness and this Court should give no weight to his statements that {

} – not only because of his directly contradictory statements in the two hearings -- but also in light of the overwhelming evidence that {

}.

Mr. Gillespie's testimony that {

}. (FOF 1512).

D. { }

{

}. (Toth, Tr. 5766, *in camera*). {

}. (Toth, Tr. 5766-67, *in camera*). {

}. (FOF 1606, 1610). { } that Daramic lacks market power and pricing power as alleged by Complaint Counsel.

{

}. (FOF 1613). {

}. (Gillespie, Tr. 3022-24, 3034, *in camera*; 5823, *in camera*).

}. (Toth, Tr. 5747-49, *in camera*). {

}. (FOF 1614; Toth, Tr. 5749-51, *in camera*). {

}. (FOF 1616, 1618, 1620). Despite this, {

}. (FOF 1602, 1623). {

}. (FOF 1604).

{

}. (FOF 1610). {

}. (FOF 1616).

{

}.

(Toth, Tr. 5765-66, *in camera*). In total, {

}. (Toth, Tr. 5748, 5765-67, *in camera*). {

}. (FOF 234, 1097).

{

}. (Seibert, Tr. 5964). {

}. (Toth, Tr. 5766, *in camera*).

{

}. (Toth, Tr. 5748-49, 5778, *in camera*). {

}. (Toth, Tr. 5748-49). {

}.

{

} show that Daramic does not have the market power, much less the monopoly position alleged by Complaint Counsel.

IV. LEGAL ARGUMENT

A. The acquisition of Microporous by Polypore had no effect on competition in the FTC's alleged SLI market segment because Microporous was neither an actual participant in the market nor an uncommitted entrant

As set forth fully in Respondent's Initial Post-Trial briefing, Complaint Counsel's case has been, and continues to be following the November 12, 2009 hearing, devoid of evidence showing that the acquisition of Microporous had any effect in their alleged SLI market. Microporous had never had a "commercial" sale of SLI material prior to the acquisition and there is no support for any claim that it would have begun selling SLI separators in North America "but for" the acquisition. (FOF 318, 336, 576-582, 1336; PX77). Microporous had no contracts for the sale of SLI products at the time of the acquisition. In fact, it had never had a contract for the sale of any SLI product in its entire history. Id. Far from showing that Microporous was "very close" to selling SLI separators in North America in February 2008, the evidence adduced at trial shows that Microporous was neither an actual participant, nor an uncommitted entrant and that Microporous had little hope of securing SLI sales in North America. (FOF 382, 576-82, 383, 414-419).

The fact that { }, as admitted by Mr. Gillespie on November 12, 2009, further shows the irrelevance of Microporous' "intended" new production line – a line for which no installation steps had been taken with a total additional capacity of only { }. (Gillespie, Tr. 5838-39, *in camera*; FOF 306-309, 385, 374-376, 927, 946-957, 1147). In this type of case, the law requires "clear proof" of entry and looks for "subjective evidence" that entry is likely, e.g., management studies and capital expenditure plans. In re B.A.T. Industries, 104 F.T.C. 852, 926-28 (1984). Complaint Counsel cannot show such evidence here. In addition, Marine Bancorp established the requirement that the would-be entrant "offer a

substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects." United States v. Marine Bancorp., 418 U.S. 602, 633 (1974). In light of the size of both Daramic { } in the SLI segments, Microporous' alleged entry at the small scale available and at the high costs it faced could not have provided sufficient competitive impact to satisfy this standard.

B. Almost Two Years After The Acquisition, Competition in the SLI Market Segment Is Intense

Almost two years after the acquisition occurred in February 2008, the facts noted above and put into evidence on November 12 show that the SLI market segment is intense. {

}, outcomes predicted by an intensely competitive process.

The enforcement agencies and, more importantly, the courts have made it clear that concentration and market share data must yield to market facts about the actual state of competition. The Merger Guidelines state that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." Sec. 2.0. The Guidelines further provide that "market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger." Sec. 1.52. The courts have agreed that concentration data "[are] not conclusive indicators of anticompetitive effect." United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). "[E]vidence of a high market share does not require a district court to conclude that there is an antitrust violation" (United States v. Syufy Enterprises, 903 F.2d 659, 665 n.6 (9th Cir. 1990)), because market share statistics can be "misleading as to actual future competitive effect." United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984). As the D.C. Circuit said, "[e]vidence of market concentration simply provides

a convenient starting point for a broader inquiry into future competitiveness." United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

Complaint Counsel have made the same inappropriate argument here that the FTC made in FTC v. CCC Holdings Inc. 605 F. Supp.2d 26 (D.D.C. 2009). In CCC, the FTC pointed to FTC v. H.J. Heinz Co., and claimed that no court had ever approved a "merger to duopoly" – just as Complaint Counsel here does with respect to the merger in the alleged North American SLI segment. 246 F.3d 708, 716 (D.C. Cir. 2001); Complaint Counsel's Post-Trial Brief at 1. In CCC, Judge Collyer rebuked the FTC for their argument, noting that just because the FTC makes the argument, that alone doesn't "settle[] the question." 605 F. Supp.2d at 21. Like in CCC, the FTC's argument cannot "settle the question," or prove the FTC's case.

Importantly, as noted above and in Respondent's initial filings, the acquisition in this case had no effect on market structure in the North American SLI segment. Respondent's Post Trial Br. at pp. 18-19. If that structure was a duopoly after the merger, it was a duopoly before the merger as well. As a result, Complaint Counsel's "merger to duopoly" argument here is in error both legally and factually.

As the authorities above show, empirical evidence of the actual state of competition overcomes presumptions that might otherwise be made about competition based on market share and concentration data. Such empirical evidence may be unavailable in a pre-consummation merger case. But it has frequently been available in post-consummation cases and, where the evidence is not subject to manipulation,[5] it has been relied upon as being particularly informative as regards the state of market competition. Indeed, several decisions have relied on post-acquisition evidence to determine that the acquisition had no anticompetitive effect. See e.g., United States v. Int'l Harvester Co., 564 F.2d 769, 778 (7th Cir. 1977)(the evidence showed "intensification in competition since [the acquisition]"); Lektro-Vend. Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981)(post acquisition evidence showed

[5] Such evidence was rejected in Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 434-35 (5th Cir. 2008) because the court believed it was subject to manipulation.

that "Vendo's [the acquiring company] post-acquisition shares and profits dramatically declined"); Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974)(post-acquisition evidence showed that defendant lost money and market share); United States v. Falstaff Brewing Corp., 383 F.Supp. 1020 (D.R.I. 1974)("post-acquisition evidence showed that competition remained intense and that the acquired company's profits and market share declined after the geographic extension merger." 660 F.2d at 276).

The post-acquisition impacts on competition in these cases are very similar to the ones in the pending case since, here also, competition has remained intense, or even intensified, and {

}. Moreover, there can be no serious claim that the competition story told by the evidence produced for the court on November 12 was manipulated by Daramic. Quite to the contrary, the competitive struggle of 2009 shows that Daramic was the victim of these developments, not their master.

In this highly competitive climate, coordinated interaction will not occur. Since the evidence presented both at trial and at the November 12 hearing show that competition is intense in the North American SLI segment, the Court should conclude that the acquisition did not violate Section 7 of the Clayton Act and dismiss the Complaint.

C. The Evidence Presented at the November Hearing Shows that the Necessary Conditions for Coordinated Interaction do not Exist in the Alleged SLI Market Segment.

The same evidence referenced above that shows competition in the SLI segment is intense also shows that so-called coordinated interaction will not occur in that segment. Much evidence in support of this proposition was presented at the initial hearing, including evidence that {

}. The evidence presented on November 12, however, shows even more dramatically {

}. If the Court had any doubt about this matter at the end of the initial hearing, surely it was in no doubt at the close of the hearing on November 12.

Daramic has presented much legal and factual information regarding the coordinated interaction issue in its Post-Trial Brief (pp. 21-22), its Post-Trial Rely Brief (pp. 30-32) and in its proposed findings of fact and conclusions of law (FOF numbers 1313, COLs 1440-45). Accordingly, this material can be summarized here.

The Commentary on the Horizontal Merger Guidelines sets out the standards that have frequently been applied: "Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group, (2) to have a means to detect deviations that would undermine the coordinated interaction, and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of deviations. . . . It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade." Commentary on the Horizontal Merger Guidelines at 18-19.

In evaluating the likelihood of coordinated interaction, courts also examine factors such as "the availability of key information concerning market conditions, transactions and individual competitors; the extent of firm and product heterogeneity; pricing or marketing practices typically employed by firms in the market; the characteristics of buyers and sellers; and the characteristics of typical transactions." Merger Guidelines § 2.1. Coordinated interaction is less likely in industries, such as the alleged SLI market, which involve differentiated as opposed to homogenous products with complex pricing and other marketing issues that are negotiated with customers on a one-on-one basis. (Respondent's Responses to CCFOF 147, 530-531, 549; RFOF 34; Kahwaty, Tr. 5181-84, *in camera*).

The aggressive competition in the alleged SLI market is entirely inconsistent with a suggestion of coordinated interaction between separator producers. {

}.

All of these obstacles to coordinated interaction apply to the FTC's alleged SLI market. Although supply side substitution among battery separators is easy (FOF 1330), they are highly differentiated products (FOF 1342), which means that it is more difficult for competitors to reach terms of coordination that are profitable for each. The large number of price and price-related terms adds to the difficulty of arriving at terms of coordination. (FOF 1444). Negotiations between battery separators and customers are conducted in confidence in a one-on-one setting and they are directed at the formulation of large contracts that cover several years in duration.

The November 12 hearing included evidence of {

},

and showed that these negotiations are conducted privately. (FOF 1505-1528). Consequently it is apparent that competing producers have no way of knowing whether Daramic is deviating from any "terms of coordination" that might have been established. It is impossible to develop viable "terms of coordination" unless the participants can monitor compliance, detect cheating and impose some kind of punishment for any cheating that occurs. Even in this proceeding, Exide has been very guarded about the information that Respondent can hear with regard to its {

}. (Russell, Tr. 5783-5788, 5824-25). And it was brought out at the initial hearing that

{

}. (FOF 1444). This state of affairs has obviously not changed and Complaint Counsel can show {

}.

There are other significant barriers to coordinated interaction in this alleged market segment, including the substantial levels of excess capacity, which mitigate strongly against any further reductions in output (FOF 1444) and the ease of entry into this industry. (FOFs 1378 – 83). FTC v. Occidental Petroleum Corp., 1986 U.S. Dist. LEXIS 26138 (D.D.C. 1986)("[C]ollusive behavior will not be possible" where entry is easy). Finally, as the next section of this brief will point out, the presence of powerful customers provides a strong deterrent to coordinated interaction.

D. Large Buyers with Substantial Market Power Will Prevent Coordinated Interaction in the alleged SLI Market Segment[6].

The presence of buyer power in markets involving infrequent purchases, long-term contracts and bidding can be a substantial factor in promoting a competitive market. Such buyer power has been pronounced "likely to promote competition even in a highly concentrated market." Baker Hughes Inc., 908 F.2d at 986; See also ABA Section of Antitrust Law, Mergers and Acquisitions at 159-60 (3d ed. 2008)("Courts have recognized that evidence that a small number of buyers purchase most of the product in the market indicates that sellers may not have a great deal of freedom in establishing prices and thus may be less likely to adhere to a collusive agreement. Sophisticated buyers are more likely to detect collusion and offer sellers large orders to induce defections from the agreement or to vertically

[6] Complaint Counsel have not, and cannot, show any evidence of Daramic has unilateral market power subsequent to the acquisition (or before). The evidence is replete that {

}

This is strong evidence that Daramic does not have unilateral market power. Additionally, {

}. Contrary to Complaint Counsel's assertion, Daramic has not been able to unilaterally raise the price of any product since the merger. (FOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489; Respondent's Response to CCFOF 324).

integrate"); FTC v. R.R. Donnelley & Sons Co., Civ. No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361, at 10 (D.D.C. 1990)("[T]he sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction"). Indeed, the existence of powerful buyers and a highly concentrated buying side of the market is an important "structural barrier to coordination" – something that Complaint Counsel incorrectly claimed respondent has failed to show. See IV Phillip A. Areeda, John L. Solow and Herbert Hovenkamp, Antitrust Law at xv, 95 (2d ed. 2006); Complaint Counsel's Post-Trial Reply Brief at 22-23.

The evidence presented at the November 12 hearing was a vivid demonstration of a "power buyer," (i.e., Exide) at work. The evidence concerning {

}. Remarkably, {

} The evidence regarding {

}. (FOF 1575, 1582-83). This picture shows a company – Daramic – {

}.

The buying side of the SLI battery separator segment is highly concentrated. {

}. (FOF 240). The evidence in this case has featured the two largest purchasers, {

}, including that Daramic is a monopolist in other market segments and a viable participant in alleged anticompetitive agreements.

Both the enforcement agencies and the courts have recognized the significant influence that buyers with market power can have. The Merger Guidelines note that "buyer characteristics and the nature of the procurement process may affect the incentives to deviate from terms of coordination." Sec. 2.12. The Guidelines also state that "[b]uyer size alone is not the determining characteristic." Rather, they specify that incentives to deviate from coordination may be enhanced "[w]here large buyers likely would engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market." Id.

As the November 12 evidence shows, the Guidelines' references to long-term contracting and to sales as a substantial percentage of output apply directly to the circumstances of this case. {

}. (RX01119, *in camera*; RX01120, *in camera*; Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*). {

}. (RX01119, *in camera*; RX01120,

in camera; Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*). Plainly, the purchasers in this segment had – and continue to have – substantial power over Daramic.[7]

The federal courts have applied these and related concepts in several cases where the role of powerful buyers has been recognized. The factors that have been considered important by the courts are all present here: large, powerful buyers; high levels of concentration on the buying side; the use of long-term contracts; and the ability of buyers to shift purchasers easily from one supplier to another. In Baker Hughes, the court held that a small number of large, powerful buyers meant that the merging suppliers could not exercise market power. 908 F.2d 981, 983 (D.C. Cir. 1990). The court cited the customers' ability to "closely examine the available options and typically insist on receiving multiple, confidential bids for each order" as evidence that buyer leverage could be used to combat price increases. Id. Similarly, the court refused to grant the FTC a preliminary injunction in Donnelley & Sons, finding that the customers of the merging firms had substantial bargaining power. 1990-2 Trade Cas. (CCH) ¶ 69,239 at 64,852 (D.D.C. 1990).

High levels of concentration on the buying side were also important factors in United States v. Country Lake Foods, and United States v. Archer-Daniels-Midland Co. 754 F. Supp. 669, 679 (D. Minn. 1990); 781 F. Supp. 1400, 1416-18 (S.D. Iowa 1991). There, government action challenging mergers in both cases was rebuffed, with the courts finding high concentration on the buyer side. Country Lake Foods, 754 F.Supp. at 679; Archer-Daniels-Midland, 781 F.Supp. at 1416-18, 1424. In Country Lake Foods three distributors accounted for more than 90% of the purchases and in Archer-

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[7] Interestingly, {

}. RX01687 at 002, *in camera*). Further, {

}. (FOF 1552).

Daniels-Midland 20 large buyers accounted for more than 60% of total purchases. Country Lake Foods, 754 F.Supp. at 679; Archer-Daniels-Midland, 781 F.Supp. at 1416.

These cases, among others, also show that Complaint Counsel's claim that a customer must enjoy { } in order to be considered to have buyer power is patently false. (Robertson, Tr. 5627, *in camera*). The courts have not required a specific minimum market share percentage when making a determination that a customer has buying power. See, e.g., Federal Trade Commission v. Elders Grain, 868 F.2d 901 (7th Cir. 1989); Baker Hughes, Inc., 908 F.2d 918 (D.C. Cir. 1990); In the Matter of Owens-Illinois, Inc., 115 F.T.C. 170 (1992); Archer-Daniels-Midland Co., 781 F.Supp. at 1406. In fact, if Complaint Counsel's statement were true, then there could be only one power buyer in each market – a suggestion contrary to all prior case law.

Archer-Daniels-Midland Co., which considered a challenge to the acquisition of two corn wet milling plants by a producer of high fructose corn syrup (HFCS), found that the acquisition did not violate either the Sherman or Clayton Acts and was therefore lawful. In finding no antitrust violation, the Court weighed the relatively stagnant HHI numbers and lack of any evidence of coordinated pricing with the significant presence of large sophisticated consumers. The Court explained:

> The evidence in this case shows that the buying side of the HFCS industry is populated by very large and sophisticated purchasers and there is a continuing trend toward increasing concentration on the buying side, as large bottlers purchase formerly independent bottling franchises or bring them under their sweetener purchasing wings, and as smaller concerns band together in buying cooperatives to increase their purchasing leverage.

Archer-Daniels-Midland, 781 F.Supp. at 1422. The Court described the power buyers as "tough, experienced, sophisticated negotiators" who "consistently negotiate a price below the price announced or listed by the HFCS producer from whom they ultimately purchase." Id. at 1418. The Court specifically named Coca-Cola as an example of a power buyer despite the fact that it controlled only 40% of the market. Id. at 1416.

The use of long-term contracts and the ability of buyers to shift purchases from one supplier to another were also cited by the courts in Donnelley and Archer-Daniels-Midland. 120 F.T.C. 36, *190-92 (1995); 781 F.Supp. at 1418. The courts there referred to buyer use of long-term contracts as a means of controlling prices and reducing the number of transactions thereby increasing their relative importance. Donnelley, 120 F.T.C. at *191; Archer-Daniels-Midland, 781 F.Supp. at 1422.

When finding buyer power in Archer-Daniels-Midland, the court cited the buyers' ability to frequently shift their purchases among suppliers, delay reaching agreement, insist upon and maintain secrecy in transaction prices and act aggressively to cut off suppliers. This recitation of factors is an amazingly similar and complete account of { }, as shown by the November 12 evidence. 781 F.Supp. 1417-18.

Assessing the new evidence in light of the cases involving substantial market power on the buying side is instructive and helpful. But it only shows the competitiveness of the SLI market segment from that perspective. The broader picture, as shown by the new evidence, is that the SLI segment is intensely competitive. That undermines and defeats the Section 7 claims that have been made in this case.

V. CONCLUSION

As set forth above, the recent actions of Exide since the close of the hearing record have provided further proof that the acquisition of Microporous has not substantially lessened competition.

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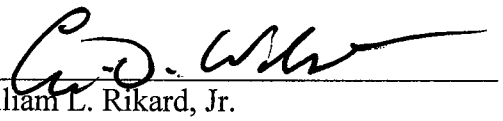
The remedy suggested by Complaint Counsel, which would require divesture of the Piney Flats and Feistritz plants, is unnecessary as the facts above prove that competition in the battery separator

market continues to thrive. Accordingly, Respondent respectfully requests that Complaint Counsel's claims be dismissed with prejudice and that a judgment be rendered in Respondent's favor.

Dated: December 2, 2009

Respectfully Submitted,



William L. Rikard, Jr.
Eric D. Welsh
PARKER POE ADAMS & BERNSTEIN LLP
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 372-9000
Facsimile: (704) 335-9689
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

John F. Graybeal
PARKER POE ADAMS & BERNSTEIN LLP
150 Fayetteville Street
Raleigh, NC 27602
Telephone: (919) 835-4599
Facsimile: (919) 828-0564
johngraybeal@parkerpoe.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Re-Opened Hearing Post-Trial Brief [PUBLIC]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580
secretary@ftc.gov

I hereby certify that on December 2, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand delivery of the foregoing ***Respondent's Post-Trial Brief for Re-Opened Hearing [PUBLIC]*** 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 December 2, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Post-Trial Brief for Re-Opened Hearing [PUBLIC]*** upon:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
rrobertson@ftc.gov

Steven Dahm, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
sdahm@ftc.gov

Brian R. Weyrich
Parker Poe Adams & Bernstein LLP
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 335-9050
Facsimile: (704) 334-4706