United States of America

FEDERAL TRADE COMMISSION

Docket No. 9327

In the Matter of

POLYPORE INTERNATIONAL, INC.,

a corporation.

RESPONDENT'S APPEAL BRIEF

PUBLIC DOCUMENT

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TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used in this Appeal Brief:

CCFOF	Complaint Counsel's Proposed Findings of Fact
CCPTB	Complaint Counsel's Post-Trial Brief
CCPTRB	Complaint Counsel's Post-Trial Reply Brief
ID	Initial Decision (reference to page number)
IDFOF	Finding of Fact in Initial Decision (reference to finding number)
PX	Complaint Counsel's Exhibit
RFOF	Respondent's Proposed Findings of Fact
RPTB	Respondent's Post-Trial Brief
RPTRB	Respondent's Post-Trial Reply Brief
RPTBRH	Respondent's Post-Trial Brief for the Reopened Hearing
RRCCFOF	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
RX	Respondent's Exhibit

STATEMENT OF THE CASE

INTRODUCTION

On February 22, 2010, Administrative Law Judge D. Michael Chappell (the "ALJ") issued his Initial Decision, finding that Respondent's acquisition of Microporous Products, L.P. ("Microporous") in February 2008 violated Section 7 of the Clayton Act and Section 5 of the FTC Act.[1] In arriving at this decision, the ALJ ignored substantial evidence introduced by Respondent that proved the merger did not violate Section 7. He also disregarded legal and economic standards and tests that he himself had ruled applicable, grounded his determinations on the unreliable testimony of Respondent's customers and competitors and the opinions of Complaint Counsel's "expert" who, like the ALJ, skirted the proper standards and econometric analysis. Complaint Counsel's case was woefully deficient and the ID, in readily adopting Complaint Counsel's case, demonstrates manifest error.

Nowhere is this error more evident than in the ALJ's order divesting the Microporous facility in Feistritz, Austria – a facility that is outside Complaint Counsel's North American geographic market and which was not even in commercial operation at the time of the merger. The ALJ ordered divestiture of the Feistritz facility even though Complaint Counsel failed to show by a preponderance of the evidence that such divestiture is necessary to restore competition allegedly lost in North America. Much more is required under the law in this consummated merger. Respondent's acquisition of Microporous does not violate Section 7 or Section 5.

STATEMENT OF FACTS

On February 29, 2008, Polypore International, Inc. acquired the stock of Microporous for approximately $76 million, $29 million in cash and $47 million in assumed debt (the

[1] As noted in the ID, the allegation that a merger violates Section 7 and Section 5 "does not require an independent analysis." (ID 199). Therefore, this Brief refers only to Section 7 for ease of reference.

"Acquisition"). (RFOF 3). Due to the small value of the transaction, the parties were not required to make a premerger notification filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

At the time of the Acquisition, Polypore's subsidiary, Daramic LLC ("Daramic") produced polyethylene ("PE") battery separators for sale to flooded lead acid battery manufacturers, with total sales in 2007 of { }.[2] (RFOF 227, 230, 239). Battery separators are placed between positively and negatively charged plates in batteries to prevent electrical short circuits while allowing ionic current to flow through the separators. (IDFOF 17).[3] PE separators are used in a wide variety of battery applications, including cars, trucks, buses, lawn mowers, golf carts, floor scrubbers, forklifts and back-up energy in critical buildings.

On the other hand, Microporous was a small company making rubber-based separators out of a single facility in Piney Flats, Tennessee, with annual sales in 2007 of { }. (RFOF 316, 325, 332, 338). Microporous sold three products: Ace-Sil (a pure-rubber separator), Flex-Sil (a pure-rubber separator), and CellForce (a separator made of rubber and PE). (RFOF 106, 127, 160-62). Microporous did not sell pure-PE separators. (RFOF 318). Nor did it sell separators for use in back-up power applications. (RFOF 103, 361). In 2007, Microporous' sales of Flex-Sil constituted nearly { } of its total sales. (RFOF 338). Microporous primarily produced rubber separators – Ace-Sil and Flex-Sil – for "specialty" batteries used in golf carts and floor scrubbers. (RFOF 118, 128, 239, 314, 569, 734; Gilchrist, Tr. 299, 461-62, *in camera*; Hall, Tr. 2799). Ace-Sil and Flex-Sil each constitute their own separate product markets. (RFOF 109-26, 1335, 1340).

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[2] The FTC Complaint only implicates Daramic.

[3] Separators can be made of paper, glass, wood, sintered polyvinyl chloride ("PVC"), polyethylene, rubber or plastic.

Daramic's PE separators did not compete with Microporous' rubber-based separators, and they are not economic substitutes for each other. (RFOF 120-24, 239, 248, 335, 544-550, 1201). Daramic viewed the Acquisition as a means to diversify its product line, gain access to Microporous' rubber technology and enter the niche rubber market, as requested by customers. (RFOF 262; Hauswald, Tr. 898).

Against this backdrop, Complaint Counsel argued that there were four distinct product markets: SLI, motive, UPS and deep-cycle,[4] ignoring Polypore's substantial evidence that the product market in this case is but one single all-PE separator market. Battery separators can be, and are, substituted for each other among each of the four end-uses outlined by the ID. (RFOF 69-78, 1185-1188, 769). Testimony by separator manufacturers and customers proved that a separator used for UPS also can be used in a motive application, and that a separator used for SLI also can be used in a deep-cycle application. (RFOF 72, 1185-1188, 769). This is because the only real difference between separators is their thickness. Thus, a separator for a UPS application may be as thin as 11 mils,[5] a size that easily fits into SLI applications. (RFOF 65, 67). Similarly, an 11 mil separator for an industrial application is just as functionally effective in a car battery as a 10 mil separator used for most SLI applications. (RFOF 67, 71).

Making separators is not "rocket science." The same manufacturer using the same machines can make PE separators for all applications. The raw materials and process are the same. The only differences emerge when the PE sheets pass through large calender rolls carved with profile patterns that can be adjusted for thickness. (RFOF 151-154, 939-940). Calender

[4] Definitions for "SLI," "motive," "UPS" and "deep-cycle" appear in the ID. (IDFOF 19, 25, 32, 35). Separators used in motive and UPS applications are part of a larger category of "industrial" application separators (IDFOF 23), and separators used in UPS applications are also part of a larger category of separators used in "reserve power" batteries. (IDFOF35).

[5] A "mil" is one-thousandth of an inch. (Whear, Tr. 4688-89).

rolls can be, and are, swapped out of the PE separator machinery in a matter of hours, meaning that separator manufacturers making separators for SLI applications can easily make separators for industrial applications, and vice versa. (RFOF 151-56).[6]

Producers of PE separators sell globally. (RFOF 186-202, 203-223, 493, 985). In 2008, Daramic exported { } of its product from North America. (RFOF 188). Entek, a powerful U.S.-based competitor in the PE separator industry, with plants located in Oregon and England and with PE separator sales in 2007 { }, exported { } of its product from North America. (RFOF 194-95, 926; RRCCFOF 172; RX00119 at 007). {

} (RFOF 932-937, 1353). Likewise, Microporous sold separators to customers across the globe from its only facility in Piney Flats, Tennessee. (Gilchrist, Tr. 540-41). Microporous exported over { } (RFOF 192, 1146). Asian PE separator manufacturers like { } and the { } supply separators to customers around the world, including South America, Italy and Korea, from single manufacturing facilities. (RFOF 199, 1049, 1109).

The PE separator market is dominated by extremely large, highly sophisticated global customers, including (a) Johnson Controls Inc. ("JCI"), the largest battery manufacturing company in the world, mainly focusing on the production of batteries for SLI applications ({ } of worldwide SLI battery sales), with sales of $38 billion in 2008, (b) Exide Technologies, Inc. ("Exide"), the second largest battery manufacturer in the world, sold approximately $3.7 billion worth of batteries in 2008, (c) EnerSys, the world's largest

[6] This ease with which a separator manufacturer may switch from making separators for SLI batteries to separators for industrial batteries – evidence important to understanding why { } and other manufacturers are able to easily enter Complaint Counsel's motive market – was ignored by the ALJ, undermining the ID's conclusions regarding market shares and entry.

manufacturer of batteries for industrial applications ({ } of worldwide industrial battery sales) with sales in excess of $2 billion in 2008 and (d) Trojan Battery Company ("Trojan"), a global manufacturer of batteries for deep-cycle applications, with sales in 2008 of {

}. (RFOF 218, 438, 516, 606). These customers are "power buyers," or at least buyers with substantial options and leverage, who can and have constrained prices, subsidized entry, and facilitated incumbent expansion. Nothing as a result of the Acquisition has changed this power. Indeed, Daramic's share declined following the Acquisition. (RFOF 306-11). Since the Acquisition, Daramic {

}. (RFOF 948-950, 1549). In addition, {

}. (RFOF 948-950, 963-972, 981, 991, 1549).

Although largely ignored by the ALJ, Entek has grown substantially, making it a strong, competitive force in the PE separator market and a significant actor in each of the ALJ's incorrectly defined markets. It primarily produces separators for SLI applications, but can also make separators for other applications. In the past, Entek has produced significant volumes of separators used in other applications, including industrial and deep-cycle applications. At the time of the hearing, {

}

(RX00114; RFOF 943-44, 963-72). Because of {

}, and {

}, Entek is an influential market competitor sufficient to constrain efforts to raise prices as a result of the Acquisition. (RFOF 969).

Although the Acquisition closed more than two years ago, Complaint Counsel failed to produce any evidence that competition in fact has been lessened. (RFOF 306-11, 946, 1152, 1300, 1384, 1549). Rather, the evidence shows that Daramic has lost sales, that competition in the separator industry is robust and that customers have the ability to obtain substantial volume of product from other competitors. In short, no anticompetitive effects resulted from the Acquisition, and none is likely.

SUMMARY OF THE ARGUMENT

In the modern era of antitrust cases, when mergers should be evaluated using the economic principles set forth in the Merger Guidelines, this ID is characterized by a wholesale lack of economic analysis, serious internal inconsistencies, and erroneous interpretation of the facts. This is even more striking given that this is a consummated merger. The ID's flaws build on one another, eventually concluding, without substantiation, that the geographic market is North America and, to compound the error, that a plant in Austria that was not operational must be divested to restore competition in North America.

Complaint Counsel presented no quantitative economic evidence to prove their alleged relevant product or geographic markets. Remarkably, Complaint Counsel's economic expert admitted that he did not perform a thorough, rigorous analysis of the merger and conceded that he had failed to perform a SSNIP test. Even though the ID acknowledges that application of economic evidence is the best way to define the relevant market, it ignores this well-established principle. Instead, the ID adopts Complaint Counsel's expert testimony that focuses on "soft" qualitative factors, and relies on unreliable testimony of Complaint Counsel's witnesses, to find its four product markets and its North American geographic market. The ALJ fails to consider or

rejects outright competent, often uncontroverted, evidence which contradicts the ID's findings and conclusions, and in doing so, has effectively relieved Complaint Counsel of their burden of proof. The weight of the evidence shows that the proper product market is an all-PE separator market and that the proper geographic market is the world.

After finding improper product and geographic markets, the ID incorrectly finds that the merger led to anticompetitive effects. In considering the market shares and concentration levels post-Acquisition, the ID selectively picks facts which support its conclusions and ignores contrary facts and evidence. Complaint Counsel failed to present evidence to prove that anticompetitive unilateral effects have occurred or are likely to occur, or that anticompetitive coordinated interaction has occurred or is likely to occur.

Even if Complaint Counsel had sustained their burdens of proof, Respondent presented evidence that rebutted Complaint Counsel's case. The ID ignores evidence showing that the industry is dominated by powerful buyers who can, and do, constrain pricing and forestall any theoretical anticompetitive practices, evidence of power that continued to build even during the hearing and at the re-opened hearing in November 2009. (RFOF 1441, 1447; RPTB 21-24; RPTBRH 24-29). The evidence also demonstrates that these "power buyers" have supported new entry and incumbent expansion in order to promote competition in the marketplace. (RFOF 1114-22, 1455; RPTB 35-44). The ID erred by ignoring the strength of these buyers and by failing to find that they would offset any competition allegedly lost as a result of the Acquisition, including the substantial amount of business Daramic has lost to other firms following the Acquisition.

The most egregious error in the ID is the inclusion of Microporous' Feistritz facility as part of the divestiture relief. In ordering this relief, the ID ignores the well-established principle

that ***complete divestiture*** of all assets ***is required only if it is necessary to restore competition*** in the relevant market. United States v. Waste Management, 588 F. Supp. 498, 514 (S.D.N.Y. 1983), rev'd on other grounds, 743 F.2d 976 (2d Cir. 1984). Complaint Counsel failed to show that the Feistritz plant affects competition in North America, or that divestiture of the Feistritz facility is necessary to restore any competition in North America. Testimony by customers and competitors made it clear that the Feistritz plant, which was not in operation at the time of the Acquisition, is not necessary to compete effectively in North America since it makes no sales in North America. Given this evidence, divestiture of the Feistritz plant is improper, punitive and cannot be sustained.

QUESTIONS PRESENTED

1. Did Complaint Counsel fail to prove a proper relevant product and geographic market?

2. Did Complaint Counsel fail to prove that anticompetitive effects have occurred or are reasonably likely to occur in the relevant product and geographic market?

3. Does substantial evidence regarding power buyers and entry demonstrate that no anticompetitive effects are likely to result from the Acquisition?

4. Did Complaint Counsel fail to prove that the Acquisition gave Respondent monopoly power or a dangerous probability of achieving or maintaining monopoly power in their alleged North American motive, UPS and deep-cycle markets?

5. Assuming *arguendo* the existence of liability, is the ordered relief, including the ordered divestiture of the Feistritz plant, inconsistent with the evidence and applicable legal standards and, therefore, overbroad, inappropriate and punitive?

COMMISSION STANDARD OF REVIEW

The Commission's standard of review is *de novo*, exercising "all the powers which it could have exercised if it had made the initial decision." FTC Rule 3.54(a); In the Matter of Trans Union Corp. No. 9255, 2000 WL 257766 (F.T.C. Feb. 10, 2000). The Initial Decision, and the findings contained therein, must be supported by a "preponderance of the evidence." In the

Matter of Chicago Bridge & Iron Co., No. 9300, 138 F.T.C. 1024, 1027 n.4 (Op of Comm'n)(Dec. 22, 2004); see also Carter Prods., Inc. v. FTC, 268 F.2d 461, 487 (9th Cir. 1959).

ARGUMENT

I. COMPLAINT COUNSEL FAILED TO PROVE A PROPER RELEVANT MARKET.

The definition of the relevant market is a **critical** requirement in antitrust cases. FTC v. Staples, Inc., 970 F.Supp. 1066, 1073 (D.D.C. 1997); see also United States v. Oracle Corp., 331 F.Supp.2d 1098, 1110 (N.D.Cal. 2004). The proper definition of a relevant market is a "necessary predicate" to a Section 7 claim. See United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957). Complaint Counsel bear the burden of proving the relevant product and geographic market. New York v. Kraft Gen. Foods, Inc., 926 F.Supp.321, 358-59 (S.D.N.Y. 1995). "[A] failure of proof in any respect means the transaction should not be [unwound]." FTC v. Arch Coal, Inc., 329 F.Supp.2d 109, 116 (D.D.C. 2004).[7] Here, after twenty-four days of hearing, Complaint Counsel failed to meet their burden.

To facilitate the analysis of a relevant market, "the [DOJ] and the FTC developed . . . the SSNIP ('small but significant non-transitory increase in price') test" in the 1992 Horizontal Merger Guidelines.[8] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1038 (D.C. Cir. 2008). Pursuant to the Guidelines, a product market is defined as "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those

[7] Because the FTC is challenging a consummated merger here, its burden is substantial. See Interview with Timothy Muris, Global Competition Review, Dec. 21, 2004 ("the FTC has to face a very high hurdle to bring a consummated merger case. If the merged entity has been operating for a while, it's not enough to assert that the transaction was anticompetitive – you have to prove it.").

[8] The FTC and DOJ are currently working to revise the Merger Guidelines to expand the use of economic evidence in considering the legality of a merger. The driving force behind the effort is to "accurately reflect the best economic and legal reasoning" in the Agencies' merger analysis and to reflect "changes during . . . seventeen years in economic learning." Christine A. Varney, Presentation at Merger Guidelines Workshop, September 22, 2009, p. 3, available at http://www.justice.gov/atr/public/speeches/250238.htm.

products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price." U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, 57 Fed.Reg. 41552, §1.11 (1992)(hereinafter "Guidelines"). Indeed, the Guidelines' SSNIP test incorporates the concepts of reasonable interchangeability of use and cross-elasticity of demand. Whole Foods, 548 F.3d at 1038; Arch Coal, 329 F.Supp.2d at 120 (Guidelines "set forth a framework for considering the issues of interchangeability and cross-elasticity of demand"); ABA Section of Antitrust Law, Mergers and Acquisitions, 3d. ed., at 66-67 ("ABA Mergers")(2008)("the case law's emphasis on both reasonable interchangeability and cross-elasticity of demand is subsumed by the Merger Guidelines within [its] "hypothetical monopolist" analytical tool").

Complaint Counsel failed to present any competent evidence of cross-elasticity of demand, the SSNIP test or other relevant economic analysis. To overcome this lack of economic evidence, the ALJ reaches 46 years into the past to rely on Brown Shoe "practical indicia" and other anecdotal evidence.[9] With the Guidelines currently being updated, it is astonishing that the case presented by Complaint Counsel and adopted in the ID is not even remotely grounded in the sound economic principles reflected in the current Guidelines.

A. Complaint Counsel Failed to Offer Reliable, Probative Evidence Sufficient to Prove Their Alleged Four Relevant Product Markets.

[9] The ALJ's use of *Brown Shoe's* "practical indicia" disregards that practical indicia should be used only "***to augment the assessment of interchangeability and cross-elasticity of demand*** when determining the relevant product market" (Arch Coal, 329 F.Supp.2d at 120 (emphasis added)), and ***not to define the relevant product market without analyzing interchangeability and cross-elasticity of demand*** pursuant to the current Merger Guidelines. See Int'l Tel. & Tel. Corp. v. General T. & E. Corp., 518 F.2d 913, 932 (9th Cir. 1975)(clarifying that the practical indicia described in Brown Shoe were meant to be used as "practical aids"); see also FTC v. Swedish Match, 131 F.Supp.2d 151, 159 (D.D.C. 2000).

Although he acknowledges the proper standards set forth above (ID 204-10), the ALJ fails to hold Complaint Counsel to their burden. Instead of offering economic evidence, Complaint Counsel offered only anecdotal evidence to support their contention that there are four distinct relevant product markets. Complaint Counsel's economic expert, Dr. John Simpson ("Simpson"), did nothing more than repeat testimony by other witnesses in the case. (ID 213). Much more is required of Complaint Counsel.

1. Complaint Counsel failed to present competent economic evidence to prove a relevant product market.

Complaint Counsel relied heavily on Simpson even though his product market testimony was riddled with defects. Simpson did not perform any quantitative analysis; he displayed substantial lack of familiarity with the products; he misapplied the proper standards and failed to follow proper methodologies; he failed to account for the fact that products he assigned to one use category are also used in other end-uses; and he relied excessively on an array of biased customer testimony. (RFOF 1177-78, 1181-86, 1190-92). Simply put, Simpson's analysis was backwards – he first arrived at a conclusion and then strained to find support for it, an error noted by the ALJ. (ID 212-13). Strikingly, although at times criticizing Simpson's work, the ALJ nevertheless relied heavily on it for his findings and conclusions. Simpson's opinions should not have been credited at all by the ALJ, and the fact that the ID is based extensively on them is error.

At the outset, Simpson conceded that he failed to perform a thorough quantitative or SSNIP analysis:

> Q. So you didn't do a rigorous analysis based upon pricing data from companies, right?
>
> A. I – by "rigorous analysis," I didn't do, like, a large-scale econometric analysis.

Q. Okay. You'll agree with me you didn't do that; you didn't do an econometric analysis here, right?

A. Correct.

(Simpson, Tr. 3327, *in camera*). When questioned by the ALJ, Simpson admitted that he did not formally estimate cross-elasticities of demand, (Simpson, Tr. 3474, 3481-82, *in camera*), a surprising admission when considering Complaint Counsel's burden and the fact that at the time of the hearing, the merger had been consummated for over 15 months.

To correctly apply the SSNIP test, the Merger Guidelines require that the analysis of the product market begin with each product of the merging companies "narrowly defined":

> [T]he Agency **will begin with each product (narrowly defined)** produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other products remained constant.

(Guidelines §1.11 (emphasis added)). Simpson agreed that it is necessary to start with the product narrowly defined, (Simpson, Tr. 3294, *in camera*) and claimed that he did so. (Simpson, Tr. 3170; Simpson, Tr. 3294-95, *in camera*). However, Simpson ultimately admitted that he did not begin by looking at the products narrowly defined. Instead, Simpson ***began*** **by** ***looking at Complaint Counsel's alleged markets*** (deep-cycle, motive, UPS and SLI) and asking whether a hypothetical monopolist of ***each type of battery separator*** in North America could profitably increase price by 5%. (PX0033 at 005 (emphasis added), *in camera*; Simpson, Tr. 3291-92, 3294-95, *in camera*). Simpson's error is significant because, among other things, it assumes away the need to determine whether and to what extent PE separators are in the same product

market as rubber-based separators, contrary to the approach set by the Guidelines, which Simpson himself admitted was the correct method to follow.[10]

Simpson also admitted that separators are used in more than one of his product categories. (Simpson, Tr. 3308, *in camera).* Simpson acknowledged that CellForce is used in both deep-cycle and motive applications. (Simpson, Tr. 3302-03, *in camera*). Although Simpson testified that the alleged deep-cycle market only includes separators that contain rubber and does not include pure-PE separators (Simpson, Tr. 3308, 3310-11, *in camera*), he eventually admitted that East Penn and Crown use pure-PE separators for deep-cycle applications. (Simpson, Tr. 3309, *in camera*; Leister Tr. at 3978-80; Balcerzak, Tr. 4093-95).

The fact that Simpson admits that the same battery separators can be used for different end-use applications (Simpson, Tr. at 3308, *in camera*), but does not account for this "dual usage" in analyzing his product markets, reveals a basic flaw of his approach. Simpson's product markets are not distinct markets as required by the Guidelines. (Simpson, Tr. 3306-08, *in camera*).

Rather than relying on economic analysis, Simpson relied on questionable testimony of customers[11] such as EnerSys, Exide and Trojan, who were complainants in this case and demonstrated a lack of impartiality. See, e.g., ID 218, 220, 224. This reliance occurred even though the ALJ criticized Simpson and Complaint Counsel for failing to identify the customer testimony that was considered (ID 213) and despite strong legal authority warning against such

[10] Simpson's testimony demonstrated a lack of familiarity with the products, which made it difficult to analyze narrowly-defined products. For example, Simpson did not know the dimensions or all of the end-use applications of separators in his product markets. (Simpson, Tr. 3296-3302, 3470-71, *in camera*). Similarly, Simpson did not know whether the proper market should be a reserve power market rather than a UPS market, since he did not analyze a reserve power market. (Simpson, Tr. 3299-3300, *in camera*).

[11] "[F]or each of the alleged markets, 'the ***main thing*** [that Dr. Simpson] was relying on in implementing the hypothetical monopolist test ***was the statements by the buyers*** that they had very little options to substitute, and hence, that the demand curve was very inelastic.'" (ID 213)(emphasis added).

reliance. 2B Phillip Areeda & Herbert Hovenkamp, Antitrust Law ("Areeda & Hovenkamp") ¶ 538b (3d ed. 2007); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) ("We question the district court's reliance on the testimony of [customers] . . . that [they] would unhesitatingly accept a price increase . . . . Without necessarily being disingenuous or self-serving or both, the testimony is at least contrary to the [customers'] economic interests and this is suspect."); United States v. Country Lake Foods, Inc., 754 F.Supp. 669, 675-76 (D.Minn. 1990); Oracle, 331 F.Supp.2d. at 1131, 1158. Simpson's, and ultimately the ALJ's, heavy reliance on customer testimony is inappropriate. Through cross-examination, Respondent demonstrated that each of Complaint Counsel's witnesses from EnerSys, Exide and Trojan were biased and antagonistic to Respondent, to the point that each had initiated or had threatened to initiate litigation against Respondent. (RFOF 654-55, 725-33, 756-64, 1541). No credit should have been given to these witnesses' testimony. [12]

The ALJ was not oblivious to Simpson's errors. The ID criticized Simpson's work in numerous respects, and he completely rejected Simpson's critical loss analysis: "Simpson . . . did not provide sufficient quantitative evidence for the magnitude of the actual loss, or sufficient methodology for calculating the actual loss." (ID 212-213). Notwithstanding the many flaws in Simpson's work, the ALJ accepted Simpson's testimony. For example, relying on Simpson's opinion, the ALJ put Microporous' Flex-Sil and CellForce along with Daramic's HD[13] in the alleged deep-cycle market while citing no evidence discussing whether a 5% price increase on Flex-Sil would produce substitution to CellForce or HD, or the reverse. In fact, the evidence

[12] The ALJ also erred by not making specific findings on credibility of Complaint Counsel's witnesses, as he should have. In the Matter of Schering-Plough Corp., No. 9257 at 8, n. 14(Op of Comm'n)(Dec. 18, 2003); Cowert v. Schweiker, 662 F.2d 731, 735 (11th Cir. 1981).

[13] Daramic HD is a PE separator made with a liquid latex additive. (IDFOF 41).

demonstrates that a 5% increase in Flex-Sil would not result in substitution. See infra at 28-30. Similarly, the ALJ placed Darak, Daramic-CL[14] and CellForce in the alleged UPS market without discussing any evidence about the effect of any 5% price increases. In addition, the ALJ overlooked evidence of supply-side substitution, although acknowledging that it "may properly be considered in defining a product market." (ID 206). The uncontroverted evidence at trial demonstrated that Entek formerly produced non-SLI separators (RFOF 681, 684) and could easily do so again. See infra at 42-43.

Ironically, the one expert who did provide competent economic analysis of the merger – Respondent's expert, Dr. Henry Kahwaty – was completely ignored by the ALJ. Kahwaty, who testified that the merger did not violate Section 7 of the Clayton Act, actually followed the Guidelines.

- Kahwaty performed a proper SSNIP analysis to conclude that the relevant product market is an all-PE market. (RFOF 1336-37).[15]
- Applying the SSNIP test, Kahwaty first concluded that Ace-Sil constitutes its own product market. (Kahwaty, Tr. 5112-13, *in camera*).
- Focusing on the Guidelines' methodology, Kahwaty's economic testimony further concluded that imposition of a SSNIP on Flex-Sil would not cause a significant switch to CellForce, HD or a pure-PE product. (Kahwaty, Tr. 5114-19, 5566, *in camera*).[16]

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[14] Daramic-CL is a PE separator made with cleaner oil. (RFOF 89).

[15] Although the ALJ states that finding an all-PE market "would not have disproved narrower product submarkets that could themselves amount to relevant markets" (ID 224), such a statement is a matter of semantics. Speaking in terms of submarkets is "superfluous and confusing in an antitrust case, where the courts correctly search for a 'relevant market.'" 2B Areeda & Hovenkamp, ¶533. The same analysis is undertaken to determine the relevant market, whether it is a larger product market or a smaller submarket. Id. at 254-57; see also Cupp v. Alberto-Culver, U.S.A., 310 F.Supp.2d 963, 970 (W.D. Tenn. 2004).

[16] This economic conclusion is supported by the fact that Trojan (Microporous' largest Flex-Sil customer) could use, at most, 25% CellForce separators and 75% Flex-Sil. See infra at 29. Accordingly, application of a SSNIP on the Flex-Sil separator price would not cause Trojan to switch substantially either to CellForce or HD. (Kahwaty, Tr. 5115-16, *in camera*).

- Kahwaty explained that Simpson's critical loss analysis erred in concluding that HD controlled the price of Flex-Sil without using any empirical analysis to support that conclusion. (Kahwaty, Tr. 5127-31, *in camera*). By contrast, Kahwaty's critical loss and SSNIP analysis, using empirical data, showed that Flex-Sil belongs in its own product market. (Kahwaty, Tr. 5119-31, *in camera).*

Ultimately, the ID fails for its heavy reliance on Simpson's opinion, which is not grounded on economic analysis but on "soft" qualitative facts elicited from the power buyers who have demonstrated a dislike of Daramic and an agenda which includes seeking complete divestiture regardless of the merits.

2. The ID selectively picks evidence to support its conclusion of four product markets while ignoring substantial contrary evidence demonstrating an all-PE product market.

Rather than relying on quantitative evidence, the ALJ relied on 46-year old Brown Shoe's "practical indicia" and anecdotal evidence. As has been noted, the ALJ ignored a huge amount of probative evidence showing that the end-use "buckets" urged by Complaint Counsel do not constitute separate markets. The ID is replete with inconsistencies, and Simpson and the ALJ selectively picked among the evidence, relying on unreliable testimony, to reach their conclusions.

a. There is significant overlap among the end-uses outlined by the four product markets.

The record is replete with evidence demonstrating that battery separators ***are*** substituted for each other among the four end-uses outlined by Complaint Counsel and that these four end-uses do not constitute separate markets. The following are uncontroverted examples, which the ALJ ignored:

- Daramic's AU profile with a 12 mil backweb thickness is used by one customer in a stationary application and another customer in an SLI application. (RFOF 70).
- AT&T uses Daramic's flat-sheet profile in a stationary application, and Concorde uses it in an SLI application. (RFOF 71).

- {

  }. (RFOF 72-73; Seibert, Tr. 4188, *in camera*).

- Separators with a 12 mil backweb are used in automobiles (SLI), golf carts (deep-cycle) and telecom batteries (stationary). (RFOF 74).

- {

  }. (RFOF 77).

- Crown uses pure-PE separators in SLI, motive and deep-cycle (floor scrubber and marine) applications. (Balcerzak, Tr. 4093-95).

In addition, the ALJ found that CellForce is used in all four applications outlined by the alleged product markets (ID 214, 216, 220, 222) and that HD is used in at least two of the four alleged markets (deep-cycle and motive). (ID 214, 217). The reality is that customers ***can*** use, and ***do*** use, the same separator for more than one application described by Complaint Counsel's four alleged product markets.

b. The ID deals with evidence erroneously and inconsistently.

The ID treats similar evidence in a totally inconsistent manner. For example, the ALJ finds that SLI separators are a separate product market, in part, because they have "distinct and relatively low prices." (ID 223). However, the ALJ fails to find that Flex-Sil is a separate product market despite the fact that it has distinct and relatively high prices. (ID 227-30; RFOF 124, 1200). The ALJ also fails to acknowledge Simpson's concession that Ace-Sil is a separate market. (PX2251 at 001, *in camera*; Simpson, Tr. 3321, *in camera*). These positions are irreconcilable.

Further, the ID cites "Daramic's documents" which purportedly analyze the alleged separator markets. (ID 218-24).[17] However, almost all of the cited documents are ***Microporous*** documents that were created long before the Acquisition. The only cited document from after the merger (PX0395) was created by Mike Gilchrist, Microporous' former CEO, whose testimony was shown to be biased and not credible.[18] Additionally, the ALJ's reference to PX0395 proves that Daramic views UPS separators as part of a broader market segment of reserve power, which is part of a larger "industrial" market segment. (ID 245; PX0395-019). Nowhere does the document indicate that Daramic views UPS separators as a distinct market. The ALJ's finding that Daramic documents support the alleged product markets is erroneous.

Daramic's documents confirm that Daramic tracks sales by PE and non-PE separators. For example, Daramic's worldwide market studies and other analyses focus on an all-PE market, not markets of SLI, motive, UPS and deep-cycle. (RFOF 186; PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*; RX01305 at 007, *in camera*). In addition, Daramic's financial documents analyze the separator market in terms of PE versus non-PE separators. (PX1688 at 001, *in camera*; RX01265 at 010, *in camera*; RX00696 at 007, *in camera*). Moreover, other competitors and customers view the industry in terms of an all-PE separator market as well. (RX00115 at 006-008, *in camera*; RX00220 at 006-007, *in camera*; RX00144 at 008, *in camera*).

Substantial evidence, ignored by the ALJ, demonstrates that the industry consistently focuses on PE and non-PE separators, rather than Complaint Counsel's four alleged markets.

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[17] Interestingly, the ID fails to cite any specific documents in support of a deep-cycle market but merely cites to Simpson, who summarily concludes that "company documents" support a deep-cycle market. (ID 216).

[18] Gilchrist evidenced a dislike for Respondent and his testimony shifted considerably during this proceeding to advance his personal interests. (Gilchrist, Tr. 469-71, *in camera*, 521-23, *in camera*, 531-33).

c. The ID relies on unreliable customer testimony.

The ID improperly relies on customer testimony in support of finding four relevant product markets, primarily testimony of Exide and EnerSys witnesses (Gillespie, Axt, Burkert, Gagge and Craig). These witnesses testified, having been heavily prepared by Complaint Counsel (Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-002), with barely-masked hostility toward Daramic. The subjective customer testimony cited by the ID is unreliable and should not have been credited by the ALJ. See supra at 13-14.

Complaint Counsel failed to sustain their burden to prove a relevant product market. Their case was not based on objective economic analysis as contemplated by the Guidelines but on a selectively chosen set of subjective documents, suspect testimony and "practical indicia," while ignoring contrary evidence. The ALJ ignored the solid economic case presented by Respondent's expert, whose testimony confirmed that application of the Guidelines produces an all-PE separator market.

B. Complaint Counsel Failed to Sustain Their Burden to Establish a Relevant Geographic Market.

Proof of a relevant geographic market is also "a necessary precondition to assessment" of the effect of the merger (ID 232), and Complaint Counsel bear the burden of proof. Here, Complaint Counsel failed to meet their burden. Instead of presenting economic evidence, Complaint Counsel's geographic market case is based on the unreliable testimony of Simpson, who merely parrots the testimony of biased witnesses. The ALJ's acceptance of Complaint Counsel's North American geographic market is error.

The ID lists certain standards that are supposed to be used to determine the geographic market, including cross-elasticities of demand and supply, the Guidelines and "other indicia," including the Elzinga-Hogarty test. (ID 234-37). As noted by the ALJ and Complaint Counsel,

the Guidelines provide the appropriate methodology for determining the geographic market. (ID 235, 238-39("Complaint Counsel stresses the Merger Guidelines' application to geographic markets" and that under those Guidelines, a SSNIP test should be used to define the geographic market); Guidelines ¶1.0; see also ABA Mergers at 119 (2008)(the Guidelines, which have been "increasingly relied on" to define the relevant geographic market, incorporate the question of where "the purchaser can practicably turn for supplies")). Yet, while all appear to agree that the Guidelines apply here, the ALJ misses that Complaint Counsel wholly failed to present a SSNIP analysis and, as a result, failed to sustain their burden.

While Complaint Counsel's case relied heavily on the suspect testimony of their economist, Simpson admitted that he did not perform a thorough, rigorous economic analysis. (Simpson, Tr. 3327, 3474, 3481-82). Complaint Counsel and Simpson failed to offer any quantitative analysis to support the geographic market adopted by the ALJ. For example, the ID concludes that the analysis of the geographic market should include consideration of the ability to price discriminate and the potential for arbitrage to defeat such price discrimination. (ID 235-36). Yet, the ID fails to acknowledge that Complaint Counsel failed to offer evidence of such price discrimination or an inability to defeat it with arbitrage. While Simpson testified that Daramic engaged in price discrimination in selling its products worldwide (Simpson, Tr. 3217-18, *in camera*), he admitted that he did not do any "rigorous analysis" of pricing in different areas of the world (RFOF 1206), and Complaint Counsel presented no evidence at all that Daramic's *costs* are uniform throughout the world. United States v. Eastman Kodak Co., 63 F.3d 95, 106-07 (2d Cir. 1995). In fact, the uncontroverted evidence shows that {

}. (Riney, Tr. 4958-59, *in camera*). Recognizing the flawed nature of Simpson's work, the ALJ himself notes that Simpson's testimony concerning price

discrimination is defective because it is "less precise[]" than the concept of price discrimination "generally used by economists." (ID 240). Even after acknowledging this defect, the ALJ nevertheless adopted Simpson's opinions as the basis of his ID.

Complaint Counsel made no effort to show that any alleged price discrimination could not be defeated by arbitrage, which is fundamentally a question of price. Simpson even admitted that he did not perform an arbitrage analysis. (RFOF 1203-04). On the other hand, Respondent's expert testified convincingly that arbitrage could defeat any price discrimination. (Kahwaty, Tr. 5164-65, *in camera*). Rather than consider this economic analysis, the ALJ summarily concludes – erroneously – that price discrimination would "not likely be defeated by arbitrage" based on nonmeasurable qualitative factors of product differentiation and alleged customer preference for "local supply." (ID 240).

Even here, as to consideration of these "soft" qualitative factors, the ID fails. The ID cites nothing more than unreliable testimony of customers and third parties regarding supposed preference for local supply and barriers to foreign manufacturers. (ID 240-42). A thorough review of the evidence demonstrates that local supply is not a necessary predicate for competition.

- Larry Burkert from EnerSys testified that local supply is not necessary. (Burkert, Tr. 2385-86).
- Jim Douglas from Douglas Battery testified that Douglas does not need local supply and actually prefers obtaining products on consignment warehousing from Daramic. (RFOF 837).
- Exide has { }. (RFOF 1529-32; Gillespie, Tr. 2991-2992). The evidence demonstrates that separators do not expire like a carton of milk or a crate of eggs, as shown by { }. (RFOF 1531-32).

Perhaps most telling, though, about the lack of merit to this local supply argument is the fact that prior to the merger, Entek, Daramic and Microporous each sold separators to customers either thousands of miles away or outside of the country itself.

- { }. (RFOF 784, 926). Entek exported { } of its separators from Oregon. (RFOF 195).
- Daramic, which has plants in Indiana and Kentucky, supplied East Penn and EnerSys, both of whom are located in Pennsylvania, (RFOF 215, 233; RX00207) and exported { } of its separators from North America. (RFOF 188).
- Microporous supplied EnerSys' European and Chinese plants from its Piney Flats plant for years. (Burkert, Tr. 2377, 2379).

In a striking exchange, the ALJ questioned Gilchrist at the hearing, asking if a customer in Europe cares whether the separators come from Italy, China or Piney Flats Tennessee, to which Gilchrist answered "If it meets your specifications and terms, no, probably not." (Gilchrist, Tr. 594). All of this evidence was ignored by the ALJ in the ID. The reality is that North American customers have lived without local supply for decades without any adverse competitive effects.

Similarly, the evidence shows that barriers to foreign producers are insubstantial. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). Although the ID discusses value-added taxes as a barrier, the analysis is based on the self-serving testimony of James Kung, who is a { } and a competitor, and JCI witnesses, as well as very old pricing information that cannot have any relevance to a merger occurring in 2008. (ID 241). The ID further notes that "suppliers in other regions do not yet produce . . . certain categories of separators, including motive and UPS separators." (ID 242). This is incorrect. {

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(RFOF 687, 690-92, 695, 1017).

The ALJ's inconsistent treatment is further exemplified by his failure to consider other relevant evidence. The ID notes that other "relevant evidence" includes evidence that buyers "have considered shifting . . . purchases to another location." (ID 235). As discussed in section III,B, the evidence shows that customers have considered shifting purchases to Asian and European suppliers { }. (RFOF 500, 598-600, 685-698, 789). Although the ALJ notes that this evidence is relevant, he ignores it.

What makes the ID's reliance on "soft" criteria even more surprising is the ALJ's acceptance and treatment of the Elzinga-Hogarty test as an appropriate test used by a number of courts and the Commission for defining a proper geographic market. (ID 237-38). This test provides that "exports or imports greater than 10% suggest that the market examined is not a relevant market." (ID 238, quoting Country Lake Foods, 754 F. Supp. at 672, n.2). The evidence in this case shows that over 10% of product made in North America is exported. (RFOF 188, 192, 195). In fact, in 2008, Daramic exported { } of its North American production, and Entek exported { } of its production from North America. (RFOF 188, 195). Microporous exported over { }. (RFOF 192). Thus, under this test accepted by the ALJ, North America is too narrow to be the proper geographic market, an error fatal to the ID and the ALJ's conclusions. The ID circumvents this inconvenient truth by citing the Elzinga-Hogarty test approvingly and then ignoring it.

As opposed to the total lack of economic analysis in Complaint Counsel's case, the analysis presented by Respondent, through Kahwaty, conformed to the criteria of the Guidelines. Using proper economic analysis, Kahwaty found that {

}. (Kahwaty, Tr. 5169-70, *in camera*).

Kahwaty testified that {

} (RFOF 1356-57).[19] Based on sound economic analysis, Kahwaty concluded that the North American market urged by Complaint Counsel was too narrow. (Kahwaty, Tr. 5072, 5163-64, *in camera*). As Kahwaty explained:

> If prices charged by North American PE plants increased, but prices charged by Asian PE plants did not, I would expect a large fraction of the North American plants' non-NAFTA volumes to switch to suppliers located outside of North America. (RX00945-060).

Kahwaty further explained:

> If the North American plants were to increase their prices by 5 percent while prices for plants located elsewhere were held constant, customers in South America and elsewhere would choose to switch suppliers from North America. (RX00945-059).

During his analysis, Kahwaty also found that the export figures of Daramic and Entek from North America, discussed above, are { }. (RFOF 1351; Kahwaty, Tr. 5169-70, *in camera*). Based on his economic analysis, Kahwaty concluded that the proper geographic market is worldwide. (RFOF 1349).

Grounded in anecdote rather than economic standards, the geographic market case presented by Complaint Counsel was wholly inadequate.

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[19] The ID cites testimony of Simpson at trial that criticized these cost numbers, stating that they were Daramic costs rather than "the cost for what independent rivals would have in Asia." (ID 243). There is no foundation for this statement and no reason otherwise to believe Daramic's production costs in Thailand could not be properly used for this purpose. Indeed, the case offered by Complaint Counsel is subject to the observation made by the court in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 219 (D.C. Cir. 1986) about a defect in the plaintiff's geographic market case there: "Plaintiffs did not offer evidence that if, prices were appreciably raised or volume appreciably curtailed in some areas, supply from other sources would not promptly restore the original price and volume."

II. COMPLAINT COUNSEL FAILED TO PROVE THAT SUBSTANTIAL ANTICOMPETITIVE EFFECTS HAVE OCCURRED OR ARE REASONABLY LIKELY TO OCCUR.

To prevail on a Section 7 claim, Complaint Counsel must prove the acquisition is "reasonably likely to have 'demonstrable and substantial anticompetitive effects'" in the relevant market. Kraft Gen. Foods, 926 F. Supp. at 358-59(quoting United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969)). The "mere possibility" of an anticompetitive effect is not sufficient; the likelihood of such an anticompetitive effect must be ***reasonably probable***. Id. at 359. Indeed, as noted above, where the merger, as here, was consummated over two years ago, Complaint Counsel must show that anticompetitive effects have actually occurred. Complaint Counsel have plainly failed to meet this burden and the ID, finding that burden to have been met, is in error.

A. The ID Erred By Concluding That the Acquisition Caused Anticompetitive Effects in the Alleged SLI and UPS Markets.

The ALJ's findings in the ID concerning market share and concentration, which are of course predicated on the earlier erroneous findings on the relevant markets, are for similar reasons in error. The ALJ, by relying on Simpson's defective work and ignoring evidence introduced by Respondent, erred while concluding that Complaint Counsel proved that the merger had anticompetitive effects.

The ID finds that Microporous was a competitor in the alleged SLI market. (ID 259). This was not the case. Microporous did not commercially sell SLI separators at the time of the merger and had no commitments from ***any*** customer to purchase SLI separators. In fact, Microporous had not been successful in producing a pure-PE product for SLI applications. While one commercial run of pure-PE product was produced for JCI in late-2003 into early-2004 for SLI application, JCI ultimately did not purchase those separators. (RFOF 336). The product

was subsequently sold to Voltmaster in 2004 in a one-time sale with Microporous having no intention of making any future sales. (RFOF 336).

The ID dismisses this undisputed evidence by claiming that Microporous was "a substantial factor" nevertheless in the alleged SLI market at the time of the merger. Here, again, close scrutiny of the record demonstrates that this conclusion is erroneous.

First, as noted above, while Microporous did approach JCI in 2003 regarding this subject, it failed to produce an acceptable product. Microporous' discussions with JCI ended in 2007. (RFOF 377, 474, 489). The record is clear that Microporous had no potential here and therefore could not be a "factor" let alone substantial.

Second, although Exide and Microporous had had some discussions regarding the supply of separators for SLI applications, those discussions were never serious. The discussions between Exide and Microporous began in 2004 and at the time of the merger, four years later, there was still no agreement between the parties for the supply of such separators. (RFOF 382, 417-19, 580; RX00748). The contention that absent the merger, Exide somehow would have bought SLI separators from Microporous is pure fantasy. FTC v. Atlantic Richfield Co., 549 F.2d 289, 296-98 (4th Cir. 1977); BOC International LTD v. FTC, 557 F.2d 241 (2d Cir. 1997).

- Although Exide entered into a non-binding MOU with Microporous for the sale of SLI separators by its own terms, it had expired on August 31, 2007. (RFOF 382).
- Exide did not sign and return the non-binding MOU to Microporous until late September of 2007, after it had expired. (RFOF 382).
- Through the fall 2007, no progress was made on an agreement with Exide. (RFOF 382; Trevathan, Tr. 3612, 3626, 3724). Although two meetings took place in early 2008, no agreement was reached, and Microporous did not believe it would ever supply Exide. (RFOF 417-19, 580).

Steve McDonald, Microporous' Director of Sales and Marketing, described the state of the Microporous-Exide discussions in February 2008 in an email weeks before the merger: "That and a $1.50 will buy you a cup of coffee." (RX285).

Third, Microporous had had brief discussions with East Penn regarding separators for SLI application but those discussions never went beyond preliminary stages. (RFOF 383).

Fourth, the ID ignores substantial evidence that Microporous' Board of Directors, worried about Microporous' financial situation and, questioning Gilchrist's financial acumen (PX2301 (Heglie, Dep. 91-93, 149-53)), mandated that Microporous **not** begin producing separators for SLI applications. (RX00401 at 001; PX2300 (Heglie, IHT 194-95)). The Board directed Microporous to leverage its existing strengths in rubber technology and products, and not become just another player in the crowded PE market. (RX00401).

These facts demonstrate that Microporous was not "a substantial factor" in the alleged SLI market. Simply because some Daramic personnel may have made certain assumptions on a worst-case scenario basis in consideration of the merger does not elevate Microporous to a participant in this alleged market or alter the factual reality set forth by Microporous' Board.

The ALJ made similar errors in finding Microporous "a substantial factor" in the alleged UPS market. At the time of the merger, Microporous did not have a product that was commercially viable. (RFOF 355-65; RPTB 20). Even at the time of the hearing, the LENO samples – the ALJ's presumed entrant – were still undergoing testing. (RFOF 361). Moreover, while the ALJ concludes that "[f]ollowing the acquisition, there is no potential entrant to constrain Daramic in the UPS market" (ID 258), the ALJ fails to note that Microporous offered no constraint prior to the merger.

Significantly, the ALJ fails to acknowledge that Project LENO, even if found commercially viable, would have no impact in the alleged North America market. LENO was intended to be a replacement for Darak. (RFOF 356-57). But Darak has never been sold for use in flooded lead acid batteries in North America. (RRCCFOF 514). Any product that might have been produced by the LENO project (which would include white PE) was intended to be used in "Stationary [flooded lead acid] batteries ***in Europe*** . . . [and] Gel batteries in the US and Europe for UPS and wheelchair." (RRCCFOF 514). Gel batteries, though, are different than flooded lead acid batteries and not part of Complaint Counsel's alleged market. (RFOF 24; CCFOF 16-19). If LENO became a successful product,[20] Microporous intended for it to be competitive with Darak in flooded lead acid batteries ***in Europe, not North America***. (RRCCFOF 514). Thus, LENO (and white PE) had no impact on competition for flooded lead acid battery separators in North America. (RRCCFOF 514). The ALJ's conclusion to the contrary cannot be sustained.

The ALJ's inconsistent treatment of the evidence is error and cannot stand. Finding that Microporous was a participant in the SLI and UPS markets, even though it had no sales or prospects (see supra at 25, 27), but dismissing Entek as an uncommitted entrant in anything but the SLI market is error. The record shows that {

}. (RFOF 588-89, 681-84, 943, 962; Weerts, Tr. 4490, *in camera*). Entek is an uncommitted entrant.

B. Complaint Counsel Failed to Prove Any Other Anticompetitive Effects In Their Alleged Markets.

[20] The ID fails to recognize substantial evidence which demonstrates that the LENO project was unsuccessful. (RRCCFOF 514; RFOF 360, 364).

The ID contains findings purporting to show that customers viewed Daramic's HD as a competitor to Microporous' Flex-Sil in the alleged deep-cycle market, that they threatened to switch to HD unless Microporous constrained its Flex-Sil pricing, and that the Acquisition represented a "merger to monopoly." (ID 77-91, 246-48). Despite this rhetoric, actual customer conduct proves that HD was not competitive with Flex-Sil.

First, the ID neglects the fact that Flex-Sil remained the dominant separator notwithstanding that it cost { } more than HD. (RPTB 12). The ID also ignores the fact that HD was not qualified for use in original equipment by Trojan, U.S. Battery or Exide (RFOF 872, 746, 548), US Battery only uses Flex-Sil in its premium battery line (RFOF 121) and that Microporous did not consider HD to be a threat to its deep-cycle business. (McDonald, Tr. 3820). Daramic had failed to compete with Flex-Sil in the alleged deep-cycle market (2007 sales of HD were a mere { } out of Daramic's total separator sales worldwide of { }). (RX01119, *in camera*; RX01418, *in camera*).

Flex-Sil has unique properties that differentiate it from other battery separators such that it is, in fact, its own product market. (RFOF 117-126, 1200-01). Witness after witness testified that Flex-Sil is considered the industry standard and is demanded by battery customers due to its superior performance and product life. (RFOF 1200). It is for this reason that Flex-Sil constituted { } of Microporous' sales to Trojan in 2007 (RX01120, *in camera*; McDonald Tr. 3853-55, *in camera*) and more than { } of Microporous' total sales (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*). In short, customers have been unwilling to switch from Flex-Sil to HD despite significant cost savings, and HD was never an effective competitor to Flex-Sil.

The ID claims that Trojan threatened to switch to HD in order to obtain price reductions on Flex-Sil. (IDFOF 529, 535-36, 538-39, 541). Despite that threat, Trojan decided that Flex-

Sil would continue to constitute 75% of its separator purchases, with HD and CellForce amounting only to 25%. (IDFOF 546).[21] The ID ignores this significant evidence. Similarly, the ID ignores evidence from U.S. Battery that Flex-Sil still constitutes 90% of U.S. Battery's deep-cycle separator purchases notwithstanding the fact that it was priced twice as much as HD. (RFOF 124, 864-65). It is startling that the ALJ ignores this evidence in light of the fact that { }. (RX01120, *in camera*) { }.

The ID claims that Exide, { }, "used HD as leverage" to obtain price breaks on Flex-Sil. (IDFOF 522-23, 525-28; RX01120, *in camera*). But, the ID ignores the testimony of McDonald that Microporous never took HD as a serious threat. (McDonald, Tr. 3818). Trojan's long-standing relationship with Microporous was determinative. (RX00641, RX00772). Significantly, the ID also ignores the fact that even though { } (RX00677, *in camera*; PX0489), { }. (RFOF 545-550; RX00677, *in camera*) { }. (RFOF 537, 541, 545, 547; RX00677, *in camera*). This is an inconvenient fact that the ID never addresses and which shows that HD was not a competitive factor with Flex-Sil. Kahwaty demonstrates this point as well with a SSNIP test showing that Flex-Sil belongs in its own product market, but his testimony was ignored. (Kahwaty, Tr. 5119-5131, *in camera*).

[21] Godber of Trojan actually testified that Trojan could use only a maximum 21% of HD and/or CellForce separators. (Godber, Tr. 176).

In a further attempt to support its conclusion of anticompetitive effects, the ID asserts that Daramic had a post-Acquisition strategy to sell Flex-Sil rather than HD and that Daramic refused to honor Microporous' promises to Trojan. (ID 91-95). However, these findings fail to take into account the evidence submitted regarding Daramic's proper business justification and intent.

For example, US Battery developed a "new" battery and assumed that Daramic would be able to provide HD separators for it despite the fact that no one at US Battery checked with Daramic to ensure that the proper HD product could be made. (Qureshi, Tr. 2093-94). The evidence showed that Daramic had significant difficulty running HD through its process for this specific application (Roe, Tr. 1312-13; McDonald, Tr. 3823-24), which the ID acknowledges (IDFOF 566, 571). The ALJ makes no finding otherwise. As for Exide, the ID notes an internal Daramic discussion regarding Exide purchasing Flex-Sil (IDFOF 568-69) but fails to put the discussion in the proper context of the production problems caused by labor strife at Daramic's Owensboro's facility (Hauswald, Tr. 1074-75) and fails to account for the language barriers encountered by Hauswald, whose native language is French. (Hauswald, Tr. 740).

As to the claimed anticompetitive behavior with Trojan, the findings show that the contract under discussion at the time of the acquisition had not been finalized (IDFOF 552, 554); that the price increases proposed by Daramic became the subject of negotiations with Trojan (IDFOF 559); that { } (refuting Complaint Counsel's claim in the case that Daramic demanded long term commitments from its customers) (RFOF 759); and that { }. (IDFOF 560). These facts and the ALJ's own findings demonstrate the "power" tactics utilized by Trojan during post-Acquisition negotiations with Daramic, and do not support any conclusion that this

situation involved the one-sided imposition of onerous terms and conditions by Daramic on Trojan.

The ID fares no better in claiming anticompetitive effects in a motive market. (IDFOF 384, 385, 386, 562, 777-79, 1273, 1366). Microporous' sales of Cell Force in 2007 in North America totaled a mere { }. (RFOF 339-40; RX01120, *in camera*). Microporous had no competitive influence on Crown or Douglas Battery, as Douglas Battery had not had any discussions with Microporous since 2004 and Crown never even considered using Microporous separators in industrial batteries in 2008. (RFOF 814, 828, 832, 838). East Penn had not qualified Microporous separators and { }. (RFOF 779, 782). Nor did Microporous have any competitive effect with respect to Exide. See supra at 26.

Contrary to the conclusions drawn in the ID, the evidence demonstrates that no anticompetitive effects have been shown in any of Complaint Counsel's alleged markets.[22]

C. Complaint Counsel Failed to Prove that Anticompetitive Unilateral Effects Have Occurred or Are Likely.

Even if Complaint Counsel had proved their markets, "[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger. . . . [The government] also will assess the other market factors that pertain to competitive effects. . . . " (ID 244, *quoting* Guidelines §2.1). As the ID notes, two types of anticompetitive effects must be considered: unilateral effects and coordinated interaction. (ID 260). Neither was established by a preponderance of the evidence.

[22] Contrary to the findings in the ID, the arguments and reasoning set forth in this section, and elsewhere in the Brief, demonstrate that Respondent did not acquire, as a result of the merger, monopoly power or a dangerous probability of achieving or maintaining monopoly power in Complaint Counsel's alleged North American motive, UPS and deep-cycle markets. For these reasons, the ID's findings on these issues in Count III are error.

The Guidelines describe the unilateral effects theory as follows: "A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level." Guidelines §2.21. Such a price increase is possible only if a significant portion of sales in the market are "accounted for by consumers who regard the products of the merging firms as their first and second choices, and . . . repositioning of the non-parties' product lines to replace the localized competition lost through the merger [is] unlikely." Id. The court in United States v. Oracle Corp. described four factors as preconditions for a unilateral effects claim in such a product setting: (1) the products are differentiated; (2) the products "controlled by the merging firms must be close substitutes;" (3) products produced by other firms in the market "must be sufficiently different" that a SSNIP would be profitable for the merged firm; and (4) "repositioning by the non-merging firms must be unlikely." 331 F. Supp.2d at 1117-18.

The FTC itself has recognized that where its focus in a merger case is on the alleged dominance of the merged entity, it must show that the "merger may result in a single firm that so dominates a market that it is able to maintain prices above the level that would prevail if the market were competitive" and it must show that such increased prices are accompanied by "lower output." In the Matter of Chicago Bridge & Iron Co., No. 9300, 138 F.T.C. 1392, 1033 (initial decision)(2003), *aff'd*, 138 F.T.C. 1024 (2004); Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997).

Here, Complaint Counsel failed to present any evidence to support a theory that Daramic, as a result of the Acquisition, has exercised or could exercise market power to increase prices and decrease output, resulting in "unilateral" anticompetitive effects. (RFOF 1236, 1308, 1313,

1366-72). In fact, the evidence demonstrates that Daramic lacks market power and that the Acquisition did nothing to change that:

(1) Microporous had a total pre-Acquisition market share of only { } in the North American all-PE market. In short, Microporous had no market power that could have been transferred to Daramic. (RFOF 338-39; RX00114, RX01119, RX00115).

(2) Microporous' strong market position was in the alleged deep-cycle market with its Flex-Sil product. Respondent acquired Microporous due to its strength in the niche rubber market, an area where Daramic had been unable to establish itself with HD and other products. (RFOF 108, 262-63).[23] As discussed herein, Flex-Sil had no competition in that alleged market, and the Acquisition had no effect on competition. The ID erred by concluding otherwise.

(3) Entek's actions demonstrate Daramic's lack of market power. (RFOF 306-309, 946-951).{

}. (RFOF 472, 475, 946). Further, Entek's influence is not limited to { }. {

}. (RFOF 943-44, 946, 964-66, 968, 1092-93, 1220). This testimony shows that Entek {

}. Guidelines §2.21; Oracle, 331 F.Supp.2d at 1117-18.

[23] The ID purports to base its decision on a "review of the evidence evincing Daramic's intentions in pursuing the acquisition of Microporous." (ID 244). However, the ID is again wide of the mark. The ALJ ignores the evidence that the Acquisition resulted from a desire of Respondent to "broaden [its] portfolio into two niche markets we do not supply today." (RFOF 262). This point was made clear in the testimony of Messrs. Graff and Toth, Directors of Respondent, which testimony remains unrefuted by Complaint Counsel. (Graff, Tr. 4877, *in camera*; Toth, Tr. 1504). The ID's reliance on outdated documents or statements made by employees whose experience lies in sales or plant operations, (Hauswald, Tr. 872, *in camera*, 958), not acquisitions, simply is not probative of Respondent's intent – an intent expressed only through its Board – in acquiring Microporous.

(4) The evidence demonstrates that Daramic's profits and market share have declined following the Acquisition. Indeed, its market share has declined largely as a result of vigorous competition with Entek { }. (RFOF 278, 283, 291, 306, 946, 959, 1287, 1362, 1369; 1549).[24]

(5) As discussed herein, the presence of power buyers, including JCI, EnerSys and Exide, would constrain any exercise of market power by Daramic, Entek or other suppliers.

The ALJ criticizes Complaint Counsel by noting that the evidence they presented on this issue "did not always differentiate the specific relevant market to which it related." (ID 261). Despite this criticism, the ALJ summarily concluded, "[I]t is clear that the acquisition *has* probable anticompetitive effects." Id. (emphasis added).

The ID's analysis of potential unilateral effects, however, is fundamentally flawed. For example, the ID erred by finding adverse unilateral effects in the alleged SLI market. (IDFOF 723-24. The Guidelines point out that for purposes of unilateral effects, consumers must "regard the products of the merging firms as their first and second choices." Guidelines §2.211. Incredibly, the ID promotes Microporous to the status of the "second best supplier" for purposes of applying its unilateral effects analysis even though Microporous did not sell SLI separators. Acknowledging the fact that Microporous did not sell SLI separators, the ID notes that Entek and Daramic were the only two sellers in this alleged market in 2007. (IDFOF 439). The ID fails to explain how a non-seller can be recognized as the "second best supplier" in order to find adverse unilateral effects.

[24]Such evidence supports the fact that there have been no anticompetitive effects post-acquisition. See, e.g., United States v. Int'l Harvester Co., 564 F.2d 769 (7th Cir. 1977) (post-acquisition evidence showed no anticompetitive conduct); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981) (post-acquisition evidence showed that defendant's profits and market shares declined); Vaney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974) (post-acquisition evidence showed that defendant lost market share); United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974) (evidence showed decline in market share and profits).

Additionally, the ID finds harmful, unilateral effects regarding Exide and unidentified "smaller battery manufacturers." (IDFOF 723-24). In support of this finding, it states that Exide "believed that it could obtain better pricing with an additional supplier competing for its business." (IDFOF 723). What Exide may have "believed" is not an adequate competitive effects analysis. Oracle, 331 F.Supp.2d at 1167-68. Further, the ID fails to identify the "smaller battery manufacturers," quantify their separator needs, or analyze whether Microporous could have satisfied those needs. Without this analysis, the ID's conclusion regarding these unknown companies cannot stand.

The ID further attempts to support its finding of adverse unilateral effects by citing alleged price increases that Daramic sought or imposed following the Acquisition. (ID 261-63; IDFOF 897-901, 903-904, 906, 908, 911-915). Under scrutiny, however, the ID's findings say nothing since they state only that Daramic sought rather than achieved a price increase (IDFOF 901, 903), that Daramic announced a price increase without indicating whether the customer rejected it (IDFOF 912-915), or that the announcement was of an input cost surcharge (IDFOF 906, 911), which the ID acknowledged is not a concern. (ID 262; IDFOF 921). Moreover, some of the ID's findings are defective since they state that a customer "received" a price increase without indicating whether it actually went into effect. (IDFOF 897-900). The ID's analysis of post-Acquisition price increases does not hold up to close examination.

Moreover, the evidence fails to demonstrate that any such increases occurred as the result of increased market power gained from the Acquisition. The ID acknowledges that there are innocent price increases and that Complaint Counsel has the burden of demonstrating that any price increases are not innocent. (ID 262, 266). In an attempt to distinguish innocent price increases from anticompetitive ones, Complaint Counsel relied on Simpson's testimony.

However, Simpson's analysis was defective – to the point that the ALJ would not rely on part of it – and Complaint Counsel failed to present any competent evidence to show that price increases were not innocent. (ID 212-13).

Simpson began by noting that econometric analysis is the preferred method to determine whether there have been any culpable post-acquisition price increases. (RFOF 1373). However, Simpson failed to perform any such analysis. Id. Instead, he attempted to utilize two other methods: (1) a "difference-in-differences" approach using a control group of three customers { }; and, (2) an attempt to compare price increases with increases in input costs. Simpson's "difference-in-differences" analysis collapsed. (RFOF 1374-75). Not surprisingly, the ID draws no conclusions based on Simpson's difference-in-differences approach.

Simpson's input cost method fared no better. First, Simpson did not look at Daramic's actual costs, but at certain cost indices that he obtained from the Bureau of Labor Statistics. (Kahwaty, Tr. 5558-59, *in camera*). Second, Simpson's cost analysis was invalid because he used an improper index. He sought to use an index that would reflect cost of ultra-high molecular weight polyethylene. However, the index he actually used was for plastic products such as plastic pipes and plastic components for furniture. That index is not for a plastic resin and, therefore, has no relationship to the raw material that Daramic purchased. (RFOF 1377).[25] Accepting the defects in Simpson's cost analysis, the ID abandons it as well.

Third, the ID refers to a price index for crude oil. (IDFOF 921-22). However, the ALJ relies on this index without any quantitative analysis showing the extent to which Daramic's total

[25] In addition, Simpson considered the wrong timeframe when analyzing the indices. { }, which led to a prejudiced conclusion that Daramic's input costs do not justify its price increase. (Riney, Tr. 4936-37, *in camera*; Seibert, Tr. 4189-90, *in camera*; Simpson, Tr. 3217-18, *in camera*).

costs might be related to an index for a single input. Rather than utilizing quantitative analysis that can withstand scrutiny, the ID bases its conclusion on the unproven assumption that such a relationship exists between this generic index and Daramic's total costs.

In short, the ID fails to demonstrate on the basis of reliable evidence and analysis that any actual post-Acquisition price increases resulted from Daramic's market power following the Acquisition. Complaint Counsel failed to present any quantitative evidence to support this theory of anticompetitive unilateral effects. In Chicago Bridge, the FTC's attempt to show post-acquisition price increases was rejected as "unreliable" and "speculative." 138 F.T.C. at 1552 (Initial Decision). The evidence presented by Complaint Counsel in this case was similarly unreliable and speculative, and Complaint Counsel's attempts to show anticompetitive post-Acquisition price increases should also be rejected.

D. Complaint Counsel Failed to Prove that Anticompetitive Coordinated Interaction Has Occurred or Is Likely.

The ID also errs in concluding that coordinated interaction has been adequately demonstrated. Indeed, the findings of theoretical effects are disproven by actual events which demonstrate convincingly a lack of potential for successful coordination. Here again, as with other parts of the analysis in this consummated merger, the facts of what has transpired are ignored in the ID.

According to the Commentary on the Guidelines, "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." U.S. Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines, at 18-19 (2006). The evidence in this case fails to prove any of these factors.

The ID's finding of a "strong presumption" that there will be coordinated anticompetitive conduct involving Daramic and Entek in the alleged SLI market is based on unreliable evidence. Indeed, the ALJ was unable to find any such coordination since the Acquisition. (ID 265-66). The evidence shows that Entek and Daramic have engaged in vigorous competition. In 2007, { }. (RFOF 306, 946). In 2009, { }. (RFOF 1549). These uncontroverted facts belie the ID's finding of coordinated interaction.

Avoiding the inconvenient facts which show spirited competition, the ID relies on a assortment of unreliable evidence. Citing to outdated, general observations, the ID claims that Daramic and Entek did not compete vigorously before the Acquisition. (ID 266). This hardly amounts to evidence of "terms of coordination" that would permit the firms to "detect deviations" and punish them.

The ID mentions that { }. (IDFOF 735, 740; ID 284). However, the ID fails to consider evidence demonstrating that { }. { }. (Kahwaty, Tr. 5091, *in camera*). This evidence demonstrates that

{

}. (Id.). Simpson ignored this evidence, as did the ALJ.

Moreover, the evidence predominantly weighs ***against*** coordination, especially when the principles of the Guidelines are followed. First, given the diversity and heterogeneity of the products in this industry, it would be extremely difficult for firms to "reach terms of coordination" as required by the Guidelines. Guidelines §2.11. Further, the Guidelines note that firm heterogeneity, including "differences in vertical integration," certainly a factor here with { }, weighs against the likelihood of coordination. (Guidelines §2.11; RFOF 1114). Although the Guidelines note that "express collusion" in the past may signal the likelihood of future coordination Guidelines §2.1, Complaint Counsel did not present any evidence of express collusion.

Not only have Complaint Counsel failed to prove that Daramic and Entek could reach terms of coordination, but there is also no evidence they would be able to detect or punish deviations. (RFOF 1240-41, 1369). In fact, the evidence showed that {

}. (RFOF 1369). {

}. (Kahwaty, Tr. 5182-83, *in camera*). Simpson {

}, which undercuts the basis of his opinion, and the ID's conclusion, regarding coordinated interaction. (Simpson, Tr. 3391, *in camera*).

Finally, a major factor weighing against coordination is that the customers purchase separators through large, multi-year contracts that are negotiated one-on-one. (RFOF 241, 243).

As the Guidelines explain, "Where large buyers . . . 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, firms may have the incentive to deviate." Guidelines §2.11. The reality of this industry demonstrates exactly that – large customers negotiate one-on-one with separator suppliers for long-term contracts. This reality is illustrated by the recent negotiations between { }, and by the negotiations between { } and { }, among others. (RFOF 478, 760-61, 1447, 1505-28). The ID errs in finding coordinated interaction has occurred or is likely in the face of this conflicting evidence.

III. THE ACQUISITION WILL NOT HAVE ANY ADVERSE EFFECTS ON COMPETITION BECAUSE BARRIERS TO ENTRY ARE LOW AND SUBSTANTIAL CUSTOMERS HAVE SPONSORED AND ENCOURAGED ENTRY BY { }.

Even if Complaint Counsel had made a prima facie case, Respondent rebutted that case by showing that entry conditions into battery separator production are low and that major customers in the industry have sponsored new entry, have transferred their purchases from Daramic to other suppliers or are actively developing Asian sources of supply. It is accepted that "power buyers," as here, can "subsidize new entry or incumbent expansion in order to increase market output or lessen the likelihood of seller coordination." ABA Mergers at 196, n.27. Indeed, the actions of the major customers in this industry show that they are capable of protecting their own interests and that competition has been protected as well. The ID erred in ignoring this evidence.

A. Barriers to Entry Into Battery Separator Production are Low.

The Guidelines provide that "[a] merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above

premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern." Guidelines §3.0. "In the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive prices for any length of time." United States v. Baker Hughes, Inc., 908 F.2d 981, 987 (D.C.Cir. 1990).

Entry may be shown by any one of the following circumstances: (1) that there has been or is threatened to be actual entry by certain firms; (2) that barriers to entry into the particular industry are low; (3) that expansion by previously existing firms either has occurred or is likely to occur; and (4) that the mere threat of entry may operate to foster competitive conditions in a market. Commentary on the Horizontal Merger Guidelines at 37; Baker Hughes, 908 F.2d at 987-89; United States v. Syufy Enter., 903 F.2d 659, 666-67 (9th Cir. 1990); Waste Management, 743 F.2d at 981-84; United States v. Calmar, Inc., 612 F.Supp 1298 (D.N.J. 1985).

The ID found that entry would not be sufficient to offset the anticompetitive effects of the merger. (ID 270-88). The ALJ erred, however, by failing to consider substantial competent evidence of actions already taken which demonstrate the threat of actual entry and expansion by existing firms.

The sufficiency of entry here need be measured only by whether a new entrant – one of Microporous' scale – would replace the competition allegedly lost. At the time of the Acquisition, Microporous operated only one line capable of producing pure-PE separators in Piney Flats, with a total capacity of 11 msm. (Gaugl, Tr. 4546-47, 4533-34). Thus, within the confines of the relevant all-PE market, sufficient new entry need only replace this one PE line in North America. In the Matter of B.F. Goodrich Co., 110 F.T.C. 207, 345 (1988); RFOF 1250-51; Guidelines §3.4.

Entry, of course, need not be *de novo* in order to counteract anticompetitive effects, and there was abundant evidence that Asian separator manufacturers, who are aggressive competitors, could enter North America by building a single PE line to sufficiently replace the capacity allegedly lost. (RFOF 1106-07, 1109, 1250-51). Several Asian separator manufacturers are considered on par with their North American counterparts in terms of quality, technology and capability. (RFOF 977-1052). Asian products have been globally approved and qualified by North American battery makers. (RFOF 789, 1074-75, 1029, 993, 989). In fact, {

}. (RFOF 597-600, 789, 990, 991, 1024-1026, 1028-1030).

In addition, potential expansion or repositioning of { } is another form of entry to be considered. See Baker Hughes, 908 F.3d at 988-89; Guidelines §2.212. The evidence shows that {

}. (RFOF 1112-1113, 932, 938, 934, 943-45, 969, 947). Entek formerly supplied industrial separators to North American customers, and it could easily do so again. (RFOF 681, 684, 968). In fact, {

}. (Weerts, Tr. 4490, *in camera*). As noted below, { }. (RFOF 681). Additionally, the evidence demonstrates that {

}.

(RX00676; PX2174; RFOF 1078, 1092-93). Entek's ability and capacity are sufficient to curtail any alleged anticompetitive effects of the merger. (RFOF 943-45).

The competent evidence demonstrates that entry into North America can be made by a separator manufacturer on a timely basis. (RPTB 30-35; RRCCFOF 874).[26] {

} have all developed and constructed new production lines in { } or less. (Gaugl, Tr. 4543; RFOF 1070, 1061-1088). Even Kung admitted that {

}. (RFOF 1074).

The capital expenditure is modest (see RRCCFOF 823), and the equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (RRCCFOF 823, 830; Gaugl, Tr. 4545-48). Indeed, the evidence demonstrates that "mushroom" PE separator manufacturers of the same relative size of Microporous' output pop up around the world (RFOF 1050), refuting the ID's finding of barriers due to technology or required expertise. The evidence demonstrates that separator manufacturers around the globe compete with Daramic (RRCCFOF 840), and the assertion that Asian separator manufacturers do not produce a quality product is belied by {

}. (RFOF 685-94, 978-79).

Nor is customer testing or qualification a barrier. The evidence demonstrates that the total time required to test a separator depends on the customer, can be conducted concurrently

[26] The ID erroneously relies in large part on the testimony of James Kung with respect to the timing of entry. (ID 155-58, 278-82). However, Kung's testimony is suspect because he is in the business of building PE lines and benefits from making such construction sound complicated. (PX0907(Kung, Dep. 26-27)). Moreover, Kung's testimony has been shown to be untruthful and cannot be relied upon as evidence of the timeliness of entry. (RRCCFOF 952).

with other testing and can occur in a matter of months. (RRCCFOF 885, 892). For example, Nawaz Qureshi, the Vice President of Engineering and Technology at U.S. Battery, testified that a motive separator can be qualified in less than a year. (Qureshi, Tr. 2067-68). Even EnerSys' Larry Axt, a buyer of industrial separators, conceded that qualifying an alternate supplier takes less than a year. (RRCCFOF 886).[27] Simply stated, the evidence demonstrates that barriers to entry are low.

B. Substantial Customers, Including the Largest Worldwide Battery Producers, Have Sponsored and Encouraged Entry by { }.

High entry barriers do not exist here for another reason: large, powerful buyers have the ability and interest to sponsor entry of separator manufacturers. "[L]arge, sophisticated buyers can counteract potentially anticompetitive post-merger behavior by encouraging entry. A 'power buyer' may subsidize new entry or incumbent expansion in order to increase market output or lessen the likelihood of seller coordination. The power buyer itself may become a seller via vertical integration with an existing producer." ABA Mergers at 196, n.27.

The behavior of "power buyers" in this industry (including JCI, EnerSys and Exide) is strong evidence of their ability to forestall anticompetitive practices and sponsor entry, and the ID erred by not finding that their conduct would offset any lost competition. (ID 288-92). The ID summarily dismisses Respondent's power buyer defense, stating that in the SLI market there is only one alternative supplier, and that there are no alternatives in the deep-cycle, motive and UPS markets. (ID 291). The ID's analysis, however, ignores substantial evidence of alternative actual or potential suppliers (discussed above) and the aggressive behavior of the power buyers in the industry.

[27] The timing needed to begin supplying UPS and SLI separators is of little significance since Microporous was not a participant in those applications.

1. {

}.

JCI is the largest battery manufacturer in the world, with over { } lead-acid automotive battery market. JCI produced more than 120 million lead acid batteries in 2008 with sales over $38 billion. (RFOF 438). {

} (RX00040 at 05-08, *in camera*). JCI has been able to do this effectively:

- {

  }. (RFOF 475-79).

- { }. (RFOF 480).

- Daramic supplied separators to JCI until December 31, 2008. (RFOF 459). Since January 1, 2009, { }. (RX00072, *in camera*; Hall, Tr. 2747-48, *in camera*).

- {

  }. (RFOF 482-84, 950, 961).

- {

  } (RFOF 306).

JCI has demonstrated the ease of {

} (Hall, Tr. 2715-2716, 2747, *in camera*; RX00053, *in camera*; RX00052, *in camera*; RX00072, *in camera*). In addition to {

}, (RFOF 475-77), {

}. (RFOF 491). {

} (RX00055; Hall, Tr.

2838-2839, *in camera*). {

}. (Hall, Tr. 2820-2821, *in camera*).

2. {

}.

Like JCI, EnerSys has the ability to manage the competitive marketplace for battery separators. Its power is such that it "rallied" its other "power buyer" competitors to oppose the acquisition of Microporous by Respondent despite the fact that there has been no impact on its own business. (RFOF 711, 726). The evidence makes it abundantly clear that EnerSys' purchase of separators has not been affected by the Acquisition and that it has the ability to promote the entry of other suppliers, and, thus avoid any anticompetitive effects of the merger.

As the largest manufacturer of industrial batteries in the world, EnerSys has repeatedly demonstrated its position of strength in dealings with its suppliers, including Daramic. (RFOF 624). EnerSys describes its own negotiation strategy as employing {

} (RFOF 625). EnerSys' strong negotiating position has been demonstrated on many occasions:

- {

  } (Seibert Tr. 4195, 4213-17, *in camera*; RX831; RX773; RX606; RX1549; RX590; RX768 *in camera*; Burkert Tr. 2434, 2436, 2438, 2464-65, *in camera*; RX768, *in camera*; RX1032; Axt, Tr. 2215-16, *in camera*; PX2264 *in camera*).

- {

  } (RX 964 at 002, *in camera*).

- {

  } (RFOF 678-79).

Utilizing its position of strength, EnerSys has also considered {

} (RFOF 681-

712), and {

}. (RFOF 711).

- {

}. (RFOF 681-84).

- {

}. (RFOF 685).

- {

} (RFOF 686). {

} (RX00023, *in camera*; RX00059 *in camera*).

- {

}. (RFOF 686-89).

- {

}. (RFOF 691-694).

These actions show EnerSys has the power and leverage sufficient to sponsor and promote entry into the North American separator industry such that the merger of Microporous and Daramic has had, and will have, no anticompetitive effects.

3. {

}.

Exide is either the largest or second largest battery manufacturer in the world. (RFOF 210). Exide sold almost $3.7 billion worth of automotive, truck, motorcycles, recreational vehicles, golf cart, boats, forklift and network batteries in fiscal 2008 and {

} (RX01186 at 006-007, 027, 057; Gillespie, Tr. 2929-30). Exide has consistently been able to use its size and leverage to "manage" its suppliers.

Exide's power is demonstrated by the fact that even though it entered into a {

}. (PX0726; PX0728; PX0835, *in camera;* RX00976, *in camera*; RX00977, *in camera*; RX01517, *in camera;* RX00342 at 033, *in camera*; RX01281, *in camera*; RX00979, *in camera*; RX01282; RX01283; RX01284; RX01285; RX00537, *in camera*; RX00019, *in camera*; Gillespie, Tr. 2985, 3070-73, 3095, 3100-3103, 3112, *in camera*). Exide admits that even with a contract with defined terms, it uses any point "not clearly stated in the contract interpretation as leverage points" against Daramic. (Gillespie, Tr. 3069-71).

Exide's power is further evidenced by the fact that {

}. (RFOF 1529, 1541). {

}. (RFOF 1529-40). Exide took these actions {

}. See ALJ's Order on Complaint Counsel's Motion for Official Notice (Feb. 16, 2010). Exide's conduct demonstrates its power – { }, even after the Acquisition.

{

}. (Gillespie, Tr. 3124-3126, *in camera*). Indeed, {

} (Gillespie, Tr. 3122-23, *in camera*). {

}. (RFOF 599). {

} (Gillespie, Tr. 3022-24, 3041, *in camera*), and it {

}. (Gillespie, Tr. 3034, *in camera*).

In sum, entry barriers into battery separator production are insignificant. With {

}, Entek has the { } to become a major producer of non-SLI separators. The evidence presented here also shows that substantial customers have been and are in the process of {

}. As shown here, {

}. All of these factors show that competition in the battery separator industry has not been adversely affected by the Acquisition and there is no probability of its being adversely affected.

IV. THE ORDERED RELIEF IS OVERBROAD, INAPPROPRIATE AND PUNITIVE.

A. The Divestiture of the Feistritz Plant Is Improper, Unnecessary and Cannot Be Legally Justified.

The ALJ's order requiring the divestiture of the Feistritz plant – a facility outside of the ALJ's geographic market – is improper and, under this record, punitive. The plant was not operational at the time of the Acquisition and made no sales into North America. In addition,

Complaint Counsel failed to prove that this foreign facility had any effect on competition in the United States. The ALJ erred by ordering the divestiture of the Feistritz facility since that relief is overbroad and not necessary to restore the competition allegedly lost in North America.

Complete divestiture of all acquired assets ***is not required*** unless necessary to restore the competition lost ***in the relevant market***. See, e.g., Waste Management, 588 F.Supp. at 514. The ID, however, fails to follow this precept and the fundamental principle that the antitrust remedy ***restore the competition that was allegedly lost*** as a result of the Acquisition. See Chicago Bridge & Co., 138 F.T.C. at 1160 (Op of Comm'n). Relief is intended to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." In the Matter of B.F. Goodrich Co., 110 F.T.C. at 345.

The ID's remedy is fatally flawed because it fails to analyze whether a complete divestiture of the North American business would remedy any competition allegedly lost in North America. Indeed, Complaint Counsel failed to present competent evidence to prove that a divestiture of facilities in Europe, built to serve customers in Europe, is necessary to restore the competition allegedly lost in North America. This is fatal to the ALJ's findings as to remedy. As discussed below, complete divestiture is not required either by law or by the circumstances of this case because a partial divestiture would restore any competition allegedly lost. (RFOF 1401-1405).

The ID ultimately found that the divestiture of foreign assets is governed by the standard articulated by the Commission in Chicago Bridge: "foreign assets [need be divested] only to the extent they are necessary for an acquirer to compete in the Relevant Markets."[28] (ID 334). The ALJ, though, found that the relevant geographic market here is North America, not Europe or the

[28] Preoccupied with their focus on "complete divestiture," Complaint Counsel cite Chicago Bridge but fail to disclose that total divestiture was not required there, as noted by the ID. (CCPTB 70-71).

world, and found no impact by foreign suppliers on North America.[29] (IDFOF 332-41, 343-53). The ALJ specifically found:

- Neither Daramic nor Entek are aware of any occasions where Asian PE producers have sold separators in North America. (IDFOF 346, 349).
- Amer-Sil does not currently sell separators in North America and { }. (IDFOF 350, 353).
- The ALJ finds that "BFR cannot, at present, sell separators in North America at competitive prices" and that { } price quote to EnerSys was "substantially higher" than Daramic's price for a similar PE profile. (IDFOF 332, 342).
- The ALJ explains that "[t]he chief barrier to separator imports into North America is . . . the ***lack of competitiveness*** of BFR . . . and other foreign separator suppliers in this region." (ID 241)(emphasis added).

Given his own findings that foreign producers do not compete in the relevant market, the ID fails to explain why divestiture of foreign assets is necessary for an acquirer to compete in the relevant market. The ID's treatment of this issue is remarkable. In a single paragraph out of 347 total pages, the ALJ dismissively decides that divestiture of the Feistritz plant "is necessary . . . to enable an acquirer to compete in that market." (ID 334). The factors cited by the ALJ in support of his conclusion merely parrot the defective arguments of Complaint Counsel: (1) that it is important to battery makers that a separator producer be able to supply product on a "global basis;" (2) that "local supply" of separators is also important to battery manufacturers; (3) that this factor prompted Microporous to develop its European plant; and (4) that "the scale of production provided by multiple plants is important to customers." (ID 334-35). The factors fail

[29] Even if, as Respondent has urged, the relevant market were determined to be global, the area in which the FTC has jurisdiction to ensure competitive conditions is the United States, not the world. Accordingly, the proper legal standard governing divestiture here is whether divestiture of the Feistritz plant is necessary for an acquirer to compete in the United States. "[C]onduct, whether at home or abroad can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States." IB Areeda & Hovenkamp, ¶270b; F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004)("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.") (emphasis in original).

to support the ALJ's conclusion, however, because they have no relevance to protection of competition in the United States.

The ID contains fact findings to the effect that both EnerSys and Exide had more business in Europe than in the United States and, therefore, they wanted Microporous to develop a European plant. (IDFOF 1276-79). Even if that is true, these findings say nothing about, and provide no support for, the necessity of the Feistritz plant to enable Microporous (or a newly constituted entity ("NewCo")) to supply EnerSys and Exide in the United States – the competition area for which the FTC has jurisdiction in this case. Further, the ID contains no findings to the effect that Microporous (or NewCo) could not compete effectively in North America without the Feistritz plant.

Indeed, Gilchrist admitted during the hearing that the Feistritz plant was ***not necessary*** for Microporous to be viable, and that Microporous for years had manufactured and shipped separators out of Piney Flats to Europe and Asia. (Gilchrist, Tr. at 511, 540-41). In addition, testimony from EnerSys made it clear that the Feistritz plant was ***not necessary***. Larry Burkert, EnerSys' Senior Procurement Manager, testified as follows:

> Q: And it's not your testimony – let me make sure I understand. It's not your testimony, sir, that you have to have a plant in Europe, a PE separator plant in Europe, and a PE separator plant in North America, is it?
>
> A: No. It's preferred. It would be my preference.
>
> Q: But that's not – that's not a requirement for doing business with someone from EnerSys' point of view; right?
>
> A: No.

(Burkert, Tr. 2385). Likewise, when discussing potential supply with Amer-Sil, EnerSys informed Amer-Sil that it did not need to have a plant in both North America and Europe. (Burkert, Tr. 2386).

Even Complaint Counsel argued that prior to the Acquisition, when it had a single plant, Microporous was a "maverick," "a strong, worldwide competitor," and "a worldwide, competitive threat." (CCPTB 2, 69). The assertion that Microporous competed effectively in North America and around the world before the Feistritz plant came online was a fundamental part of Complaint Counsel's case.[30] The ALJ fails to reconcile the inconsistency that Microporous, without Feistritz, was a worldwide competitive threat but NewCo could not achieve that status without Feistritz.

Moreover, the ALJ's reliance on "local supply" to support divestiture of Microporous is illusory. Divestiture of only the Piney Flats plant would provide NewCo with the same "local supply" in the United States/North America that Microporous had at the time of the merger. Feistritz divestiture would do nothing to provide local supply in the United States, the area for which the FTC has jurisdiction to protect competition. Of course, Microporous' development of the Feistritz plant was for the purpose of providing "local supply" – but in Europe. In short, as regards the issue of Feistritz divestiture, the ID is defective since the evidence upon which it relies and the analysis it provides are non-probative.

The ID gives little attention to Respondent's argument. In concluding that "broad divestiture" ensures that NewCo will have "a real chance at competitive success,"[31] the ID fails

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[30] The ID cites the testimony of EnerSys' Mr. Axt, that he would not "commit additional volume for a manufacturer with only one operation." (IDFOF 1276; Axt, Tr. 2143, *in camera*). This questionable testimony of a single customer (a complainant in this case) hardly supports the proposition that Microporous could not compete effectively in North America without Feistritz. This testimony is rightly viewed as "questionable" for two reasons. First, EnerSys began transferring business to Microporous in 2006, long before Feistritz was operational (RFOF 620) and, second, EnerSys had earlier told Amer-Sil, another separator producer, that it did not need to have a plant both in North America and Europe. (Burkert, Tr. 2386, *in camera*). In any event, the proper standard regarding this issue is not whether every customer is satisfied with the relief ordered but whether, as the ALJ put it, Feistritz divestiture is "necessary for an acquirer to compete in the Relevant Markets." In addition, the finding noted by the ALJ fails to include any claim that Microporous could not have provided additional supply security for EnerSys by warehousing additional inventory rather than constructing a complete, second production facility.

[31] Quoting from In re Olin, No. 9196, 113 F.T.C. 400, 1990 FTC LEXIS 234, at 65 (June 13, 1990), rev. denied, 986 F.2d 1295 (9th Cir. 1993).

to consider that Feistritz was a financial drain on Microporous and that Feistritz was not important to Microporous' North American business. It notes Respondent's points that (1) at the time of the acquisition, Microporous had no orders for the second line at Feistritz and that the Exide MOU had expired; (2) the Feistritz plant was operating at less than full capacity; (3) but for the transfer of the Daramic production previously at its Potenza plant, the production level at Feistritz would be about { } and (4) projected net income at Feistritz for 2009 was { }. (ID 335-36). The ID, however, fails to address any of this evidence.

At the time of the Acquisition, Microporous was financially unstable, and the Feistritz plant only increased its precarious financial situation. (RRCCFOF 1198). Microporous had a tremendous debt of approximately $46,139,000. Id. Had it been operational, Feistritz would have been a significant financial drain on Microporous. Id. If Feistritz were operating as a stand-alone entity, it would have had a projected net income for 2009 of { }. Id. It is not clear how operating a plant which is losing money would provide NewCo a "real chance at competitive success."

Moreover, neither the Piney Flats nor Feistritz plant was operating at full capacity at the time of the Acquisition. Microporous had one operating plant in Piney Flats with three production lines: one line each for Ace-Sil, Flex-Sil and CellForce. { } of production from the CellForce line was being exported to EnerSys in Europe (RFOF 1146), and Microporous planned to shift that production to Feistritz. (Trevathan, Tr. 3762-63). At the time of the hearing, Microporous' Piney Flats lines were operating at 35-40% of capacity. (RFOF 425). To the extent that the opening of the Feistritz plant resulted in available capacity in Piney Flats, there was no evidence introduced by Complaint Counsel that Microporous was able to use that capacity. Trevathan did not identify any new business in the U.S. that made use of any freed-up

capacity, and Gilchrist was unable to identify even one customer pertinent to such new business. (Trevathan, Tr. 3623; Gilchrist, Tr. 503; RFOF 1148). EnerSys, {

}. (Craig, Tr. 2639, *in camera*). The evidence demonstrates that Microporous did not add to its customer base with the anticipated transfer of { } of its production to Feistritz, and if anything, such a transfer would have made its already shaky financial situation worse. (RFOF 1146).

Moreover, even if the evidence had shown that additional capacity was needed in Piney Flats to supply customers in North America and to restore competition allegedly lost, which it does not, the ID failed to consider divestiture of the PE "line in boxes" as an alternative to divestiture of the Feistritz plant. Such divestiture, which the ALJ has also included in his relief, would add an entirely new production line at Piney Flats if additional capacity there were somehow deemed necessary.

While these facts strongly suggest that the ALJ's divestiture package will be wholly nonviable in the asset marketplace, the ID concludes that "it is neither necessary, nor appropriate to speculate as to the viability of a divestiture package." (ID 336). Given these facts and the requirement that divestiture occur at no minimum price, the divestiture order constitutes punitive relief, which is specifically prohibited by judicial and FTC precedent.[32] This level of treatment inevitably evokes due process concerns and is totally indefensible.[33]

B. The Relief Order Contains Additional Provisions Which Are Not Tied to the Liability Found.

[32] E.I. duPont de Nemours, 366 U.S. at 326; In re Grand Union Co., 102 F.T.C. 812 (1983).

[33] Section V(B)(1) of the Order requires Respondent to maintain a Microporous work force equal to the force in place as of the Acquisition. This requirement is out of "sync" with the facts since the Microporous work force long since has dropped below its level as of February 29, 2008, due to efficiencies Daramic has implemented and to the economic downturn. The Order should only require that the work force be maintained from the date of the Order until the date of divestiture. The Order, again, is punitive in its current scope.

Other provisions of the relief order are also not legally justifiable, as they are not tied to the liability found in the ID. Importantly, the primary basis for liability against Respondent is a Section 7 merger claim. The ALJ found no liability on Complaint Counsel's monopolization claim. Therefore, any ordered remedy must be related to the finding of an illegal merger.[34]

Yet, it is apparent from the ID that the remedy is not restricted to the alleged illegal merger. For example, the definition of "Terminable Contract(s)" includes contracts entered into by Daramic with customers ***prior to the Acquisition***, provided that those contracts are "in effect at any time between the date the Order becomes final and the Effective Date of Divestiture." (ID 358). Such a far-reaching provision allows customers to terminate agreements with Daramic even though the contracts were entered into before Daramic purportedly gained any market power through the Acquisition. This is not rational, and certainly cannot be justified, especially when the ALJ found in favor of Respondent on the monopolization claims.

Additionally, Section II(C)(4) of the Order requires Respondent to grant to NewCo a "Shared Intellectual Property License." The definitions of "Retained Asset(s)," "Shared Intellectual Property" and "Shared Intellectual Property License" produce the result that Respondent would be required to grant NewCo a license to use intellectual property that was owned and used by Polypore/Daramic well in advance of the Acquisition. "Shared Intellectual Property" is defined to include intellectual property that is a "Retained Asset," which, in turn, is defined as any property that was "owned, created, developed, leased or operated by Polypore prior to the Acquisition." Any such requirement that Polypore must license to NewCo its own, "pure" IP would be manifestly punitive and should not be allowed. E.I. du Pont de Nemours, 366 U.S. at 326 ("Courts are not authorized in civil proceedings to punish antitrust violators, and

[34] For purposes of this discussion, Respondent concedes that the relief ordered for Count II relates to the liability found for that claim.

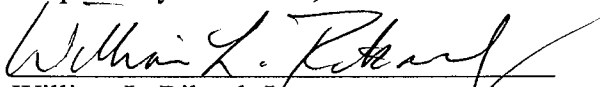
relief must not be punitive."); In re Grand Union Co., 102 F.T.C. 812 (1983)("The Supreme Court . . . has ruled that punitive relief is inappropriate in a civil antitrust proceeding.").

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that Complaint Counsel's Complaint should be dismissed with prejudice, and that judgment should be rendered in Respondent's favor.

Dated: April 23, 2010

Respectfully Submitted,



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Julie Brill
William E. Kovacic
Edith Ramirez
J. Thomas Rosch

In the Matter of	)	
	)	**Docket No. 9327**
POLYPORE INTERNATIONAL, INC.,	)	
a corporation.	)	**PUBLIC DOCUMENT**

PROPOSED ORDER

Upon consideration of the Briefs submitted by Respondent and Complaint Counsel, the arguments of counsel for the parties before this Commission in Open Session, and the record in this matter, it is hereby ordered that:

1. Count I of the Complaint is dismissed with prejudice; and

2. The Commission finds that Respondent did not acquire, as a result of the merger, monopoly power or a dangerous probability of achieving or maintaining monopoly power in Complaint Counsel's alleged North American deep-cycle, motive and UPS battery separator markets.

Dated:_____

_____
The Commission

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2010, I caused to be filed via hand delivery and electronic mail delivery an original and twelve (12) copies of the foregoing ***Respondent's Appeal Brief (Public Version)***, 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:

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I hereby certify that on April 23, 2010, I caused to be served one copy via electronic mail delivery and two copies via overnight delivery of the foregoing ***Respondent's Appeal Brief (Public Version)*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
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I hereby certify that on April 23, 2010, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Appeal Brief (Public Version)*** upon:

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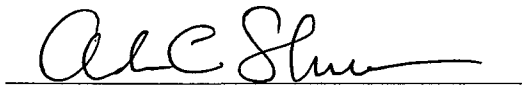

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