

**ORIGINAL**



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**PUBLIC**

**Docket No. 9327**

**COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT  
VOLUME 1**

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August 7, 2009

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## I. EXHIBIT AND WITNESS INDICES

### A. Exhibit Index

1. See Exhibit A hereto.

#### Response to Finding No. 1:

Complaint Counsel has no specific response.

### B. Witness Index

2. See Exhibit B hereto.

#### Response to Finding No. 2:

Complaint Counsel has no specific response.

## II. PROCEDURAL BACKGROUND

### A. Transaction Background

3. On February 29, 2008, a subsidiary of Polypore International, Inc. ("Polypore")

 } (PX0162, *in camera*) Polypore acquired Microporous for approximately \$76 million, \$29 million in cash and \$47 million in assumed debt. (RX1572 at ¶4; PX0800 at 2, *in camera*) 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 Act. (Toth, Tr. 1557, 1559; PX0800 at 2, *in camera*).

#### Response to Finding No. 3:

Complaint Counsel has no specific response.<sup>2</sup>

### B. Pre-Hearing Background

4. On March 7, 2008, the FTC initiated a non-public investigation into the Acquisition. During its investigation, the FTC issued Civil Investigative Demands to Polypore, its Daramic subsidiary and various third parties, and conducted many investigational hearings. The FTC then proceeded to issue a Part 3 Complaint in this matter on September 9, 2008, alleging that the Acquisition violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("Section 5") and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that Polypore monopolized or attempted to monopolize certain product markets in North America. (RX 1572

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<sup>1</sup> Microporous previously had done business in the battery separator industry under the company name Amerace. (Gilchrist, Tr. 314).

<sup>2</sup> Complaint Counsel's Findings of Fact is abbreviated as CCFOF. Respondent's Finding of Fact is abbreviated as RFOF. Complaint Counsel's Reply Findings of Fact is abbreviated as CCRF.

at 8-9). On October 15, 2008, Polypore filed its Answer and Defenses, which denied the FTC's allegations and set forth its affirmative defenses. (RX1589).

**Response to Finding No. 4:**

Complaint Counsel has no specific response.

5. An initial Scheduling Order was entered in the case on October 22, 2008, setting forth a discovery cut-off date of February 13, 2009 and a trial date of April 14, 2009. (RX1591). Due to extensive third party discovery issues, the Scheduling Order was amended to extend these and other remaining deadlines by four weeks. (ALJ Order dated Feb. 4, 2009).

**Response to Finding No. 5:**

Complaint Counsel has no specific response.

C. Hearing Summary

6. The hearing commenced in this case on May 12, 2009 and concluded on June 12, 2009. During the 22 days of actual trial proceedings, live testimony was received into the hearing record from the following 30 witnesses:

**Witnesses Related to Polypore/Daramic/Microporous**

- Robert Toth, CEO and President of Polypore
- Pierre Hauswald, General Manager and VP of Daramic
- Sterling Tucker Roe, VP of Worldwide Sales and Marketing of Daramic
- Harry Seibert, VP and Business Director of Daramic
- Tim Riney, VP of Finance of Daramic
- Christopher Thuet, Business Director Asia-Pacific of Daramic
- Hans-Peter Gaugl, Managing Director Austrian Facility for Daramic Austria GmbH (also former Manager of Austrian facility for Microporous)
- John Kevin Whear, VP of Technology of Daramic
- Larry Trevathan, VP Operations of Daramic (also former VP Operations of Microporous)
- Steven McDonald, Sales Manager, North America of Daramic (also former Director of Sales of Microporous)
- Michael Gilchrist, formerly CEO and President of Microporous
- George Brilmeyer, formerly Director of Research & Development of Microporous

- Michael Graff, Managing Director of Warburg Pincus (also Chairman of the Board of Directors of Polypore)

**Witnesses Related to Battery Manufacturers**

- Richard Godber, CEO and President of Trojan Battery
- Donald Wallace, Executive VP of Sales and Marketing of U.S. Battery Mfg. Co.
- Nawaz Qureshi, VP of Engineering and Technology of U.S. Battery Mfg. Co.
- Larry Axt, VP of Global Procurement of EnerSys
- Larry Burkert, Senior Procurement Manager of EnerSys
- John Gagge, Jr., Sr. Director Engineering and Quality Assurance for EnerSys
- John Craig, Chairman, CEO and President of EnerSys
- Rodger Hall, Global VP of Procurement for Johnson Controls Battery
- Mitchell Bregman, Exide Technologies (former procurement council)
- Melvin Gillespie, Jr., VP of Global Procurement for Exide Technologies
- Norman Benjamin, President of Bulldog Battery Corporation
- Dale Leister, Director Procurement Strategy & Supplier Dev., East Penn Mfg.
- James Douglas, Executive VP of Douglas Battery Mfg. Co.
- Arthur Balcerzak, Director of Purchasing for Crown Battery (as consultant)
- Daniel Weerts, Vice President of Sales and Marketing of Entek Holding Company

**Expert Witnesses**

- John Simpson, FTC Economist (FTC's expert witness)
- Henry J. Kahwaty, Ph.D., Director of LECG (Respondent's expert witness)

**Response to Finding No. 6:**

Complaint Counsel has no specific response.

7. In addition, for certain witnesses who were unavailable to attend trial proceedings, testimony was received into the record through admission of certain deposition transcripts and investigational hearings, subject to any lodged objections. See JX3, JX8, JX9.

**Response to Finding No. 7:**

This material cited does not support the finding. JX3, for the most part, consists of excerpts of investigational hearings and depositions of Respondent personnel. Many of these witnesses were available and did testify at trial. (JX3). In addition, there is no JX9.

8. The hearing record in this case was closed by Order dated June 22, 2009. Concurrent reply briefs and replies to findings of fact are due to be filed by the FTC and Respondent on July 31, 2009. Closing arguments are scheduled for August 20, 2009.

**Response to Finding No. 8:**

Complaint Counsel has no specific response.

**III. THE BATTERY SEPARATOR INDUSTRY**

**A. Terminology**

9. The following provides a glossary of some of the recurring terms and separator product names referred to in the testimony, documents and deposition/investigational hearing transcripts:

10. **AGM** – initials which refer to “absorbptive glass mat” battery separators. The liquid in the battery is absorbed like a sponge into the glass mat part of the separator and there is no free liquid electrolyte. AGM batteries are sealed and do not need maintenance. (Godber, Tr. 147; Hauswald, Tr. 994-95; Qureshi, Tr. 2055-56).

**Response to Finding No. 10:**

Complaint Counsel has no specific response.

11. **ACE-SIL®** – product name of a hard rubber battery separator developed by Microporous (and now sold by Daramic) that is made from rubber silicon. This pure rubber product is very stiff and typically used in very high end stationary applications such as telecommunications, back up power for nuclear plants, and military products. (Gilchrist, Tr. 300; Hauswald, Tr. 992; Roe, Tr. 1748; McDonald, Tr. 3786; RX1638 (physical product sample)).

**Response to Finding No. 11:**

Complaint Counsel has no specific response.

12. **Aftermarket** – refers to the market for replacement batteries for products (in contrast to original equipment batteries). (Godber, Tr. 143-44; Gillespie, Tr. 2932).

**Response to Finding No. 12:**

Complaint Counsel has no specific response.

13. **Antimony** – refers to an antimony alloy that is sometimes included in the composition of the positive plate of a battery used for deep-cycle applications in order to improve battery performance. Antimony can have a tendency to travel from the positive plate to the negative plate during usage, which could eventually lead to reduced battery performance. The addition of

rubber to a battery separator can help reduce the rate of antimony transfer. (Godber, Tr. 138-40, 149-50; Whear, Tr. 4667-68, 4683-84; PX1791 at 001).

**Response to Finding No. 13:**

Deep-cycle batteries use a high-antimony lead alloy grid and use high-density active material that takes longer to fall apart. (Qureshi, Tr. 1995). The positive lead alloy grid at U.S. Battery has an antimony content of 5% and the negative grid has an antimony content of 2.75%. (Qureshi, Tr. 1998). The deposition of antimony from the positive plate to the Negative is called antimony poisoning. It is referred to as poisoning because antimony transfer will cause the premature death of the battery. (PX1791 at 001; PX1124 at 001; Godber, Tr. 137-139). The reduction of antimony transfer is important property for separators used in deep-cycle batteries. (Leister, Tr. 4039). The separator plays an important role in scavenging or tying up the antimony in the electrolyte, preventing it from going to the negative plate. (Qureshi, Tr. 2004). Antimony is what makes the battery deep-cycle; if you do not have enough antimony the cycle loses capacity. (Qureshi, Tr. 2001-2002).

14. **Backweb Thickness** – a primary measurement of a battery separator that is the thickness of the substrate in space between membranes of a rib. Simply put, it is the thickness of the separator that is measured between the ribs. The backweb thickness serves to create a wall of insulation in the battery between plates. (Hauswald, Tr. 966-67, 979; Leister, Tr. 4044; Whear, Tr. 4685, 4688; PX669, *in camera*).

**Response to Finding No. 14:**

Complaint Counsel has no specific response.

15. **Battery Separators** – products of various composition that are porous insulators placed between positively and negatively charged plates in batteries to prevent electrical short circuits while allowing ionic current to flow through the separators. (Gilchrist, Tr. 314; Hauswald, Tr. 968-69; Benjamin, Tr. 3504; Whear, Tr. 4665-66).

**Response to Finding No. 15:**

Complaint Counsel has no specific response.

16. **Black Scum** – refers to a dark-colored residue that can gather on the liquid surface inside a polyethylene or polyethylene-based flooded lead-acid battery during usage. The black scum can result from the interaction of various chemicals and the oil component of a separator through a process of oxidation. (Hauswald, Tr. 1096-98; Brilmeyer, Tr. 1834-35; Whear, Tr. 4707-08).

**Response to Finding No. 16:**

Complaint Counsel has no specific response.

17. **CellForce®** – product name for a polyethylene battery separator developed by Microporous (and now sold by Daramic) for deep-cycle applications that includes ground up ACE-SIL® rubber product as an additive in the polyethylene matrix of the separator to improve performance. (Gilchrist, Tr. 337-38, 340; Hauswald, Tr. 672-73, 993; RX1640 (physical product sample)).

**Response to Finding No. 17:**

Complaint Counsel has no specific response.

18. **Daramic HD** – product name of a Daramic polyethylene battery separator made with a liquid latex additive for deep-cycle applications. (Hauswald, Tr. 671-72; PX949 at 004, *in camera*; PX319 at 007).

**Response to Findign No. 18:**

Complaint Counsel has no specific response.

19. **Darak** – product name of a non-PE Daramic battery separator made with cross-linked phenolic resin for more porosity. The separator is made only in Germany and is typically used in gel type batteries. (Hauswald, Tr. 989-90; Whear, Tr. 4681; PX582 at 051).

**Resposne to Finding No. 19:**

Complaint Counsel has no specific response.

20. **Deep-cycle** – refers to certain end use applications for batteries where the batteries are placed in products having a lower amperage draw over a longer duration of time. These batteries are repeatedly discharged deeply to a low state of charge prior to recharging. Example applications include golf carts, floor scrubbers, scissor lifts, utilities, and marine boat applications. (Godber, Tr. 137-38; Gillespie, Tr. 2931; Whear, Tr. 4682, 4694; PX0319 at 007-008).

**Response to Finding No. 20:**

Complaint Counsel has no specific response.

21. **FLEX-SIL®** - product name of a premium battery separator product developed by Microporous (and now sold by Daramic) that is made of pure rubber (no polyethylene) for use in deep cycle applications such as golf carts, floor scrubbers and aerial lifts. Flex-Sil product is sold only in "leaf" cut-piece form. (Roe, Tr. 1737, 1749; Hauswald, Tr. 992-93, McDonald, Tr. 3787; RX1639 (physical product sample)).

**Response to Finding No. 21:**

Flex-Sil's premium status is based more on its price rather than its performance as

compared to Daramic's HD. (PX0423 at 002).

22. **Flooded Lead-Acid Battery** – a battery that has liquid acid in it up to a level above the positive and negative lead plates. Due to repeated charging and discharging, especially in deep-

cycle applications, liquid will have a tendency to evaporate and the battery will need to be watered at certain intervals (except in a sealed, no maintenance automotive battery). (Godber, Tr. 147; Brilmeyer, Tr. 1841; Qureshi, Tr. 2053-54; Whear, Tr. 4682)

**Response to Finding No. 22:**

Complaint Counsel has no specific response.

23. **Enveloping** – instead of having the battery separator material cut into separate smaller “leaf” pieces, the battery manufacturer will purchase the material in roll form and itself fold the separator material around the plates of the batteries and seal it on the side (thus “enveloping” the plate like it is in a pouch). (Roe, Tr. 1748-49; Qureshi, Tr. 2036; PX1791 at 002) This process also can be referred to by a battery manufacturer as “sleeving”. (Benjamin, Tr. 3508).

**Response to Finding No. 23:**

Complaint Counsel has no specific response.

24. **Gel (Non-Flooded) Battery** – instead of having a liquid lead-acid like flooded batteries, these batteries (such as an AGM battery) have a gel silica that interacts with the positive and negative plates of the battery to allow for ionic transfer. (Godber, Tr. 147; Gaugl, Tr. 4557; Whear, Tr. 4681).

**Response to Finding No 24:**

The citations do not support this finding. Gel batteries are not the same thing as AGM batteries. In an AGM battery the electrolyte is absorbed into the fiber glass separator and there is no free active material. In a gelled battery, the electrolyte is very thick but free of the separator. (Douglas, Tr. 4053-54). AGM and Gel batteries are both types of sealed batteries but are not one and the same. (Godber, Tr. 147).

25. **Industrial Separators** – refers to separators for all industrial applications for batteries, including industrial motive power or industrial stationary batteries. (Roe, Tr. 1815; Whear, Tr. 4682-83).

**Response to Finding No. 25:**

Complaint Counsel has no specific response.

26. **Leaf Separator** – refers to battery separator material that has been cut into pieces (i.e., “leaves”), and many of these pieces will be stacked together in between plates and used in a single battery. (Roe, Tr. 1748-49; PX1791 at 2).

**Response to Finding No. 26:**

Complaint Counsel has no specific response.

27. **Motive Power** – refers to an end use application of batteries for certain industrial products that move, such as forklifts and mine equipment. (Gilchrist, Tr. 306; Roe, Tr. 1197; Balcerzak, Tr. 4092; Whear, Tr. 4694).

**Response to Finding No. 27:**

Complaint Counsel has no specific response.

28. **OE/OEM** – generally synonymous terms for original equipment or original equipment manufacturer. These types of batteries are installed as original equipment on a product (in contrast to batteries for the “aftermarket” which are replacement batteries). (Roe, Tr. 1762-63; Gillespie, Tr. 2932).

**Response to Finding No. 28:**

Complaint Counsel has no specific response.

29. **Overall Thickness** – a primary measurement of a battery separator that measures the overall thickness of the product including the ribs (e.g., thickness of substrate and height of ribs together). Overall thickness serves to provide the space between electrodes and make a reservoir for the liquid. (Hauswald, Tr. 966-67, 979; Leister, Tr. 4044; Whear, Tr. 4688-89). (For demonstrative purposes see PX669, *in camera*).

**Response to Finding No. 29:**

Complaint Counsel has no specific response.

30. **PE Separators** – abbreviation for a polyethylene battery separator. Daramic’s polyethylene battery separators are formulated from ultra high molecular weight polyethylene, as well as other ingredients such as silica and oil. (Toth, Tr. 1501, 1549; PX582 at 041, 043). Certain PE separators include additional additives as well. (PX582 at 043-050; PX0949 at 003-004, *in camera*). These products are sold under trade names/trademarks that include Daramic Standard, Daramic HP, Daramic V, Daramic HD, Daramic HPR, Daramic HP-S, Daramic HPO, Daramic Duralife, Daramic W and Daramic CL. (PX582 at 043-050; PX0949 at 003-004, *in camera*).

**Response to Finding No. 30:**

Complaint Counsel has no specific response.

31. **Profile** – profile refers to the specifications of a separator and includes the thickness of the backweb as well as the shape of the ribs, i.e., whether they are vertical, diagonal, or S-shaped, along with the height and density of the ribs. Daramic offers a choice of approximately 80 profiles with its battery separators (Whear, Tr.4675-76).

**Response to Finding No. 31:**

Complaint Counsel has no specific response.

32. **Reserve Power** – an end use application for batteries where the batteries are used to provide back-up or reserve power to a system. (Gilchrist, Tr. 306; Axt. Tr. 2099; Douglas Tr. 4052-53).

**Response to Finding No 32:**

Complaint Counsel has no specific response.

33. **Ribs** – protrusions on the separator. The ribs, which vary in height, thickness or shape from separator to separator, help fix the physical spacing in the battery to make sure there is an appropriate amount of acid between the plates. The shapes and sizes of these ribs make up oart of the “profile” of the separator. (Hauswald, Tr. 966-67; Whear, Tr. 4665-67, 4675-76; PX1791 at 002).

**Response to Finding No. 33:**

Complaint Counsel has no specific response.

34. **SLI** – abbreviation refers to an end use application for batteries known as “starter, lighting, and ignition,” which is generally synonymous with an automotive-type application for batteries. Examples of SLI batteries include those placed in automobiles, trucks, buses, boats, snowmobiles, jet skis and recreational vehicles. (Brilmeyer, Tr. 1831-32; Gillespie, Tr. 2390, *in camera*; Leister, Tr. 3976-77).

**Response to Finding No. 34:**

Complaint Counsel has no specific response.

35. **Stationary** - refers to an end use application for a battery where the product is stationary, such as large back-up batteries for telecommunications, emergency lighting, UPS or other reserve power application. (Roe, Tr. 1736, 1816-17; Whear, Tr. 4692).

**Response to Finding No. 35:**

Complaint Counsel has no specific response.

36. **Traction** – refers to an end use application for batteries in certain industrial products (e.g., electric forklifts). Term generally synonymous with “motive power” applications. “Motive power” is typically referred to in U.S., while “traction” is typically referred to globally. (Roe, Tr. 1250; Balcerzak, Tr. 4092).

**Response to Finding No. 36:**

Complaint Counsel has no specific response.

37. **UPS** – refers to an end use application for batteries known as “uninterruptible power supply” or “uninterruptible power source” products. These are batteries for emergency power use in case of a power outage/stoppage. Examples include back-up stationary batteries for computer systems, telecommunications systems, and cell phone towers. UPS batteries are generally considered to be a type of reserve power batteries. (Gilchrist, Tr. 306; Roe, Tr. 1736-37; Brilmeyer, Tr. 1832-33; Douglas Tr. 4052-53).

**Response to Finding No. 37:**

Complaint Counsel has no specific response.

38. **VRLA** – abbreviation refers to valve-regulated lead-acid battery. VRLA is simply another name for an AGM battery. (Godber, Tr. 366; Douglas, Tr. 4052).

**Response to Finding No. 38:**

Complaint Counsel has no specific response.

**B. The Product and The Relevant Product Market**

**a. The Role of a Battery Separator**

**(a) Physical Characteristics**

39. Lead acid batteries are made up of three primary components: a positive electrode, a negative electrode, and an electrolyte. (PX2110 at 010). The cells of a battery are made up of electrodes which are lead plates that are positively and negatively charged. (PX2110 at 010). The plates are stored in the electrolyte, which is a solution of sulphuric acid. (PX2110 at 010). The cell discharges electrons as the acid slowly changes the lead in the plates into lead sulphate. (PX2110 at 010). An electric current then flows if the terminals are connected through a conductor. (PX2110 at 010). When an electric current is being drawn from a battery it is being discharged. (PX2110 at 010).

**Response to Finding No. 39:**

Complaint Counsel has no specific response.

40. A battery separator is a porous insulator placed between two plates of opposing polarity to prevent electrical short circuits while allowing ionic current to flow through the separator. (PX2110 at 010). From this standpoint, a battery separator is a passive element in a lead-acid battery. (Whear, Tr. 4666).

**Response to Finding No. 40:**

Complaint Counsel has no specific response.

41.

 } (PX2110 at 010; Douglas, Tr. 4072, *in camera*; Craig, Tr. 2553 (3-4%)).

**Response to Finding No.41:**

Complaint Counsel has no specific response.

42. A battery separator serves two primary functions. (Whear, Tr. 4666).

**Response to Finding No. 42:**

While in general a battery separator may have two primary functions across all types of separators, battery manufacturers in North America demand separators that are designed for specific applications and have particular additives and chemical recipes that make a particular

separator suitable for a specific application. (Whear, Tr. 4667-4668; see also, PX0582 at 043-050).

43. First, it prevents the positive and negative electrodes from having contact. If the positive and negative electrodes come into physical contact with each other, the cell will short out with no voltage or energy. While a separator needs to prevent physical contact, it must allow ions or electrolytes to flow back and forth within the battery which is why separators are porous. This function is performed primarily by the microporous backweb of a battery separator. (Whear, Tr. 4666).

**Response to Finding No. 43:**

Complaint Counsel has no specific response.

44. The second function of a battery separator is to provide physical spacing. The separator fixes a physical spacing between the electrodes. The function is performed primarily by the ribs of a battery separator. A battery separator may have taller and shorter ribs depending upon the desired amount of acid between the plates. (Whear, Tr. 4666; Hauswald, Tr. 966-69).

**Response to Finding No. 44:**

Complaint Counsel has no specific response.

45. Separators are characterized by their backweb thickness and their overall thickness. Backweb thickness denotes the thickness of the substrate between the ribs. Overall thickness is the height of the ribs, including the substrate thickness. Both thicknesses are measured in the unit mils or thousandths of an inch. (Whear, Tr. 4688-4689) (For illustrative purposes see RX00945 at 167, *in camera*).

**Response to Finding No. 45:**

Separators for flooded lead-acid batteries are characterized by far more than backweb and overall thickness. The thickness of the battery separator represents merely the primary physical characteristics and not its chemical characteristics which determine how that separator will perform and in what application it will be best suited. (Whear, Tr. 4682-4683; see also PX0582 at 043-050). For instance, in a PE separator intended for a UPS application, or anywhere the formation of black scum is an issue, Daramic offers its "CL" which uses a patented "clean oil" that it markets as having "superior reduction of black residue." (Whear, Tr. 4710-4711; PX0582 at 050). Likewise, a separator destined for a deep-cycle application where antimony poisoning is a concern will have a rubber additive inserted to allow the separator to inhibit the transfer of antimony from the positive to the negative plate within the battery. (Whear, Tr. 4667-4668).

46. Battery manufacturers who purchase separators target a certain overall and backweb thickness in the separators they purchase, but a certain degree of tolerance is accepted within the industry. The typical tolerance for the backweb thickness is plus or minus one and one-half mils. The typical tolerance for the overall thickness is plus or minus three mils (or plus or minus four mils if the separator has a glass mat laminate). (Whear, Tr. 4689-4690).

**Response to Finding No. 46:**

There is no documentary evidence for backweb thickness tolerances and no customers were asked questions about this topic at trial. The self-serving testimony of a Daramci employee is not sufficient for a factual finding.

47. Battery separators can be made out of glass, paper, polyvinyl chloride ("PVC"), rubber, polyethylene, cellulosic and polypropylene. (Whear, Tr. 4666; Hauswald, Tr. 960; PX2110 at 010).

**Response to Finding No. 47:**

{While battery separators can be made from the materials listed by Respondent, in North America flooded lead-acid battery manufacturers use only PE, rubber, rubberized PE, and to a very limited extent phenolic resin separators. { [REDACTED] [REDACTED] [REDACTED] } (PX0922, Roe, IHT at 34-35, *in camera*). In fact, Daramic's Strategy Audit states there are { [REDACTED] [REDACTED] } (PX0265 at 004, *in camera*).

48. The main variables in a battery separator are the backweb thickness, the shape and/or height of the ribs, whether or not a laminate is used (a glass mat for instance), and whether an additive is used. (Whear, Tr. 4667).

**Response to Finding No. 48:**

Complaint Counsel has no specific response.

49. An additive can serve a variety of functions in a battery separator such as serving as a wetting agent, improving oxidation resistance, improving water loss, and/or suppressing antimony. (Whear, Tr. 4668).

**Response to Finding No. 49:**

To this list of additive functions must be added: reducing black scum and improving puncture resistance. (PX0582 at 044, 050). Complaint counsel would clarify the third function

stated as "improving water loss," as improving water retention or "lower[ing] water loss".

(Whear, Tr. 4668; PX0582 at 045, 046).

50. The most common types of additive are ones intended to suppress antimony. These additives include rubber, lignin, and various other organic chemicals. (Whear, Tr. 4668).

**Response to Finding No. 50:**

Complaint Counsel has no specific response.

51. Various additives which may be used in battery separators to suppress antimony poisoning are commercially available. (Whear, Tr. 4668).

**Response to Finding No. 51:**

The only additives used to suppress antimony currently in the market for flooded lead-acid battery separators are natural rubber and latex. The additive referred to in Mr. Whear's testimony has not been commercially used and the company Ensci is not known to be still in operation. (Whear, Tr. 4771). While the Ensci additive was offered to Daramic, Daramic never actually considered using it. (Whear, Tr. 4772-4775). In fact Mr. Whear is aware of no company that actually used the additive. (Whear, 4775).

52. For example, Daramic uses a rubber additive which is commercially available from BASF. (Whear, Tr. 4668).

**Response to Finding No. 52:**

Complaint Counsel has no specific response.

53. Additionally, the company Ensci, Inc., which was founded by Thomas Clough, has produced and patented organic chemical additives, in conjunction with Trojan Battery, which could be used in battery separators to suppress antimony. (Whear, Tr. 4670-75; RX00674; RX00675; RX00676).

**Response to Finding No.53:**

This finding is contradicted by the record evidence. (See CCRF 51).

54. In 2005, Ensci, Inc. offered to sell these additives to Daramic for use in Daramic's battery separators, but Daramic declined as it was already using a different additive to suppress antimony. (Whear, Tr. 4675, 4771).

**Response to Finding No. 54:**

This finding is contradicted by trial testimony of Mr. Whear. According to Mr. Whear, Daramic first looked at the Ensci material in the "2002, 2003 time frame". (Whear, Tr. 4774).

During this time Daramic was using wood lignan as an antimony suppressor for its DC separator. (Whear, Tr. 4777). In 2005, when Daramic improved its DC separator and renamed it HD, rather than use the Ensco material it switched to latex for antimony suppression. (Whear, Tr. 4778).

55. A battery separator "profile" refers to the thickness of the backweb along with the shape of the separator's ribs (whether they are vertical, diagonal, or S-shaped), the density of these ribs, and the height of these ribs. (Whear, Tr. 4675).

**Response to Finding No. 55:**

Complaint Counsel has no specific response.

56. Daramic produces approximately 80 different separator profiles. (Whear, Tr. 4675-76).

**Response to Finding No. 56:**

Complaint Counsel has no specific response.

57. Daramic works with its customers to develop separator profiles which are suitable for the customer's batteries. (Whear, Tr. 4677).

**Response to finding No. 57:**

Complaint Counsel has no specific response.

58. A separator profile can be further differentiated by its backweb thickness (the thickness between the ribs), its overall thickness, and the formula used. (Whear, Tr. 4685). Considering these variables, Daramic offers over 5000 different product offerings or SKU's. (Whear, Tr. 4685-86).

**Response to Finding No. 58:**

The separator profile is not differentiated by its formula. The profile is determined by the calendar system, a stage of the manufacturing process that is well after the mixing and extrusion stage, when additives are added and combined to achieve specific separator chemical properties (formula) such as antimony suppression, high puncture resistance and/or lower black sum occurrence. (Whear, TR. 4667-4668, 4782; PX0625 at 001). What Mr. Whear says in the citation referenced is that "you could make [a profile] into a multitude of or a few different formulas as well." *Not* that the profile is related to the formula can be a character of the profile.

(Whear, Tr. 4685). The same formula can be produced in many different profiles depending on the calendar process used.

59. Some separator profiles have become standardized or widely accepted by customers. This is most common in separators that are used in SLI end use applications. (Whear, Tr. 4686).

**Response to Finding No. 59:**

Complaint Counsel has no specific response.

60. Non-standard profiles are designed through collaboration with individual customers whereby a separator profile is prototyped, tested, and verified, and then once approved a calendar roll will be grooved for that particular profile. (Whear, Tr. 4686).

**Response to Finding No. 60:**

Complaint Counsel has no specific response.

(b) End Uses

61. Polyethylene based separators are manufactured for myriad end uses, including starting, lighting, and ignition batteries, stationary batteries, batteries that provide backup power, batteries that provide emergency power, and batteries that are deeply discharged. (Whear, Tr. 4679).

**Response to Finding No. 61:**

Complaint Counsel has no specific response.

62. Generally, a separator manufacturer does not know for certain which end-use application a particular separator will be used in. (Whear, Tr. 4687-88; Hauswald, Tr. 974-75, 978; Weerts, Tr. 4456, *in camera*) fix.

**Response to Finding No. 62:**

PE separator manufacturers know the end-use applications of the separators they sell.

{ [REDACTED] } (Weerts, Tr. 4504, *in camera*). Daramic has sufficient information regarding the applications for its products that it is able to provide information regarding the demand for each type of application, including deep-cycle, motive power, reserve power, and SLI. (PX0395 at 019, *in camera*; Burkert, Tr. 2336). [REDACTED]

[REDACTED] (RX01120, *in camera*; McDonald, Tr. 3895-3896, *in camera*).

Daramic is aware of the end-use applications for the separators it sells. For example, Daramic has an agreement with { [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED] }

(Roe, Tr. 1354-1355, *in camera*). Daramic is aware that certain backweb thicknesses are typically used in particular types of end use applications. (Roe, Tr. 1308). Customers often request a specific backweb thickness when ordering a separator from Daramic. (Roe, Tr. 1308-1309). Daramic tracks the backweb thickness of all separators that it sells in the AFS database. (Roe, Tr. 1309-1310). In developing a new separator product for battery manufacturers, it is necessary to know for what application the battery is intended. In Dr. Brilmyer's position as Director of R&D, he insisted upon knowing the application that his separators would serve before a developmental separator project could be green-lighted. From his perspective such knowledge is essential. (Brilmyer, Tr. 1828-1829). Daramic actually suggests specific separators for specific applications. [REDACTED]

[REDACTED] } (PX0913  
(Whear, Dep. at 6, *in camera*)).

63. This is true even if the manufacturer, such as Daramic, knows that a particular separator is going to a specific customer, as customers often withhold this level of detail when purchasing separators. (Whear, Tr. 4688; Hauswald, Tr. 978; Douglas, Tr. 4057-59).

**Response to Finding No. 63:**

The assertion in this finding is contradicted by the record evidence. (*See* CCRF 62).

64. The end use application of a battery separator can be generally, but not precisely, determined by looking at the physical dimensions of the separator. (Whear, Tr. 4690).

**Response to Finding No. 64:**

Complaint Counsel has no specific response.

65. Battery separators used in SLI or automotive applications have overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils. (Whear, Tr. 4690-91, 4697; for illustrative purposes see RX1662).

**Response to Finding No. 65:**

This finding is contradicted by the sales data provided by Respondent. In reality, over

[REDACTED]

[REDACTED] (PX1450, *in camera* (AFS database on Excel spreadsheet pivot table sorted by backweb thickness for North American customers); Roe, Tr. 1315;

Hauswald, Tr. 678-679).

66. Battery separators used in deep-cycle applications have overall thicknesses ranging from 35 mils to 100 mils, and backweb thicknesses ranging from 8 mils to 15 mils. (Whear, Tr. 4691-92, 4697; for illustrative purposes see RX1662).

**Response to Finding No.66:**

This finding is contradicted by the sales data provided by Respondent. In reality, nearly

[REDACTED]

[REDACTED] (PX1450, *in camera* (AFS database on Excel spreadsheet pivot table sorted by backweb thickness for North American customers); Roe, Tr. 1315).

67. Battery separators used in stationary applications have overall thicknesses ranging from 11 mils to 200+ mils, and backweb thicknesses ranging from 11 mils to 32 mils. (Whear, Tr. 4692, 4698)(For illustrative purposes see RX1662).

**Response to Finding No. 67:**

This finding is irrelevant. [REDACTED]

[REDACTED] (PX1450, *in camera* (AFS database on

Excel spreadsheet pivot table sorted by backweb thickness for North American customers);

Hauswald, Tr. 1162; (PX0923 (Hauswald, IHT. 48-49)).

68. Battery separators used in motive power applications have overall thicknesses ranging from 60 mils to 140 mils, and backweb thicknesses ranging from 13 mils to 25 mils. (Whear, Tr. 4694-95, 4698)(For illustrative purposes see RX1662).

**Response to Finding No. 68:**

This finding is contradicted by the sales data provided by Respondent. In reality, none of the motive separators sold by Daramic were thinner than [REDACTED]

[REDACTED] (PX1450, *in camera* (AFS database on Excel spreadsheet pivot table sorted by backweb thickness for North American customers); Hauswald, Tr. 680).

69. A battery separator cannot be grouped into a product market based on its backweb thickness and overall thickness. (Whear, Tr. 4699).

**Response to Finding No. 69:**

In addition to rib profile and dimensional thickness measures, the differences between types of PE separators include electrical resistance, different puncture resistance, and different oxidation resistance, all of which are important in determining which separator you use with any particular end use application. (Leister, Tr. 4023-4024).

70. There is overlap between the size of separators used in different end-use application such that battery separators of the same size or thickness can be used in multiple end-use applications. (Whear, Tr. 4695, 4699; RX00677; *in camera*) (For illustrative purposes see Kahwaty Slide No. 44). For example, Daramic's AU profile has a 12 mil backweb thickness and a 39 mil overall thickness. This profile, which has yearly sales in excess of one million dollars, is used by a customer, Exide India, in a stationary application but is also used by a customer, Shin-Kobe, in an SLI application. (Whear, Tr. 4699-4700, 4767).

**Response to Finding No. 70:**

{ [REDACTED] } (PX1450, *in camera*) In any case, Mr. Whear's testimony regarding Daramic's sales of its AU profile does not come from his personal knowledge, (Whear, Tr. 4699), and is contradicted by Daramic's AFS database. First, Daramic's

{ [REDACTED] } (PX1450, *in camera*).

Second, the overall thickness is { [REDACTED] }.

(PX1450, *in camera*). Third, the AFS database shows that the product type for both sales were automotive separators. (PX1450, *in camera*).

71. Daramic's flat-sheet profile is another example. This profile is sold to AT&T at an 11 mil backweb and overall thickness for use in a stationary application and is also sold to Concorde at a 10 mil backweb and overall thickness for use in a SLI application. (Whear, Tr. 4700).

**Response to Finding No. 71:**

Daramic does not indicate the composition of the separators used by AT&T and Concorde. Daramic's AFS database shows that { [REDACTED] } (PX1450, *in camera*). The total sales to

[REDACTED]  
[REDACTED] } (PX1450, *in camera*).

During this same period, the sales of the [REDACTED]  
[REDACTED] } (PX1450, *in camera*). Although the two sales share the same  
profile, Daramic discriminates in its pricing between the two sales, one allegedly used for a  
stationary application and one for an SLI application. (PX1450, *in camera*; Whear, Tr. 4700).

72. [REDACTED]  
[REDACTED] } (PX1450, *in camera*).

**Response to Finding No. 72:**

Daramic's finding is not supported by the evidence because PX1450 does not indicate the  
end uses for Daramic sales. All that can be derived from PX1450 is that, in 2008, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1450, *in camera*).

73. [REDACTED]  
[REDACTED] } (Seibert, Tr. 4188, *in camera*).

**Response to Finding No. 73:**

The evidence does not indicate the type of product (i.e., Daramic HD, Daramic HP, etc.)  
for its sales of [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1450, *in camera*). During this same period, the sales of  
the [REDACTED]  
[REDACTED] } (PX1450, *in camera*) Although the two sales share the same profile, Daramic  
discriminates in its pricing between the two sales, one allegedly used for a backup application

{ [REDACTED] } and one for a deep cycle application { [REDACTED] }

(PX1450, *in camera*; Seibert, Tr. 4188, *in camera*).

74. There is also a fair amount of end-use overlap in separators with a backweb thickness in the 11-12 mil range. (Hauswald, Tr. 984-985)(For illustrative purposes see RX1662). Within the 12 mil backweb range, for example, one would find separators used in automobiles (SLI), golf carts (deep cycle) and telecom batteries (stationary). (Hauswald, Tr. 984-985). (For illustrative purposes see Kahwaty Slides at No. 44). { [REDACTED] }  
[REDACTED] }. (RX00677, *in camera*).

**Response to Finding No. 74:**

Dr. Kahwaty lacked the foundation to testify regarding the backweb thicknesses of products actually sold by Daramic. (Kahwaty, Tr. 5435, 5439, , *in camera*).

There is very little overlap between end uses for separators of 12 mil backweb thickness in North America. [REDACTED]

[REDACTED]  
(PX1450, *in camera*).

Daramic has shown no overlap between end uses for separators of 11 mil backweb thickness in North America. In fact, in 2008, there were no separators sold in North America with 11 mil backweb thickness of type automotive, deep cycle, or industrial. (PX1450, *in camera*).

Less than 0.1 percent of Daramic's North American sales in 2007 and 2008 of automotive separators were more than 10 mils. (PX1450, *in camera*; Hauswald Trial Tr. 680; Roe Tr. 1315). [REDACTED]

[REDACTED] (PX1450, *in camera*; see also for demonstrative purposes Kahwaty Slide 44). { [REDACTED] }  
[REDACTED] }. (PX1450, *in camera*).

[REDACTED]

[REDACTED] } (PX1450, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] } (PX1450, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] } (Kahwaty, Tr. 5446, , *in camera*). For example, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1450, *in camera*).

[REDACTED]

[REDACTED] } (Kahwaty, Tr. 5435, *in camera*). Dr.

Kahwaty was unable to testify regarding how the data was pulled to create slide 44 of his presentation. (Kahwaty, Tr. 5439, *in camera*). Dr. Kahwaty's slide 44 does not indicate the country in which each product was sold. Dr. Kahwaty's slide 44 includes industrial sales to

[REDACTED]

[REDACTED] } (PX1450, *in camera*). Although

Dr. Kahwaty could not testify about the year for which he provided data on his Slide No. 44,

Daramic only had no HD sales at [REDACTED]

[REDACTED] } (PX1450, *in camera*).

75. The ranges of backweb and overall thicknesses set forth above do not include the width tolerances permitted in the battery separator industry. (Whear, Tr. 4702). Including the width tolerances in these ranges would increase the overlap of separator sizes between different end-use applications. (Whear, Tr. 4702).

**Response to Finding No. 75:**

There is no documentary evidence in support of the proposition regarding customers' acceptance of tolerances. The testimonial evidence is self serving and should be given little weight. Furthermore, any tolerance margin would not create overlaps that would significantly impact the product markets alleged by Complaint Counsel.

76. Many separator profiles are used in more than one of the FTC's relevant markets. Thus, polyethylene products with the same rib profile are sold for use in batteries found in different end-use applications. (Whear, Tr. 4699-4702) (For illustrative purposes see RX1662).

**Response to Finding No. 76:**

Customers consider much more than rib profiles when selecting a separator for a particular market. Customers look at a range of product attributes, including puncture resistance, oxidation resistance, and water loss. (Kahway, Tr. 5446-5448, *in camera*).

77. For example, { [REDACTED] } (Seibert, Tr. 4186-89, *in camera*; RX00631, *in camera*; RX00677, *in camera*; RX01119, *in camera*; RX01323, *in camera*; RX01604, *in camera*; RX01605, *in camera*; PX1450, *in camera*).

**Response to Finding No. 77:**

{ [REDACTED] } examples are not examples of the previous fact, as Daramic states. Automobile and motorcycle separators are both SLI separators, which are within the same market as defined by the FTC. [REDACTED] [REDACTED] [REDACTED] have not been sold by Daramic in North America and are not relevant to this case. (PX1450, *in camera* (pivot table sorted by North American sales by profile.)).

Daramic's BC profile with the HD composition is used by { [REDACTED] } [REDACTED] [REDACTED] } (PX1450, *in camera*). The compositions of the products used for the different applications are important in determining their end use.

78. As a result, it is inaccurate to separate a polyethylene separator used for one end-use application from a polyethylene separator used in other end-use applications. (Whear, Tr. 4694). By way of example, there is no distinction in the functionality of a separator used in a so-called motive power battery and a separator used in any other type of deep cycling battery. The separators in each of these applications both serve the same function within the battery. Each battery is used to move something (a golf cart, a forklift, or a mining vehicle) and both are deeply discharged and then recharged. (Whear, Tr. 4694).

**Response to Finding No. 78:**

At a basic level all battery separators perform the same function. In the North American market, however, separators are designed for several different end uses. Separators for motive power and deep cycle batteries for golf carts and floor scrubbers require antimony poisoning suppression. Separators used for motive power batteries are much thicker than separators used for deep cycling in golf cart and floor scrubber applications. Separators for automotive applications are much thinner and do not require the antimony poisoning suppression required for deep cycle and motive applications. Separators for stationary batteries do not require antimony suppression, but require a clean operation so that the clear case does not build up black scum. The separators used in each of these applications are distinct and not substitutable.

(c) Types of Separators

79. Polyethylene separators were patented in 1967 by W.R. Grace. (Whear, Tr. 4678-79).

**Response to Finding No. 79:**

Complaint Counsel has no specific response.

80. The patent on the polyethylene separator expired in the mid-1980s, and thereafter, the information necessary to manufacture polyethylene separators was publicly available. (Whear, Tr. 4679; Toth, Tr. 1626). Consequently, there are no patent barriers which would prevent any individual or company from manufacturing a polyethylene separator. (Toth, Tr. 1626).

**Response to Finding No. 80:**

Complaint Counsel has no specific response.

(d) Daramic Products

81. {

} (PX0949 at 003, *in camera*).

**Response to Finding No. 81.**

Complaint Counsel has no specific response.

(i) Polyethylene Separators - "Daramic"

82. [REDACTED] (PX0949 at 003, *in camera*).

**Response to Finding No. 82.**

Complaint Counsel has no specific response.

83. [REDACTED] (PX0950 at 042, *in camera*).

**Response to Finding No 83:**

Complaint Counsel has no specific response.

84. [REDACTED] (PX0949 at 003, *in camera*). (For illustrative purposes see RX1636, RX1633).

**Response to Finding No. 84:**

To suggest that there is one Daramic PE separator is disingenuous. According to daramic's own marketing materials there are at least eight different separator models differentiated by formula as opposed to any measure of thickness. (PX0582 at 042-050). If one includes Cellforce and Darak, Daramic sells at least 10 different separaotrs for use in various flooded lead-acid battery applications. (PX0582 at 051(Darak has limited sales within the *flooded* lead acid battery market. Primarily, its sales are for gelled batteries.).

85. [REDACTED] (PX0949-003, *in camera*).

**Response to Finding. No. 85:**

Complaint Counsel has no specific response.

86. [REDACTED] (PX0582 at 42; PX0949 at 003, *in camera*).

**Response to Finding No. 86:**

Complaint Counsel has no specific response.

87. {

[REDACTED] } (PX0949 at 003, *in camera*). Daramic HP is formulated from ultra-high molecular weight polyethylene, amorphous silica and specially formulated oil. (PX0582 at 44). This product offers excellent puncture and oxidation resistance for increased life in flooded lead-acid battery applications. (PX0582 at 44). Daramic HP is used in most end-use applications, including stationary and automotive batteries, and can be produced in a wide range of thicknesses. (Hauswald, Tr. 987-88). Daramic HP is available with or without glass mat. (PX0582 at 43).

**Response to Finding No. 87:**

HP was formulated for SLI application due the increased occurrence of separator punctures in the automated battery manufacturing process. (PX0913 (Whear, Dep. at 26, *in camera*)). See also, (Brilmyer, Tr. 1915; Whear, Tr. 4805). Separators are designed for specific applications according to formula. For instance, using the HP PE separator in a UPS application would lead to a much greater scum issue than using Daramic CL. (Brilmyer, Tr. 1922). Daramic HP was envisioned to be used with the expanded metal process typical in automotive battery separator manufacture. (PX0913 (Whear Dep. at 23-26)).

88. {

[REDACTED] } (PX0949 at 003, *in camera*). Daramic Standard is formulated from ultra-high molecular weight polyethylene, silica and oil. (PX0582 at 43). This product offers good puncture and oxidation resistance for general use in flooded lead-acid battery applications. (PX0582 at 43). Daramic Standard is available with or without glass mat. (PX0582 at 43).

**Response to Finding No. 88:**

Complaint Counsel has no specific response.

89. {

[REDACTED] } (PX0949 at 003, *in camera*). Daramic CL is used in products in a multitude of end-use applications including traction and stationary battery applications. (Hauswald, Tr. 988; PX0582 at 50). Daramic CL is available with or without a glass mat. (PX0582 at 45).

**Response to Finding No. 89:**

According to Daramic's own marketing material cited in Finding No. 89 by respondents, these traction and stationary applications are the only two for which this separator is intended. Moreover, the oil used is not simply "cleaner" oil, as labeled in this finding, but rather it is in fact a special and proprietary "clean" oil. (PX0582 at 050 ("Daramic CL is formulated from. . . a proprietary 'clean oil' for use in traction and stationary battery applications.")).

90. { [REDACTED] } (PX0949 at 003, *in camera*). Daramic V is formulated from ultra-high molecular weight polyethylene, amorphous silica, oil and an additive which decreases the water loss caused by antimony deposition. (PX0582 at 45). This product is available with or without a glass mat. (PX0582 at 45).

**Response to Finding No. 90:**

Complaint Counsel has no specific response.

91. { [REDACTED] } (PX0949 at 003, *in camera*).

**Response to Finding No. 91:**

Complaint Counsel has no specific response.

92. { [REDACTED] } (PX0949 at 003, *in camera*). Daramic HP is designed to reduce puncture problems caused by sharp edges on metal grids. { [REDACTED] } (PX0949 at 003, *in camera*). This product is available with or without a glass mat. (PX0582 at 045).

**Response to Finding No. 92:**

This finding conflates facts concerning the HP product and those concerning HPR. (See CCRF 87).

93. { [REDACTED] } (PX0949-004, *in camera*). Daramic HPO is designed to be used in warm weather climates. (PX0582 at 48). { [REDACTED] } (PX0949 at 004, *in camera*). This product is available with or without a glass mat. (PX0582 at 48).

**Response to Finding No. 93:**

Complaint Counsel has no specific response.

94. { [REDACTED] } (PX0949 at 004, *in camera*). This product is available with or without a glass mat. (PX0582 at 49).

**Response to Finding No. 94:**

Complaint Counsel has no specific response.

95. { [REDACTED] } (PX0949 at 004, *in camera*; Hauswald, Tr. 989). Daramic HD is formulated from ultra-high molecular weight polyethylene and is designed to minimize antimony poisoning in lead-acid batteries. (PX0582 at 46). Daramic HD is available with or without a glass mat. (PX0582 at 46).

**Response to Finding No. 95:**

Complaint Counsel has no specific response.

96. { [REDACTED] } (PX0949 at 004, *in camera*).

**Response to Finding No. 96:**

Complaint Counsel has no specific response.

97. All of the polyethylene based separators (including Daramic Standard, Daramic HP, Daramic CL, Daramic V, Daramic HP-S, Daramic HPR, Daramic HPO, Daramic Duralife, Daramic HD, Daramic W, and CellForce) perform the function of keeping the positive and negative electrodes from touching and to provide physical spacing for the electrode. Each specific product has been slightly modified to perform different functions for the end use applications where the separator is used, such as lower electrical resistance or water loss. (Whear, Tr. 4682).

**Response to Finding No. 97:**

Complaint Counsel has no specific response.

98. Interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of a battery, but may impact the battery's overall performance. (Whear, Tr. 4683).

**Response to finding No. 98:**

This finding is contradicted by the existence of the various formulations themselves as well as the very citation used by Respondent. "[Interchanging different separators] might change the life of the battery for instance." (Whear, Tr. 4683). If a battery does not last as long as advertised the battery maker will be liable for a large warranty claim. The marketing material of Daramic relies on the fact that the differences in these PE separators are significant in terms of the effect of the additives on the performance of the separator. For instance, the HD separator is favorable compared to rubber and both rubber and HD with latex are shown as far superior to standard PE in terms of antimony suppression. (Whear, Tr. 4805-4806; PX0582 at 046).

(ii) DARAK Separators

99. [REDACTED] (PX0949 at 004, *in camera*; Hauswald, Tr. 989-90). DARAK separators are formulated from a modified phenolic resin and include an integrated polyester mat for reinforcement. (PX0582 at 51).

**Response to Finding No. 99:**

Complaint Counsel has no specific response.

100. [REDACTED] (PX0949 at 004, *in camera*). (For illustrative purposes see RX1637).

**Response to Finding No. 100:**

Complaint Counsel has no specific response.

101. The DARAK product is manufactured only in Daramic's Norderstedt, Germany plant. However, on an annual basis, only one-fifth of the DARAK separators produced by Daramic are sold to customers in North America. (Hauswald, Tr. 990-91).

**Response to Finding No. 101:**

Complaint Counsel has no specific response.

102. DARAK is a unique separator in that it can achieve levels of porosity up to 75 percent, while polyethylene separators typically have only a 60 percent porosity level. (Hauswald, Tr. 989-90).

**Response to Finding No. 102:**

Complaint Counsel has no specific response.

103. However, seventy-five percent of the DARAK separators produced by Daramic are used in gel batteries, not flooded lead-acid batteries. (Hauswald, Tr. 990).

**Response to Finding No. 103:**

Complaint Counsel has no specific response.

104. A DARAK separator can be used in both a flooded lead-acid battery and a valve regulated lead-acid battery (also known as a gel or recombination battery). (Whear, Tr. 4681).

**Response to Finding No. 104:**

Complaint Counsel has no specific response.

(iii) Polyvinyl Chloride ("PVC") Separators

105. { [REDACTED] } (PX0949 at 004, *in camera*).

**Response to Finding No. 105:**

{ [REDACTED] } (See PX0949 at 236 (Respondent's reply to CID)).  
*in camera*

(e) Microporous Products

106. { [REDACTED] } (PX0949 at 004, *in camera*; Hauswald, Tr. 991). (For illustrative purposes see RX1638, RX1639, and RX1640).

**Response to Finding No. 106:**

In addition to the products listed in this finding, Microporous also sold PE for SLI prior to the acquisition. (PX0921 (McDonald, IH at 34); PX0131 at 016; PX0264 at 003).  
*in camera*

107. Post-acquisition, Daramic continues to manufacture and sell Ace-Sil, Flex-Sil and CellForce. (PX0582 at 042; Whear, Tr. 4681).

**Response to Finding No. 107:**

Complaint Counsel has no specific response.

108. { [REDACTED] } (Hauswald, Tr. 897-899, *in camera*; Toth, Tr. 1422-23, 1504, 1551-52, 1554-55; Graff, Tr. 4857-58; Graff, Tr. 4861, 4877, *in camera*; RX01097, *in camera*). Customers of Daramic had inquired repeatedly of Daramic representatives as to when Daramic would have a rubber separator. (Hauswald, Tr. 1059).

**Response to Finding No. 108:**

[REDACTED]

[REDACTED]

(Hauswald, Tr. 784, *in camera*; PX0203 at 086, *in camera*). Microporous had [REDACTED]

[REDACTED]

[REDACTED] (PX0462 at 005, *in camera*; PX0738 at 013, *in camera*; PX0463 at 002, *in camera*). Daramic expected [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX0463 at 003, *in camera*).

(i) Ace-Sil

109. ACE-SIL® is a product which has been in production since 1935. (Gilchrist, Tr. 313-14; RX01452 at 005). [REDACTED] (Whear, Tr. 4681; PX0949 at 004, *in camera*). ACE-SIL® does not contain any polyethylene. (Hauswald, Tr. 992)(For illustrative purposes see RX1638).

**Response to Finding No. 109:**

Complaint Counsel has no specific response.

110. [REDACTED]

[REDACTED] (Gilchrist, Tr. 385; PX0949 at 012, *in camera*). Because of its brittleness, ACE-SIL® cannot be sleeved or enveloped. (Gilchrist, Tr. 316-17).

**Response to Finding No. 110:**

Complaint Counsel has no specific response.

111. [REDACTED]

[REDACTED] (Whear, Tr. 4681; PX0949 at 004, *in camera*). ACE-SIL® is the only battery separator utilized in 20 to 25 year warranty reserve power applications. (PX0131 at 044).

**Response to Finding No. 111:**

Complaint Counsel has no specific response.

112. ACE-SIL® is typically sold in cut pieces with a glass mat finish attached. (Hauswald, Tr. 992).

**Response to Finding No. 112:**

Complaint Counsel has no specific response.

113. Because ACE-SIL® is composed primarily of hard rubber, it can be manufactured with a large overall thickness, while still maintaining its porosity. For this reason, ACE-SIL® is used when a thick separator is required. (Hauswald, Tr. 1006).

**Response to Finding No. 113:**

Complaint Counsel has no specific response.

114. ACE-SIL® is manufactured only by Daramic, and only at Daramic's Piney Flats manufacturing facility. (Hauswald, Tr. 1006; Gilchrist, Tr. 339).

**Response to Finding No. 114:**

Complaint Counsel has no specific response.

115. Microporous had no competition for its ACE-SIL® product. (PX920 at 006, *in camera*; Gilchrist, Tr. 552-53). Piney flats is the only plant in the world making an ACE-SIL® product (Toth, Tr. 1554-55, 1556-57).

**Response to Finding No. 115:**

Complaint Counsel has no specific response.

116. Because no competitor makes ACE-SIL® and no other product is used as a substitute for it, the Court finds that ACE-SIL® is a product market by itself.

**Response to Finding No. 116:**

A product market must be proven and cannot simply be stated as such by either

Complaint Counsel or Respondent. Complaint Counsel neither alleged nor presented evidence of competitive impact on an Ace-Sil market.

(ii) Flex-Sil

117. { [REDACTED] } (PX0949 at 004, *in camera*) (For illustrative purposes see RX1639).

**Response to Finding No. 117:**

Complaint Counsel has no specific response.

118. { [REDACTED] } (PX0949 at 004, *in camera*).

**Response to Finding No. 118:**

The extent to which a battery can be considered deep-cycle depends on the amount of antimony in the battery. Deep-cycle batteries use a high-antimony lead alloy grid and use high-density active material that takes longer to fall apart. (Qureshi, Tr. 1995). The positive lead alloy grid at U.S. Battery has an antimony content of 5% and the negative grid has an antimony content of 2.75%. (Qureshi, Tr. 1998). It is the antimony that allows the battery to effectively cycle that is survive the process of continuous discharge and recharging. "[D]eep-cycle batteries are designed to run at relatively lower current draw for a long period of time, such as driving a golf cart, scissor lifts, floor-sweeping machines." (Qureshi, Tr. 1994). Thus, regardless of the end use application, to be considered deep-cycle the determining factor is the presence, and the concomitant need to suppress, antimony.

119. Flex-Sil is manufactured only by Daramic, and only at Daramic's Piney Flats manufacturing facility. (Hauswald, Tr. 1012). (Toth, Tr. 1554-55, 1556-57).

**Response to Finding No. 119:**

Complaint Counsel has no specific response.

120. { [REDACTED] } (PX0949 at 012, *in camera*). In fact, Flex-Sil is the industry gold-standard separator in motive, deep-cycle battery applications. (Whear, Tr. 4683; PX0433 at 001 ("Flex-Sil is no doubt the separator of choice in today's market for golf cart battery application."); Gilchrist, Tr. 535 ; Godber, Tr. 271). Prior to the acquisition, Microporous, based on the buying patterns of customers, operated on the basis that Flex-Sil was the industry standard for deep-cycle applications. (Gilchrist, Tr. 535-536).

**Response to Finding No.120:**

The finding intentionally conflates the motive power and deep-cycle markets. Although motive power batteries cycle with deep discharge, motive or traction batteries and those used to power electric golf carts are completely different. (Gilchrist, Tr. 306-307, 341, 385, 389 (PX0131 at 030)). (For reference, compare PX3003 (huge traction battery seen in court by Complaint Counsel's table and PX1400 and PX1402 (small batteries seen in court on Complaints Counsel's table). For the Motive power application the former Microporous offered CellForce,

while for the golf cart deep-cycle market it offered Flex-Sil and CellForce. (PX0131 at 028, 030; see generally PX0949 at 224-228).

121. As a rubber-based separator Flex-Sil is unique in that no other battery separator product can offer the same degree of antimony suppression as Flex-Sil. (Whear, Tr. 4684-85). Trojan, Microporous' largest customer, considers FLEX-SIL® to be unique. (Godber, Tr. 277; RX772, *in camera*; RX1338). U.S. Battery uses FlexSil in its premium battery line, offering a one year warranty. (Wallace, Tr. 1966-67). Over 90% of U.S. Battery separator purchases have been FlexSil. (Qureshi Tr. 2064-65). Both Trojan and U.S. Battery advertise the FlexSil separator on their websites, not Daramic HD. (Godber, Tr. 245-46, 277; (Wallace, Tr. 1963-65) (For illustrative purposes see RX01643).

**Response to finding No. 121:**

This finding is directly contradicted by the testimony of U.S. Battery's head of technology. U.S. Battery has tested Daramic HD product and the Microporous Flex-Sil product side by side and determined the two "are very comparable." (Qureshi, Tr. 2033). After the merger, Mr. Qureshi met with Daramic's David Gunter and told him that in identical applications, there were no noticeable differences between HD and Flex-Sil. (Qureshi, Tr. 2088-89; see also PX0682-002, *in camera* [REDACTED]

[REDACTED] Emphasis in original)). With regard to U.S. Battery's use of Flex-Sil in its year warranty battery, U.S. Battery is pleased with the performance of HD such that its purchases have increased over time and have grown to include additional models in its product line. (Wallace, Tr. 1947-1948). U.S. Battery planned additional purchases of the HD separator in its Group 27 and 31 lines of batteries prior to Polypore's purchase of Microporous. (Wallace, Tr. 1948). U.S. Battery also planned to put HD in its US 2000 model battery which has a one year warranty. (Wallace, Tr. 1978).

122. Polyethylene is a completely inert material - it has no effect on inhibiting that antimony transfer process. (Gilchrist, Tr. 365). Rubber-based products, such as Flex-Sil, inhibit antimony transfer quite well. (Gilchrist, Tr. 365). For this reason, when it comes to preventing antimony transfer, batteries made with a polyethylene based separator are ultimately inferior in performance to batteries made with a rubber-based separator. (Gilchrist, Tr. 365). FlexSil test results exceed those of Daramic HD. (RX01089; Godber Tr. 172, 271; RX01093 at 2 ("Nawaz

said the batteries had failed and that we didn't have anything to worry about as far as Daramic was concerned"); RX835; RX1334; RX1329).

**Response to Finding No. 122:**

This finding is directly contradicted by Complaint Counsel's response to finding 121.

Furthermore, Respondent attempts to support this finding with documents it did not use at trial and do not support its contention. For example, RX1089 contradicts rather than supports Respondent's contention. In the email from an Exide representative to Roger Berger of Microporous, the Exide representative states, "We have had some successful trials with the HD which prompted us to convert some of the Salina production." This is a far cry from the suggestion in this finding that HD was failing tests. With regard to the Gilchrist trial testimony referenced, that testimony was elicited by questions by Complaint Counsel regarding the performance of straight, without antimony suppressing additives, PE separators. (Gilchrist, Tr. 364-365). The suggestion that this testimony represents Mr. Gilchrist's understanding of the performance of Daramic's HD or CellForce separators in golf cart batteries is at best highly misleading.

123. Flex-Sil also has very different functional capabilities than PE separators in that Flex-Sil cannot be enveloped. (Gilchrist, Tr. 373).

**Response to Finding No. 123:**

Complaint Counsel has no specific response.

124. FlexSil is priced substantially above Daramic HD. (Wallace, Tr. 1972; Qureshi, Tr. 2064). Despite the fact that FlexSil was priced substantially higher than Daramic HD, U.S. Battery purchased FlexSil separators, comprising over 90% of its separator purchases. (Wallace Tr. 1961-62; Qureshi Tr. 2064-65.) Trojan only purchased FlexSil separators, not Daramic HD, despite the substantial price differential. (Godber Tr. 270-71).

**Response to Finding No. 124:**

U.S. Battery and Trojan were both long standing customers of Microporous's Flex-Sil product for their respective deep-cycle batteries. These companies are slow to change. U.S. Battery representatives testified that since they began using Daramic's DC product, they had consistently been increasing their orders and looking to further expand their use of DC's

replacement HD. (Wallace, Tr. 1946-1948). U.S. Battery planned additional purchases of the HD separator in its Group 27 and 31 lines of batteries prior to Polypore's purchase of Microporous. (Wallace, Tr. 1948). U.S. Battery also planned to put HD in its US 2000 model battery which has a one year warranty. (Wallace, Tr. 1978).

125. Complaint Counsel called Mike Gilchrist, Microporous' former CEO, as its witness. Gilchrist testified that FLEX-SIL® had no real competition for its niche position in the battery separator market. (Gilchrist, Tr. 554; RX780).

**Response to Finding No. 125:**

“Q: There's no other company in the world, to your knowledge, that makes a rubber product like the Flex-Sil product; right? A: That's correct.” (Gilchrist, Tr. 554). Mr. Gilchrist testified that there were no other companies that made an all rubber battery separator of the Flex-Sil recipe, not that there were no other companies making a separator product that competed for the same market sales as Flex-Sil. “Q: And in the replacement market, which I think you testified was over 85 percent of the total market out there for deep-cycle, in that area, did you see at the time competition from HD for Flex-Sil? A: Yes, we did.” (Gilchrist, Tr. 608). When asked whether MPLP had ever lost any Flex-Sil business to HD, Mr. Gilchrist affirmed that they had. (Gilchrist, Tr. 368-370).

126. The aforementioned facts show that FlexSil is its own relevant product market. FlexSil is a niche product used in deep cycle applications and has very different, and superior, technical capabilities than polyethylene based separators.

**Response to Finding No. 126:**

The aforementioned responses to the aforementioned findings show that MPLP's Flex-Sil was forced to compete against a game and formidable competitor in Daramic's HD separator product for deep-cycle (primarily golf and floor scubber) sales. (See CCRF 117-126).

(iii) CellForce

127. { [REDACTED] } (PX0949 at 005, *in camera*). (For illustrative purposes see RX1640). CellForce is manufactured as a

traditional polyethylene product, except that the rubber additive (ACE-SIL® dust) is added to the product formula during the manufacturing process. (Hauswald, Tr. 993-94).

**Response to Finding No. 127:**

Complaint Counsel has no specific response.

128. { [REDACTED] }  
(PX0949 at 005, *in camera*).

**Response to Finding No. 128:**

The end use applications for which CellForce can be used must include automotive SLI.

Prior to the acquisition, MPLP had been developing a novel use for CellForce in conjunction with JCI using CellForce in car batteries. (PX2300 (Heglie, IHT at 122-123)). [REDACTED]

[REDACTED]

[REDACTED] (PX0921 (McDonald, IH at 66-67, *in camera*)).

(f) Other

(i) AGM

129. { [REDACTED] }  
(PX0925 at 004, *in camera*).

**Response to Finding No. 129:**

There is no denying AGM separators are a kind of separator, but to be clear, AGM separators are *not* used in flooded lead-acid batteries, and flooded batteries are only substituted AGM batteries for very limited particular uses where the sealed and leak-proof nature of the battery technology is mandated, and therefore, do not constrain the prices of those separators that are used in flooded batteries. (RX00945 (Kahwaty, Expert Report at ¶117)).

130. { [REDACTED] } (PX0925 at 004, *in camera*). { [REDACTED] }  
{ [REDACTED] } (PX0925 at 004, *in camera*).

**Response to Finding No. 130:**

The assertion in this finding is contradicted by the record evidence. (*See CCRF 129*).

131. [REDACTED]  
[REDACTED] (PX0925 at 005, *in camera*).

**Response to Finding No. 131:**

Cited material does not support the proposition.

132. [REDACTED]  
[REDACTED] (PX0925 at 006,  
*in camera*).

**Response to Finding No. 132:**

Cited material does not support the proposition.

133. [REDACTED]  
[REDACTED] (PX0925 at 005, *in camera*). [REDACTED]  
[REDACTED] (PX0925 at 004,  
*in camera*).

**Response to Finding No. 133:**

Cited material does not support the proposition. The assertion in this finding is contradicted by the record evidence. (*See CCRF 129*).

(ii) PVC

134. [REDACTED] (PX0916 at  
003, *in camera*). [REDACTED] (PX0916 at 003, *in  
camera*).

**Response to Finding No. 134:**

Cited material does not support the proposition. Furthermore, there is no other PVC separator supplier in the world. Stating Amer-Sil "is one" when it is in fact the *only* one is misleading at best.

135. [REDACTED]  
[REDACTED] (PX0916 at 004, *in camera*).  
EnerSys has purchased PVC separators for use in its industrial batteries. (*Axt. Tr.*, 2101).

**Response to Finding No. 135:**

Cited material does not support the proposition. [REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] } (PX0916

(Dauwe, Dep. at 47, *in camera*, 35)).

136. { [REDACTED] } (PX0916 at 004, *in camera*).

**Response to Finding No. 136:**

Cited material does not support the proposition.

137. { [REDACTED] } (PX0916 at 005, *in camera*).

**Response to Finding No. 137:**

Cited material does not support the proposition. Furthermore, the lower ER and higher oxidation resistance are two of several differences between PVC and PE separators. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX0916 (Dauwe, Dep. at 125-129), *in camera*)). [REDACTED]

[REDACTED] (PX0916 (Dauwe, Dep. at 23)).  
*in camera*

138. { [REDACTED] } (PX0916 at 005, *in camera*).

**Response to Finding No. 138:**

Complaint Counsel agrees that PVC separators cannot be sleeved, however, cited material does not support the proposition.

139. { [REDACTED] } (PX0916 at 006, *in camera*; RX1614 at 011). { [REDACTED] } (PX0916 at 024, *in camera*; Gillespie Tr., 2931-32, 3042, *in camera*).

**Response to Finding No. 139:**

See response to Finding No. 135. Furthermore, Respondent's own expert acknowledges that PVC does not have a constraining effect on the price of PE and rubber based separators in North America. (RX00945 (Kahwaty, Expert Report at ¶117)).

(g) The Manufacturing Process

- (i) PE Separators (manufactured by Daramic) and PE Separators with a Rubber Additive (manufactured by Daramic and Microporous)

140. { [REDACTED] }  
(PX0949 at 007, *in camera*). These basic ingredients are used by all polyethylene battery separator manufacturers. (Hauswald, Tr. 998).

**Response to Finding No. 140:**

Complaint Counsel has no specific response.

141. The basic polyethylene manufacturing process has three stages: 1) Mixing/Extrusion, 2) Extraction, and 3) Finishing. (RX1304 at 001-006; Hauswald, Tr. 996-997; RX1641, demonstrative). This basic manufacturing process is used not only by Daramic, but by all polyethylene battery separator manufacturers. (Hauswald, Tr. 998; Gilchrist, Tr. 593). The technology needed to construct a polyethylene manufacturing line is public knowledge. (Gilchrist, Tr. 564-66; Gaugl, Tr. 4547; Hauswald, Tr. 998).

**Response to Finding No. 141:**

With regard to the third sentence, the evidence contradicts Respondent's assertion that the technology needed to construct a polyethylene manufacturing line is public knowledge. (*See generally* CCFOF 1009-1013, 1015-1018, 1022-1029). Mr. Gaugl testified that the manufacturing process for making PE separators "is not available to everybody." (Gaugl, Tr. 4547). While Mr. Gaugl claimed there were a lot of people that know the process, he was only able to identify James Kung, two former Jungfer employees – Dr. Winkler and Mr. Duya – and "certain people at Daramic as well as at Entek" that he believed could put together and design a line. (Gaugl, Tr. 4642). As stated below, each of these entities ability to propagate the technology is quite limited.

{ [REDACTED] } (PX0907 (Kung, Dep. at 92, *in camera*)).

Daramic owns the Jungfer process and considers information regarding its PE manufacturing processes and know how, including that acquired from Jungfer, to be confidential. (PX2237 at 002; PX0533 at 003). Daramic has admitted that “Daramic’s confidential information cannot be readily ascertained or derived from publicly available information.” (PX2237 at 006). Moreover, “Daramic takes reasonable efforts to maintain the confidentiality and secrecy of its confidential information including entering into confidential agreements with its employees and limiting access to that information.” (PX2237 at 007). “Daramic (and Polypore) have a stated company policy of confidentiality . . . and require its employees to sign confidentiality and nondisclosure agreements.” (PX0533 at 003). In fact, Daramic sued Microporous for allegedly misappropriating Daramic’s trade secrets relating to Microporous’s use of the Jungfer process. (PX2237 at 006).

{ [REDACTED] } (Weerts, Tr. 4498, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4498-4499, *in camera*).

142. During the mixing/extrusion stage, the polyethylene and the silica are linked together and oil is added to the formula mix. (Hauswald, Tr. 997). Also, during this stage, the separator’s backweb thickness and ribs are created. (Hauswald, Tr. 997; RX1304 at 001). More specifically, { [REDACTED] } (PX0949 at 007, *in camera*).

**Response to Finding No. 142:**

Complaint Counsel has no specific response.

143. The second stage, extraction, is needed to add porosity to the separator. This is achieved by removing excess oil though the use of a solvent. (Hauswald, Tr. 997; RX1304 at 001). In this stage, { [REDACTED] } (PX0949 at 007, *in camera*).

**Response to Finding No. 143:**

Complaint Counsel has no specific response.

144. Finally, during the final finishing stage, the separator material is processed into cut pieces or into roll form. (Hauswald, Tr. 997-98; RX1304 at 001; RX1641 film for illustration).

**Response to Finding No. 144:**

Complaint Counsel has no specific response.

145. { [REDACTED] } (PX0949 at 008, *in camera*).

**Response to Finding No. 145:**

Complaint Counsel has no specific response.

146. { [REDACTED] } (PX0949 at 008, *in camera*).

**Response to Finding No. 146:**

Different ingredients, among other things, do make each type of PE separator unique.

However, the finding that the different ingredients are "minor," is contradicted by the evidence.

For example, Daramic's CL separator, which is used in UPS and motive power applications, are made using a special patented "clean" oil that reduces the presence of black scum. (Whear, Tr.

4807). Black scum can interfere with the proper maintenance and function of these types of batteries. (Whear, Tr. 4807; PX0582 at 050; *see generally* CCFOF 21-25; 138-146).

147. { [REDACTED] } (PX0949 at 007, *in camera*).

**Response to Finding No. 147:**

The finding is contradicted by the fact that in the document it cites for support of its contention, Respondent's CID response to the FTC, Respondent states that { [REDACTED] } (PX0949 at 007, *in camera*). Moreover, the manufacturing process for the products is not the same. (See CCRF 149). In addition, Complaint Counsel notes that the liquid latex rubber additive is added before the calender rolls. (Hauswald, Tr. 1013-1014; *see also* PX0635 at 003-004, *in camera*).

148. { [REDACTED] } (Hauswald, Tr. 1012-1023; RX1309, *in camera*; PX0949 at 007, *in camera*). (For illustrative purposes see RX1641).

**Response to Finding No. 148:**

The finding is contradicted by the fact that in its draft supply agreement with Exide, Microporous referred to CellForce as its "hybrid rubber and polyethylene product. (PX0065 at 002; *see also* PX0078 at 009 ("CellForce <**natural rubber, plastic hybrid**> primarily used in motive power (fork trucks) and deep cycle battery applications.") (Emphasis in the original)). Moreover, the manufacturing process and the equipment need to produce CellForce are not the same. (See CCRF 149). In addition, Complaint Counsel notes that the natural rubber additive is added before the calender rolls. (Hauswald, Tr. 1013-1014; *see also* PX0635 at 003-004, *in camera*).

149. The manufacturing process Daramic uses to produce polyethylene separators is the same manufacturing process used to produce CellForce and Daramic HD. In the production of CellForce and Daramic HD, an extra rubber additive is added to the component mix during the manufacturing process. (Hauswald, Tr. 1013-14).

**Response to Finding No. 149:**

This finding is contradicted by the evidence that the manufacturing process for the patented product CellForce requires one to find the right process parameters and settings, which entails modifying the mixing unit, the controls of the mixing unit, changing the temperature

profiles on the extruder and calender, and modifying the extractor. (Gaugl, Tr. 4550.) In addition, during the process of producing CellForce, you evaporate sulfur components, which are corrosive to the copper in the electrical equipment causing equipment failures. (Gaugl, Tr. 4589). In fact, the original purchase equipment agreement at Piney Flats required Jungfer to supply a line for the production of PE separators, “[b]y changing it over to run CellForce, the specification for the equipment would have been a little bit different.” (Gaugl, Tr. 4590).

Because of the equipment failures at Piney Flats related to producing CellForce on a line designed for PE, Microporous changed the layout of the production in Austria and modified the equipment to better accommodate CellForce and to avoid the problems it ran into at Piney Flats.

(Gaugl, Tr. 4590-4591, 4600-4601). Similarly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0913 (Whear Dep. at 113, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED] } (PX0913 (Whear Dep. at 113-114, *in*

*camera*)). [REDACTED]

[REDACTED] (Hauswald, Tr. 1013-1014; *see also* PX0625 at 003-004, *in camera*).

150. Essentially, Daramic HD and CellForce are both made on a standard PE line, but in making Daramic HD, latex is added, and in making CellForce, ACE-SIL® dust is added. (Hauswald, Tr. 1013; Gilchrist, Tr. 312).

**Response to Finding No. 150:**

Respondent’s assertion in this finding is contradicted by the record evidence. (*See* CCRF 149).

151. On any PE line, including PE lines where a rubber additive is used, after the product mix passes through the extruder, but before the product mix enters the calender roll, the product can be used in any end-use application. Said another way, the composition of the product is the same



(PX0949 at 003, *in camera*). Daramic CL is formulated using “proprietary ‘clean’ oil for use in traction and stationary battery applications.” (PX0582 at 050). Daramic HP-S is a product

{“ [REDACTED] [REDACTED] } (PX0949 at 003, *in camera*).

Moreover, the evidence is clear that the composition and formulation of products used in deep-cycle applications differ from the PE used in other applications. (*See* CCFOF 85-91). In deep-cycle applications a pure PE separator does not perform adequately. (Qureshi, Tr. 2005-2006; Godber, Tr. 150-151). Daramic HD product { [REDACTED]

[REDACTED] } (PX0949 at 004, *in camera*). Daramic HD “is designed to minimize antimony poisoning in lead-acid batteries used for heavy-duty and deep cycle applications.” (PX0582 at 046). { [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] } (PX0949 at 019, *in camera*). Likewise, CellForce has a

different formulation than other Daramic PE separators. { [REDACTED] [REDACTED] } (PX0949 at 005, *in camera*). { [REDACTED] [REDACTED] } (PX0949 at 004-

005, *in camera*).

152. Separators are manufactured for different end uses based on the separator's thickness and rib-pattern. In the manufacturing process, as the product passes through the calender roll it receives a defined thickness and rib pattern. (Hauswald, Tr. 1016). The spacing between the top and bottom calender rolls determines the backweb thickness of a battery separator. The grooves of a calender roll determine the height of the ribs and the overall thickness of a battery separator. (Hauswald, Tr. 1017-1019).

**Response to Finding No. 152:**



The evidence from Dan Weerts of Entek, Roger Hall, who sits on the Board of BFR, and various EnerSys executives contradict RFOF 154 and RFOF 155, below, that the same PE manufacturing line can easily produce different end use applications, such as SLI or industrial.

Mr. Weerts testified { [REDACTED] } (Weerts, Tr. 4493-4494, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4515, *in camera*).

{ [REDACTED] } (Weerts, Tr. 4515-4516, *in camera*).

{ [REDACTED] } (PX0672 at 002, *in camera*; PX0907 (Kung, Dep. at 85-86, *in camera*)). [REDACTED]

[REDACTED] { [REDACTED] } (Hall, Tr. 2849-2850, *in camera*). { [REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 262, *in camera*)). To date, BFR has not { [REDACTED]

[REDACTED] } (Hall, Tr. 2880, *in camera*). Mr. Hall is not aware of any instance in which { [REDACTED]

[REDACTED] } (Hall, Tr. 2880, *in camera*). { [REDACTED] } (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*). Even if { [REDACTED] had the appropriate

calender roll, it would still be { [REDACTED] } before { [REDACTED] } could begin ordering

product from them. (Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). { [REDACTED]

[REDACTED] } (Gagge, Tr. 2508-2509, *in camera*).

155. As a result, one manufacturing facility can easily switch from producing one separator product to another. (Hauswald, Tr. 1012-19).

**Response to Finding No. 155:**

The assertion in this finding is contradicted by the record evidence. (*See CCRF 154*).

156. A calender roll can be substituted into the manufacturing line in place of another calender roll in a very short timeframe. (in twenty minutes, Hauswald, Tr. 1019). (For illustrative purposes see RX1641). Moreover, { [REDACTED] } (Weerts, Tr. 4493-4494, *in camera*).

**Response to Finding No. 156:**

The evidence that the time frame for switching a calender roll to go from one PE product to another is "very short," with the changeover and re-start being accomplished in 2 to 4 hours, is contradicted by the evidence. { [REDACTED]

[REDACTED] } (Weerts, Tr. 4516, *in camera*). Mr. Gaugl stated that a changeover between CellForce and straight PE, including changing the calender roll, takes 4 to 6 hours and is done only once every two weeks. (Gaugl, Tr. 4551-4552).

157. { [REDACTED] } (Hauswald, Tr. 1024; Gilchrist, Tr. 559, Weerts, Tr. 4488-4489, *in camera*; Gaugl, Tr. 4553; RX00146 at 002-003, *in camera*).

**Response to Finding No. 157:**

Respondent's claim regarding the cost of a calender roll is contradicted by its own witness, Mr. Whear, and its response to the FTC's CID issued on April 7, 2008. Mr. Whear testified that it costs \$40,000 to \$60,000 to procure a calender roll. (Whear, Tr. 4678).

Respondent's CID response estimated the cost for a calender roll to be { [REDACTED] } (PX0949 at 011, *in camera*; see also PX0578 at 004 "a production tool will cost about \$80m."). Moreover, with over 100 different calender rolls, Daramic's sunk investment is significant. (Whear, Tr. 4778-4779).

158. It takes a calender roll vendor anywhere from 2 days to 5 weeks to make and sell a new calender roll. (Gilchrist, Tr. 569).

**Response to Finding No. 158:**

Respondent's claim regarding the lead time for acquiring a calender roll is contradicted by its own witness, Mr. Gaugl, who stated that the lead time is significantly longer than the two days to five weeks claimed by Mr. Hauswald. Mr. Gaugl testified that the lead time for calender rolls was 12 to 14 weeks. (Gaugl, Tr. 4553-4554; *see also* RFOF 1066).

159. Moreover, all of the equipment necessary for the construction of a polyethylene line - including extruders, extractors, ovens, dryers, and calender stacks - can be purchased "off-the-shelf" from various third-party vendors. (Hauswald, Tr. 1025-29; RX1300; RX1219; RX1220; RX1221; RX1222; RX1223; RX1224; RX1046, *in camera*; RX1030; RX1031; RX1040, *in camera*). For example, all of the equipment necessary for the polyethylene lines in the Feistritz, Austria facility was procured from third-party vendors. (Hauswald, Tr. 1102-04; RX1046, *in camera*). { [REDACTED]

} (Weerts, Tr. 4498-99, *in camera*)

**Response to Finding No. 159:**

Respondent's claim in the first sentence of this finding that the equipment can be purchased "off-the-shelf" is contradicted by evidence. In its answers to Complaint Counsel's interrogatories, Respondent provided contradictory evidence with regard to extraction equipment: { [REDACTED]

[REDACTED] } (PX0949 at 040, *in camera*). Moreover, "long-lead-time items," which include some special-order items, cannot be purchased "off-the-shelf." (Gaugl, Tr. 4544). Mr. Gaugl, Respondent's witness who was responsible for setting up the Feistritz facility, testified that the long-lead items included the calender, the distillation unit and the dryers. (Gaugl, Tr. 4544). He also testified that the distillation unit, the condensation unit, the carbon beds and the extractor, were "special-order equipment which you cannot buy right off the shelf." (Gaugl, Tr. 4544-4545). Moreover, the equipment is far from off-the-shelf. As Mr. Hall stated on behalf of BFR: { [REDACTED]

[REDACTED] } (Hall, Tr. 2769-2770, *in*

camera). { [REDACTED]  
[REDACTED]  
[REDACTED].}

(Gaugl, Tr. 4612; PX0905 (Gaugl, Dep. at 77, *in camera*)). The machine suppliers draw up blueprints for the equipment based on the specifications Microporous provided. (Gaugl, Tr. 4611-4612). { [REDACTED]  
[REDACTED] } (PX0924 (Jensen, Dep. at 24-25, *in camera*)).

(ii) Rubber Separators

160. { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0949 at 008, *in camera*; RX1310 at 001; Hauswald, Tr. 999-1006). (For illustrative purposes see RX1641).

**Response to Finding No. 160:**

Complaint Counsel has no specific response.

161. Flex-Sil battery separators are produced from a blend of natural rubber, precipitated silica, and water. After mixing these ingredients, the material is extruded in sheet form to a calender stack that forms a customer specific rib design. The rib design is created as the product passes through the calender roll. The calendered sheet is then cured or cross linked by irradiation from an electron beam accelerator system. The sheet is then dried to remove most of the water introduced during the initial mixing process. This water removal forms the basis for the porous structure required for the battery separator to function properly in a battery. (Hauswald, Tr. 1006-1012; RX1311 at 001; PX0949 at 008, *in camera*) (For illustrative purposes see RX1641).

**Response to Finding No. 161:**

Complaint Counsel has no specific response.

162. Flex-Sil battery separators are produced using the same ingredients and through the same manufacturing process as ACE-SIL® battery separators, with the exception that sulfur is not

used in the process, but instead an electron beam is used to cross-link the Flex-Sil product (Hauswald, Tr. 1006, 1008-09).

**Response to Finding No. 162:**

Complaint Counsel has no specific response.

(iii) Phenolic Resin Separators (manufactured by Daramic)

163. {

[REDACTED]

} (PX0949 at 009, *in camera*).

**Response to Finding No. 163:**

The first sentence of this finding is contradicted by the evidence that Darak is produced at its Norderstedt, Germany plant, not at its Selestat, France plant. (PX0949 at 004, *in camera*; PX0195 at 005). Complaint counsel has no specific response to the rest of this finding.

(iv) Polyvinyl Chloride Separators (manufactured by Daramic)

164. {

[REDACTED]

} (PX0949 at 010, *in camera*).

**Response to Finding No. 164:**

Complaint Counsel has no specific response.

(h) The Production Lines

165. {

[REDACTED]

} (PX0950 at 038, *in camera*).

**Response to Finding No. 165:**

Complaint Counsel has no specific response.

166.

{ [REDACTED] } (PX0950 at 039, *in camera*; Gaugl, Tr. 4545)

**Response to Finding No. 166:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the mixing equipment for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

{ [REDACTED] } (Hauswald, Tr. 871, *in camera*).

{ [REDACTED] } (Hauswald, Tr. 871, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } (Hauswald, Tr. 872-873, *in camera*). { [REDACTED]

[REDACTED] } (Hauswald, Tr. 875, *in camera*).

167.

{ [REDACTED] } (PX0950 at 039, *in camera*; Hauswald, Tr. 961-962; Gaugl, Tr. 4566).

**Response to Finding No. 167:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the extruder for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

{ [REDACTED] } (Hauswald, Tr. 871, *in camera*).

{ [REDACTED] } (Hauswald, Tr. 871, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } (Hauswald, Tr. 872-873, *in camera*). { [REDACTED]

[REDACTED] } (Hauswald, Tr. 875, *in camera*).

168. { [REDACTED] } (PX0950 at 039, *in camera*).

**Response to Finding No. 168:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the calender stack for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

[REDACTED] (Hauswald, Tr. 871, *in camera*).

[REDACTED] (Hauswald, Tr.

871, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hauswald, Tr. 872-873, *in camera*). [REDACTED]

[REDACTED] (Hauswald, Tr. 875, *in camera*). .

169.

[REDACTED]

(PX0950 at 040, *in camera*; Gaugl, Tr. 4545).

**Response to Finding No. 169:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the extraction equipment for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

[REDACTED]

[REDACTED] (Hauswald, Tr.

871, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hauswald, Tr. 872-873, *in camera*). [REDACTED]

[REDACTED] (Hauswald, Tr. 875, *in camera*).

With regard to the last sentence of this finding, other than Respondent's bare assertion provided in its response to Complaint Counsel's interrogatories, there is no evidence to support the proposition that one could acquire extraction equipment for less than one-tenth the cost that Daramic paid for an extractor at its Thailand facility.

170. [REDACTED]  
[REDACTED]  
[REDACTED] (PX0950 at 040, *in camera*).

**Response to Finding No. 170:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the oven and web vapor tunnel for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

[REDACTED] [REDACTED] (Hauswald, Tr. 871, *in camera*). [REDACTED]

[REDACTED] (Hauswald, Tr. 872-873, *in camera*). [REDACTED]  
[REDACTED] (Hauswald, Tr. 875, *in camera*).

171. [REDACTED]  
[REDACTED]  
[REDACTED] (PX0950 at 040, *in camera*).

**Response to Finding No. 171:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the winder rolls for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

[REDACTED] (Hauswald, Tr. 871, *in camera*).

[REDACTED] (Hauswald, Tr. 871, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hauswald, Tr. 872-873, *in camera*). [REDACTED]

[REDACTED] (Hauswald, Tr. 875, *in camera*).

172. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (PX0950 at 041, *in camera*).

**Response to Finding No. 172:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the Slitter Rewind line for the "Thailand production line," because Daramic's Thailand facility has multiple production lines of varying sizes. (Hauswald, Tr. 875, *in camera*). Respondent does not identify which production line it is referring to in the second

part of this finding, nor does it state whether the production line being referred to is one that was acquired through the acquisition or one that it constructed new.

{ [REDACTED] } (Hauswald, Tr. 871, *in camera*).

{ [REDACTED] } (Hauswald, Tr.

871, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } (Hauswald, Tr. 872-873, *in camera*). { [REDACTED]

[REDACTED] } (Hauswald, Tr. 875, *in camera*).

173. { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0950 at 041, *in camera*).

**Response to Finding No. 173:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the evaporator. While Respondent states how long such equipment "generally" takes to be delivered or what it "typically" costs, Respondent does not state for what size production line it is referring.

174. { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0950 at 041, *in camera*).

**Response to Finding No. 174:**

Respondent's finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the defect detector and sheet conveyor. While Respondent states how

long such equipment “generally” takes to be delivered or what it “typically” costs, Respondent does not state for what size production line it is referring.

175. {

} (PX0950 at 041-042, *in camera*).

**Response to Finding No. 175:**

Respondent’s finding is ambiguous with regard to the cost and the time it takes for delivery and installation of the testing equipment. While Respondent states how long such equipment “generally” takes to be delivered or what it “typically” costs, Respondent does not state for what size production line it is referring.

176. {

} (PX0950 at 038-039, *in camera*; RX1026, *in camera*).

**Response to Finding No. 176:**

Respondent’s claim in this finding that the equipment is readily available is contradicted by the evidence. The equipment for a PE line is not readily available and several pieces of the long-lead-time equipment must be special ordered. (*See CCRF 159*). The process for manufacturing PE separators is “a complicated yet continuous process.” (PX0611 at 003). The process requires 15 to 18 different pieces of equipment. (Gaugl, Tr. 4610). One cannot call a machine supplier and order a complete PE battery separator line. (Gaugl, Tr. 4610-4611).

177. There are no patents, intellectual property, or other technological barriers to installing this equipment and building a PE battery separator production line. (PX0950 at 42, *in camera*; Toth, Tr. 1626, Gaugl, Tr. 4547).

**Response to Finding No. 177:**

The evidence contradicts Respondent’s assertion that there are no patents, intellectual property, or other technological barriers to building a PE battery separator production line. The know-how is not public knowledge. (*See CCRF 141*). The technology for building a line was

considered by { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX2236 at 031, *in camera*; see generally CCFOF 1023-1029). Moreover, Daramic owns 18 active patents, which is more than any other battery separator manufacturer. (PX2074).

178. The same production lines can be used to manufacture different types of polyethylene separators, including those with or without a rubber additive. (Hauswald, Tr. 1012-13; Gaugl, Tr. 4551; PX0949 at 011, *in camera*).

**Response to Finding No. 178:**

This finding is contradicted by the evidence that the equipment, which was originally designed to run PE, suffered electrical failures when it attempted to run the patented product CellForce, a PE separator with a rubber component. (Gaugl, Tr. 4589-4590). Moreover, in order to run CellForce on lines originally designed for PE, the former Microporous had to find the right process parameters and settings, which entails modifying the mixing unit, the controls of the mixing unit, changing the temperature profiles on the extruder and calender, and modifying the extractor. (Gaugl, Tr. 4550). The designer of Microporous's PE line, Mr. Gaugl, admitted that he would have changed the specification of the equipment if he had known upfront about the factors that led to the machine failures. (Gaugl, Tr. 4590).

179. The same production line can manufacture polyethylene-based separators for automotive and industrial applications. (Hauswald, Tr. 1019-20; Gilchrist, Tr. 558-60; Gaugl, Tr. 4552-53; PX0949-011, *in camera*).

**Response to Finding No. 179:**

Complaint Counsel has no specific response.

180. { [REDACTED] }  
[REDACTED] } (Weerts, Tr. 4493-4494; Hauswald, Tr. 1019; Gaugl, Tr. 4551; PX0949 at 011, *in camera*).



The bare assertion in the last sentence that { [REDACTED] } is not supported by the citations provided.

182. { [REDACTED] } (PX0949 at 012, *in camera*).

**Response to Finding No. 182:**  
Complaint Counsel has no specific response.

183. { [REDACTED] } (PX0949 at 012, *in camera*).

**Response to Finding No. 183:**  
Complaint Counsel has no specific response.

184. { [REDACTED] } (PX0949 at 012, *in camera*).

**Response to Finding No. 184:**  
Complaint Counsel has no specific response.

185. { [REDACTED] } (PX0949 at 012, *in camera*).

**Response to Finding No. 185:**  
Complaint Counsel has no specific response.

C. The Relevant Geographic Market of the Industry

a. Battery Separator Manufacturers Operate in a Global Market

186. { [REDACTED] } (Hauswald, Tr. 858-59, *in camera*; PX0522 at 11-18, *in camera*; RX01073, *in camera*; RX01409, *in camera*; RX620, *in camera*; RX1001, *in camera*; RX1002; RX1004, *in camera*; RX1074, *in camera*; RX1075, *in camera*; RX1084, *in camera*; RX1085, *in camera*; RX1086, *in camera*; RX1087; RX1088; RX1179, *in camera*; RX1409, *in camera*).

**Response to Finding No. 186:**

This proposed finding is contradicted by the weight of the evidence concerning the North American market for each of the relevant products, which is where consumers could practicably turn for alternative sources of these PE separator products, and where Daramic faced competition prior to acquiring MPLP. (*See generally* CCFOF 161-257). North America is the area in which the most direct and immediate effect of the acquisition has been felt. (*See, e.g.*, CCFOF 420-424, 468, 471, 501-503, 547, 699). The self-serving testimony of Daramic's employees concerning "a global PE separator market" is contradicted by testimony of numerous customers (CCFOF 166-167, 170-171, 182-187, 190-198, 200-201, 204, 255, 257); Daramic's only remaining competitor in the North American SLI separator market (CCFOF 251-252); Dr. Simpson (CCFOF 161-163); and – in several cases – the Daramic employees' own testimony and business documents (CCFOF 164-165, 168-169, 174-181).

187. { [REDACTED] } (RX00677, *in camera*; RX01084, *in camera*). Daramic has sales teams and technical service teams located all over the world. (Seibert, Tr. 4143-44).

**Response to Finding No. 187:**

Complaint Counsel has no specific response.

188. { [REDACTED] } (RX0119, *in camera*; RX01407, *in camera*). { [REDACTED] } (RX1076, *in camera*; RX1077, *in camera*) { [REDACTED] } (Thuett, Tr. at 4351, *in camera*; RX1076, *in camera*; RX1077, *in camera*; RX1080 at 40, 43, 46, *in camera*); RX1178, *in camera*; RX1179, *in camera*; RX1180, *in camera*. { [REDACTED] }

[REDACTED] } (Thuet, Tr. at 4351, *in camera*).

**Response to Finding No. 188:**

Complaint Counsel has no specific response to the first two sentences of this proposed finding. The third sentence is contradicted by the fact that Daramic has not shipped any of the relevant products from Asia to North America, even during the recent strike at its Owensboro, Kentucky plant. (Roe, Tr. 1233-1234). Further, Daramic has produced no evidence to show that Asian PE producers are selling any of the relevant products to any North American customers. (Roe, Tr. 1234-1237; Seibert, Tr. 4266-4267, *in camera* (no record of any Asian sales in North America)).

189. { [REDACTED] } (Seibert, Tr. 4152-53, *in camera*; RX01073, *in camera*; RX01409, *in camera*; RX1074; RX1085, *in camera*; RX1086, *in camera*; RX1087, *in camera*). { [REDACTED] } (Seibert, Tr. 4152-54, *in camera*). { [REDACTED] } (Seibert, Tr. 4153, *in camera*).

**Response to Finding No. 189:**

This proposed finding is contradicted by the fact that { [REDACTED] } (See CCFOF 256). Moreover, Daramic stresses the benefits of local supply when selling and marketing to customers. (PX0582 at 018, 020-021). (See also CCFOF 180-181). Finally, Daramic charges its customers different prices in different geographic regions. (See CCFOF 164-169).

190. { [REDACTED] } (Seibert, Tr. 4175-76, *in camera*; RX1065 at 7; RX1069; RX1070, *in camera*; RX1071; RX1022, *in camera*; RX1339 at 7; RX1349, *in camera*). In fact, the competition from Asian manufacturers is increasing all over the world, not solely in Asia. (Thuet, Tr. 4339).

**Response to Finding No. 190:**

This proposed finding does not specifically address any of the relevant product markets.

Moreover, it is contradicted by testimony from Daramic's witnesses, Entek, and the former MPLP (See CCFOF 248-252).

191. Prior to the acquisition, Microporous considered its CellForce separator to be a "world leader product." (Gilchrist, Tr. 339). Additionally, Microporous sold and shipped separators from its facility in Piney Flats, Tennessee to customers around the world, including locations in the U.S., Mexico, South America, Europe, Asia and Africa. (McDonald, Tr. 3790-91; Gilchrist, Tr. 540-41).

**Response to Finding No. 191:**

Complaint Counsel has no specific response.

192. Before being acquired, Microporous exported a large portion of its separators from North America. (McDonald, Tr. 3790-91). In fact, prior to the acquisition, Microporous exported 60% to 70% of its CellForce product. (Gaugl, Tr. 4555) {

[REDACTED] } (Thuet, Tr. at 4352, *in camera*) {

[REDACTED] } (Thuet Tr. at 4353, *in camera*). {

[REDACTED] } (Hall, Tr. 2846-47, 2880, *in camera*).

[REDACTED] (Hall, Tr. 2894, *in camera*). {

[REDACTED] } Thuet, Tr. 4434; RX00677, *in camera*).

**Response to Finding No. 192:**

This proposed finding is contradicted by evidence of numerous additional cost factors and logistical issues involved in exporting and shipping the relevant products over substantial distances. (See CCFOF 199-206; see also CCFOF 172, 177, 179, 188-189).

193. {

[REDACTED] } (Weerts, Tr. 4467-68, *in camera*).

**Response to Finding No. 193:**

The proposed finding is not supported by the testimony of Mr. Weerts. He testified that

{ [REDACTED] }

(Weerts, Tr. 4500, *in camera*). Mr. Weerts also stated that {

[REDACTED] }

(Weerts, Tr. 4501, *in camera*). As for { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4512, *in camera*; see also CCFOF 251-252).

194. { [REDACTED] } (Weerts, Tr. 4465-67, *in camera*; RX01530 at 003, *in camera*; RX1512). { [REDACTED]

(Weerts, Tr. 4465-67, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4465-66, *in camera*; RX00117, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4466-67, *in camera*; RX00119, *in camera*; RX00120, *in camera*; RX00121, *in camera*; RX00122, *in camera*). { [REDACTED] } (RX259, *in camera*; RX260, *in camera*).

**Response to Finding No. 194:**

This proposed finding is contradicted by the specific testimony of Mr. Weerts concerning

{ [REDACTED] } (See CCRF 193).

195. In 2008, { [REDACTED] } its North American facility. (PX1833 *in camera*). In 2007, { [REDACTED] } (PX1833, *in camera*).

**Response to Finding No. 195:**

Respondent's general citation to an entire 86-page exhibit does not allow for a specific response.

196. { [REDACTED] } (Weerts, Tr. 4464-65, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4464-65, *in camera*).

**Response to Finding No. 196:**

The proposed finding is vague. More specifically, { [REDACTED]

[REDACTED] }

(Weerts, Tr. 4502, *in camera*; see also CCRF 193-194).

197. { [REDACTED] } (Weerts, Tr. 4469, *in camera*).

**Response to Finding No. 197:**

This proposed finding is contradicted by the weight of the evidence. (See CCRF 193-194, 196; *see also* CCFOF 251-252).

198. { [REDACTED] }  
(Weerts, Tr. 4469, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Weerts, Tr. 4474-75, *in camera*).

**Response to Finding No. 198:**

Respondent's assertions in this finding are contradicted by the record evidence. { [REDACTED] }  
[REDACTED]  
[REDACTED] } (RX00114 at 024-077, *in camera*; *see also* CCRF 933).  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4483, *in camera*; RX00132, *in camera*).

199. Due to the excess capacity, Asian separator manufacturers are exporting products to other parts of the world. (Thuet, Tr. 4339-40). For example, Daramic is exporting separators to Europe, the Middle East and South America. (Thuet, Tr. 4339). NSG, Anpei and Epoch are also exporting to Europe and South America. (Thuet, Tr. 4339-40; RX50, *in camera*). { [REDACTED] } (Seibert, Tr. 4165, *in camera*).

**Response to Finding No. 199:**

Respondent's assertions in this finding are contradicted by the record evidence. (See CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057. This finding is contradicted by Mr. Kung who testified that excluding Daramic, Asia is a net purchaser of separators. (PX0907 (Kung, Dep. at 146-47, *in camera*)). { [REDACTED] } (See CCRF 1357). If they were, they would have expanded capacity and exported separators to North America. Dr. Simpson testified that the excess capacity is a result of the current recession. When the recession ends, demand will

increase and that excess capacity will decrease. Thus, battery separator manufacturers must act accordingly. (Simpson, Tr. 3195, *in camera*).

Even if Asian competitors were selling separators outside of Asia as alleged by Respondent's, they are certainly not selling separators in Complaint Counsel's North American geographic market. Daramic competes with various companies for sales of separators in Asia and other parts of the world, but to the extent that Respondent alleges that Daramic competes in North America with any company other than Entek for sales of PE SLI separators, or has any competition whatsoever in North America for sales of deep-cycle, motive and/or UPS separators, testimony at trial from Daramic, { [REDACTED] } all contradict this finding.

Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). [REDACTED] [REDACTED] (Roe, Tr. 1236-1237, 1807, 1812-1813; Thuet, Tr. 4379-4380; Seibert, Tr. 4165, *in camera*; PX0902 (Keith, Dep. at 81, 127-128, *in camera*); PX0907 (Kung, Dep. at 186-187, *in camera*). Dr. Kahwaty admitted being aware of *no* Asian suppliers selling in North America. (Kahwaty, Tr. 5343, *in camera*). Nor has Daramic ever lowered prices on separators sold to customers in North America due competition from any of the Asian battery separator manufacturers. (Roe, Tr. 1812-1813).

Notwithstanding post-acquisition price increases, Daramic has not lost any North American motive power or deep cycle business to any competitor since the acquisition of Microporous, nor has it had to adjust prices in North America on such separators due to

competition from any other supplier since the acquisition of Microporous. (Roe, Tr. 1217-1218, 1236-1237, 1279, 1812-1813).

{ [REDACTED] }  
[REDACTED] } (See generally, CCFOF 207-246). { [REDACTED] }  
( [REDACTED] )  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*).

Moreover, the assertion in the second sentence is contradicted by the fact that Daramic is not an Asian separator manufacturer. (Hauswald, Tr. 711-713).

{ [REDACTED] }  
[REDACTED] } (PX0907 (Kung, Dep. at 186-187, *in camera*)). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*).  
{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2746, *in camera*).

Additionally, this proposition is contradicted by the fact that NSG refused to quote on Exide's RFP due of NSG's new relationship with Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

200. Asian separator companies have grown substantially in the past years and are competitive with Daramic. (Seibert, Tr. at 4149; Thuet, Tr. at 4330; RX00032, *in camera*).

[REDACTED] (Hauswald, Tr. 862-63, *in camera*, 866-867, *in camera*; Hauswald, Tr. 1030, 1034, 1036-37, 1107-11; Seibert, Tr. 4159-66, 4176-77, *in camera*; Thuet, Tr. 4331-4333, 4335-36, 4339-40; RX1342; PX184; RX551 at 3-4, *in camera*; RX1447, *in camera*; RX1448, *in camera*; RX1064; RX1067; RX1125; RX1447, *in camera*; RX1558, *in camera*; RX1085, *in camera*; RX1409, *in camera*; RX586, *in camera*; RX1600, *in camera*; RX587-04, *in camera*; RX555, *in camera*; RX553, *in camera*; RX550, *in camera*). Daramic considered the quality of Anpei, BFR and Baotou's product sufficient that it made an offer to purchase each of those companies. (Hauswald, Tr. 1109).

**Response to Finding No. 200:**

Daramic does not compete with any Asian battery separator producer in North America.

(Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). [REDACTED]

[REDACTED] (RX01084, *in camera*; RX0185, *in camera*). According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE

separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). Dr. Kahwaty confirmed that pre-acquisition, no Asian battery separator producer has sold flooded lead-acid separators in North America. (Kahwaty, Tr. 5343, *in camera*). { [REDACTED]

[REDACTED] }  
(Weerts, Tr. 4500-4502, *in camera*).

Microporous did not consider the regional Asian suppliers as potential competitors for its separator business in North America. (Gilchrist, Tr. 308). Mr. Gilchrist explained, aside from Daramic and Entek, there were no other competitors that [REDACTED] [REDACTED] against Daramic and Entek. (Gilchrist, Tr. 423-434).  
*in camera*

Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] }

(Weerts, Tr. 4501, 4512, *in camera*).

Asian firms do not compare favorably to the former Microporous. { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Axt, Tr. 2221, *in camera*). Because { [REDACTED] } are located in { [REDACTED] } technical visits are more difficult and time consuming, as well as additional transportation costs and times, duties, and extra inventory. (Axt, Tr. 2223, *in camera*). { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2223, *in camera*; see generally, CCFOF 971-982).

Additionally, the { [REDACTED] } from a manufacturing operations perspective. It has been Mr. Gillespie's experience that the { [REDACTED] }  
[REDACTED] } than US separator manufacturers. (Gillespie, Tr. 3031-3032, *in camera*). According to Mr. Gillespie, the majority of separators manufactured in Asia are manufactured for the Chinese market, { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3032, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] Burkert, Tr. 2366-67, *in camera*).

Respondent's assertion that Daramic made an offer to BFR, Anpei and Baotou because they all manufactured comparable separators is contradicted by the trial evidence. First, Baotou's, Anpei's, and BFR's separators are not of a comparable quality. (CCRF 1002, 1008-1009, 1011, 1020, 1022-1025, 1028, 1030, 1033, 1040-1041, 1044-1045, 1049, 1051, 1053). Daramic's Strategy Audit listed { [REDACTED] } as "Worst in Industry" for { [REDACTED] }  
[REDACTED]

[REDACTED] } where as it considered itself “Best in Industry” in those categories. (PX0265 at 16, *in camera*). [REDACTED] } were also included as the “Worst In Industry” in Daramic’s Strategy Audit in the same categories as [REDACTED] } in addition to these two categories – [REDACTED] } (PX0265 at 16, *in camera*). Moreover, according to Mr. Hauswald, Baotou could only produce separators with a backweb thickness of 250. And these separators were not of equal quality of Daramic’s because Baotou’s factory had “sand wind entering every where in the plant, and creating stoppage and pinholes.” (PX0697). Dr. Kung tried to fix [REDACTED] line on three different occasions. (PX0907 (Kung, Dep. 119, *in camera*). Dr. Kung said [REDACTED] line were old and dirty. (PX0907 (Kung, Dep. 109-110, *in camera*). Daramic’s Vice-President of Technology, Kevin Whear, stated that when Daramic tested [REDACTED] separators, they produced the “worst black scum I ever remember seeing.” (PX0913 (Whear, Dep. 117, *in camera*)). As if Mr. Whear’s comment left any doubt, he also stated Baotou’s separators “were really bad.” (PX0913 (Whear, Dep. 117, *in camera*)). Lastly, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Hall, Tr. 2771-2773, *in camera*; see also CCFOF 983-986).

201. Asian separator manufacturers have also sought to sell PE separators to customers located in North America.

a. East Penn obtained a quote for the sale of PE separators from Anpei. (Leister, Tr. 3992). East Penn also obtained PE samples from Anpei. (Leister, Tr. 3992; RX79).

**Response to Finding No. 201 a.:**

East Penn is not currently seeking to obtain PE separators supplies from any Asian PE separator manufacturers, nor does East Penn even know if Anpei has the available capacity to supply East Penn with separators. (Leister, Tr. 4035-4036). East Penn believes that obtaining PE separator supplier from Anpei in Asia would be a logistical challenge that would pose an even greater challenge to East Penn than does its current supply situation with Entek. (Leister, Tr. 4035). Given that East Penn is currently dissatisfied with obtaining supply from Entek's West Coast manufacturing facility due to long lead times and added freight charges, turning to Anpei for supply would pose even greater problems for East Penn. (Leister, Tr. 4008-4009, 4035). Moreover, to the extent that Respondent asserts that East Penn has tested PE SLI, motive, stationary or deep-cycle separators from Anpei, such assertion is contradicted by testimony at trial that the only Anpei separators that East Penn has ever tested were separators for lawn mower batteries. (Leister, Tr. 4032).

b. { [REDACTED] } (Hall, Tr. 2862, *in camera*; RX00037-03). { [REDACTED] }, *in camera*; RX00043-03,05, *in camera*; RX00048-02 [REDACTED] }, *in camera*; RX00066-07, *in camera*; RX00074-06, *in camera*.)

**Response to Finding No. 201 b.:**

{ [REDACTED] } (Hall, Tr. 2862-63, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2746, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2878, *in camera*; PX1509 at 9, *in camera*).

c. { [REDACTED] }  
{ [REDACTED] } (Burkert, Tr. at 2360-61, *in camera*; RX00023; RX193; RX198; RX199, *in camera*; RX203, *in camera*; RX204; RX225; RX237; RX239, *in camera*).

Response to Finding No. 201 c.:

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (see generally CCFOF 947-950, 966-967, 969, 972-974, 983-986). { [REDACTED] }  
[REDACTED] } (Hall, Tr. 2881, *in camera*). { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*) { [REDACTED] }  
[REDACTED] } (Hall, Tr. 2881, *in camera*); { [REDACTED] }  
[REDACTED]  
(PX0907 (Kung, Dep. at 262), *in camera*; Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*).

This timeline is also true of { [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*).

{ [REDACTED] }  
[REDACTED] } (Hall, Tr. 2881-2882, *in camera*; PX0907 (Kung, Dep. at 291, *in camera*)). [REDACTED]  
[REDACTED] (Axt, Tr. 2217-19). Mr. Hall has communicated to { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2881-2882, *in camera*).

{ [REDACTED]

[REDACTED] } (PX1248 at 001, *in camera*).

d. { [REDACTED]

[REDACTED]

} (Burkert, Tr. at 2450, *in camera*; RX00223).

**Response to Finding No. 201 d.:**

Mr. Axt testified that { [REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2305, *in camera*; Burkert, Tr. 2450-51, *in camera*).

After working with { [REDACTED]

[REDACTED]. } (Burkhert, Tr. 2359, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2306, *in camera*).

e. { [REDACTED]

[REDACTED]. } (RX303, *in camera*, RX304; RX305; RX306; RX307).

**Response to Finding No. 201 e.:**

{ [REDACTED]

[REDACTED]. } (Gillespie, Tr. 3025-3026, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]. } (Gillespie, Tr. 3029-3031, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3025, *in camera*).

{ [REDACTED]

[REDACTED]. } (See e.g., Gillespie, Tr. 3024, 3041, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }; Gillespie, Tr. 3024-3025, *in camera* { [REDACTED]

[REDACTED] }; Gillespie, Tr. 3024-3025, *in camera* { [REDACTED]

[REDACTED] }.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3024-3025, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3028-3030, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] }. (Gillespie, Tr. 3028-3036, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. } (Gillespie, Tr. 3041, *in camera*).

202. { [REDACTED] } (RX00095, *in camera*).

**Response to Finding No. 202:**

This finding is not supported by the document it cites. { [REDACTED]

[REDACTED]

[REDACTED] } (RX00095 at 007, 017, *in camera*). Furthermore, the finding is contradicted by { [REDACTED]

[REDACTED] } (PX0011, *in camera* ( { [REDACTED]

[REDACTED] }); *see also* PX0917 (Cullen, Dep. at 149-150, 154-160, *in camera*)).

b. Battery Manufacturers Also Conduct Their Business in a Global Market

203. JCI is the largest manufacturer of automotive batteries in the world, and it procures separators on a global basis. (Hall, Tr. 2662-64). Rodger Hall of JCI is the Global Vice President for Procurement. (Hall, Tr. 2662). In that position, he is responsible for global procurement of all materials purchased by JCI, including PE separators. (Hall, Tr. 2663-64). In addition, Mr. Hall is in charge of JCI's "global separator strategies." (Hall, Tr. 2664).

Response to Finding No. 203:

{ [REDACTED]  
[REDACTED] }

(PX1522 at 004, *in camera*). { [REDACTED]

[REDACTED] (*See* PX1519 at 009, *in camera*). JCI is a company with plants around the globe that compete and purchases in regional markets.

Mr. Hall is also a director on BFR's board of directors. (Hall, Tr. 2716).

204. JCI has numerous plants located throughout the world, including the U.S., Mexico, Brazil, Europe and Asia. (Hall, Tr. 2794-95). { [REDACTED] } (Hall, Tr. 2865, *in camera*; PX1505, *in camera*) { [REDACTED] } (RX36, *in camera*; RX39, *in camera*; RX75, *in camera*; RX65, *in camera*; RX57, *in camera*; RX00070-03, *in camera*).

Response to Finding No. 204:

{ [REDACTED]  
[REDACTED] }

(PX1522 at 004, *in camera*). { [REDACTED]

[REDACTED] } (*See* PX1519 at 009, *in camera*).

JCI understood the value of local supply very well. { [REDACTED] } (PX0652; PX0924 (Jensen, Dep. at 94-95, *in camera*)). [REDACTED] (PX0652 at 001; PX0924 (Jensen, Dep. at 99, *in camera*)). This deep discount came from Entetec's strong interest in enticing Daramic to build a production line close to its facility. (PX0652 at 001 ("Enertec is not selling us land for the money; they are looking for a Brazil supplier.")). [REDACTED] [REDACTED] [REDACTED] (PX0653 at 001; PX0924 (Jensen, Dep. at 110, *in camera*)).

Similarly, in 2006, JCI worked to develop a new supplier in Asia to introduce new competition to that geographic region. (Hall, Tr. 2702). [REDACTED] (Hall, Tr. 2702-2703; PX1509 at 003, *in camera*). JCI believed that the addition of one or more new Asian suppliers would { [REDACTED] } (PX1519 at 009, *in camera*). JCI's strategy with regard to BFR was {" [REDACTED] } (Hall, Tr. 2856, *in camera*, 2878, *in camera*).

205. { [REDACTED] } (RX00072, *in camera*).

**Response to Finding No. 205:**

JCI's contract with Entek provides that its European SLI PE purchases will be supplied from Entek's European plant, and its American volumes will be supplied from Entek's U.S. plant. (RX00072 at 30). JCI has endeavored to get its Asian volumes supplied through { [REDACTED] }. (PX1519 at 009, *in camera*). JCI believed that the addition of one or more new Asian suppliers would [REDACTED] } (PX1519 at 009, *in camera*). JCI's strategy with

regard to { [REDACTED]

[REDACTED] } (Hall, Tr. 2856, *in camera*, 2878, *in camera*).

JCI views the SLI PE separator market as being regional with local competitors. (CCRF 204).

206. { [REDACTED] } (Hall, Tr. 2715-16; PX0907 (Kung, Dep. at 59); RX00053, *in camera*; RX00032, *in camera*). As part of its joint venture agreement with BFR, JCI contemplated BFR supplying it with separator on a global supply basis. (RX1602). (See also RX 51 ("Strategic vision for expanding BFR market outside of China/Asia"); RX00054-02 [REDACTED]

[REDACTED] ), *in camera*; RX00055, ("We can work together to make BFR a world class separator supplier to JCI and other battery manufacturers"); Hall Tr. 2860).

**Response to Finding No. 206:**

BFR cannot compete in North America. (CCFOF 207-246).

[REDACTED] (Hall, Tr. 2856, *in camera*). Mr. Hall also testified that [REDACTED]

[REDACTED] (Hall, Tr. 2860, *in camera*; see also PX1519 at 009, *in camera*).

JCI believed that the addition of one or more new Asian suppliers would { [REDACTED]

[REDACTED] } (PX1519 at 009, *in camera*). JCI's strategy with regard to { [REDACTED]

[REDACTED] } (Hall, Tr.

2856, *in camera*, 2878, *in camera*). JCI views the SLI PE separator market as being regional

with local competitors. (CCRF 204).

Mr. Hall testified that the { [REDACTED] } cited by respondent was

merely { [REDACTED]

[REDACTED] } (Hall, Tr. 2857-59, 2883, *in camera*).

207. { [REDACTED] } (RX00065 at 011-13, *in camera*).

**Response to Finding No. 207:**

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4483, *in camera*; RX00132, *in camera*).

208. EnerSys is the largest manufacturer of industrial batteries in the world, and it procures separators on a global basis. (Axt, Tr. 2228; RX236; RX1203, *in camera*). Larry Axt of EnerSys is responsible for "global procurement" of all raw materials and finished goods, as well as indirect material and capital equipment. (Axt, Tr. 2097-98). Furthermore, Larry Burkert of EnerSys is in charge of "global procurement" of separators. (Burkert, Tr. 2369).

**Complaint Counsel's Response to Finding No. 208:**

Complaint counsel does not disagree.

209. EnerSys has more than 20 plants worldwide. (Axt, Tr. 2226). EnerSys manufactures batteries in Mexico, China and Europe which are shipped to and sold in the U.S. (Axt, Tr. 2228-29). Because of its size and numerous facilities throughout the world, EnerSys manages its business strategy on a global basis. (Axt, Tr. 2239). EnerSys maintains global strategies for its policies and procedures concerning quality assurance. (Gagge, Tr. 2542).

**Complaint Counsel's Response to Finding No. 209:**

This proposed finding mischaracterizes the testimony of Mr. Axt. He explained that EnerSys makes some motive batteries in Mexico that it ships to the United States. Mr. Axt further clarified that the only battery EnerSys manufactures in China that is exported to the United States is a two-volt AGM battery used in wireless telecommunications. (Axt, Tr. 2228-2229). The only flooded lead-acid battery made by EnerSys in Europe that it exports to North America is "an extremely low volume" product called OPz. (Craig, Tr. 2549-2551).

210. Exide ranks as the first or second largest battery manufacturer in the world, depending on the specific area. (Gillespie, Tr. 2930). Exide is a "global participant in the global marketplace." (Gillespie, Tr. 3093).

**Response to finding No.210:**

To the extent that Respondent asserts that the fact that [REDACTED]  
[REDACTED] such  
assertion is contradicted by testimony from [REDACTED] (Gillespie, Tr. 2998, *in camera*, 3093).

211. Douglas Gillespie of Exide is the Vice President of Global Procurement, and he is responsible for the procurement of materials around the world. (Gillespie, Tr. 2926, 2928). {

[REDACTED] } (Bregman, Tr. 2898-99, *in camera*).

**Response to finding No.211:**

Complaint counsel has no specific response.

212. { [REDACTED] } (Bregman, Tr. 2898-99, *in camera*; RX144, *in camera*; RX300, RX301, *in camera*; RX302; RX303, *in camera*; RX304; RX305; RX306, *in camera*). { [REDACTED] } (Gillespie, Tr. 3026, *in camera*). { [REDACTED] } (Gillespie, Tr. 3060, *in camera*).

**Response to finding No.212:**

To the extent that Respondent asserts that [REDACTED] negotiates one global price for separators, such assertion is contradicted by testimony from [REDACTED] (Gillespie, Tr. 2998, *in camera*, 3093).

213. Exide conducted a global search for automotive battery separator manufacturers. (Gillespie, Tr. 2962-63; RX144, *in camera*; RX300, RX301, *in camera*; RX302; RX303, *in camera*; RX304; RX305; RX306, *in camera*; RX362). In conducting the search, Exide visited various separator manufacturers around the world, hired a third party to identify separator manufacturers in the Asia-Pacific region, and sent a Request for Proposal ("RFP") to "the top separator manufacturers around the globe." (Gillespie, Tr. 2962-63). Through the RFP, Exide provided its global PE separator requirements to numerous separator manufacturers. (Gillespie, Tr. 2965, 2967; RX144, *in camera*; RX145, *in camera*; RX339 at 17, *in camera*; RX338). { [REDACTED] } (RX147, *in camera*).

**Response to finding No.213:**

[REDACTED] (Gillespie, Tr. 2998, *in camera*, 3093). [REDACTED] [REDACTED] (See CCRF 584-589).

214. Exide is working to standardize the specifications for its separators used around the world. (Gillespie, Tr. 3093).

**Response to finding No.214:**

To the extent that Respondent asserts that Exide is working to come up with one specification for all separators, such assertion is contrary to testimony at trial. { [REDACTED]

[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3118, *in camera*).

215. East Penn is a lead acid battery and wire and cable manufacturing company headquartered in Lyon Station, Pennsylvania. (Leister, Tr. at 3968). East Penn has manufacturing facilities located in Lyon Station, and Corydon, Iowa with annual sales of approximately \$1.25 billion. (Leister, Tr. at 3968). East Penn also has a battery manufacturing facility in Asia, with three automotive plants, one motive power plant, and one stationary plant. (Leister, Tr. at 3969).

**Complaint Counsel's Response to Finding No. 215:**

Complaint Counsel has no specific response to the first two sentences of this proposed finding. The third sentence is false on multiple levels. Mr. Leister testified that East Penn has one battery plant in Wujiang, China. (Leister, Tr. 3969). That facility is an assembly plant for UPS (stationary) batteries for sale in Asia; it does not engage in any manufacturing. (Leister, Tr. 4030-4031).

216. East Penn sells its batteries manufactured out of its Lyon Station facility outside of North America. (Leister, Tr. 3969-70).

**Complaint Counsel's Response to Finding No. 216:**

This proposed finding would be accurate only if restated without the first "its," which is highly misleading. Even with this correction, the finding is still too vague to allow a specific response. Mr. Leister's testimony did not quantify the percentage of output (in units or dollars) from the Lyon Station facility that is sold outside of North America. (Leister, Tr. 3969-70).

217. East Penn purchases its PE separators for its global operations from Daramic and Entek, approximately 70% and 30%, respectively. (Leister, Tr. at 3984). East Penn has obtained a quote and samples from Anpei. (Leister, Tr. at 3992).

**Complaint Counsel's Response to Finding No. 217:**

This proposed finding misstates the cited testimony. Mr. Leister stated that the SLI Division of East Penn purchases PE separators from Daramic and Entek. (Leister, Tr. at 3984). In addition, East Penn desires a local supplier of PE separators for its North American facilities, by which it means a supplier on the East Coast of North America. (CCFOF 190-194). It is not currently seeking PE separators from any Asian supplier. (Leister, Tr. 4035-4036).

218. Trojan is the largest manufacturer of golf cart batteries in the world. (Godber, Tr. 274). It has two manufacturing plants, one located in California and the other in Georgia. (Godber, Tr. 253). [REDACTED] (Godber, Tr. 252-53, *in camera*).

**Complaint Counsel's Response to Finding No. 218:**

Complaint Counsel has no specific response.

219. Trojan sells approximately 60% of its batteries to the after-market. (Godber, Tr. 144). Of those after-market sales, 35-38% of Trojan's sales are domestic, while 62-65% of its sales are international. (Godber, Tr. 144).

**Response to Finding No. 219:**

Complaint Counsel has no specific response.

220. Trojan acquires AGM battery separators from China and uses those separators primarily in its marine line. (Godber, Tr. 148). Trojan's product sales and purchases of component parts indicate that it is involved in activity throughout the global marketplace.

**Response to Finding No. 220:**

Respondent's assertions are contradicted by the facts in evidence. First, about one percent of the batteries Trojan sells are AGM and they are resold. (Godber, Tr. 148). [REDACTED]  
[REDACTED]  
[REDACTED] (RX0945, *in camera*  
(Kahway (Expert Report at ¶117); Wallace, Tr. 1978 (AGM batteries are not flooded acid batteries)). Third, AGM batteries cost approximately 30% more than a flooded battery, which means that the cost to transport the AGM battery overseas is a smaller percentage of the overall cost of the battery. (Godber, Tr. 149). Fourth, Trojan imports the entire AGM battery, which is

completely different proposition than importing separators because there are several { [REDACTED] } involved with importing a separator. (PX0907 (Kung, Dep. at 167-169, *in camera*)).

221. Trojan competes for customers with US Battery, Exide, Crown Battery, East Penn Battery, Surette, a Canadian company, Johnson Controls, Global and YUASA. (Godber, Tr. 145). Global and YUASA are Asian battery manufacturers. (Godber, Tr. 145; Thuet, Tr. 4336-37.)

**Response to Finding No. 221:**

Respondent's assertions are contradicted by the facts in evidence. Mr. Godber actually said "probably overseas would be Global and Yuasa," referring to companies that Trojan competes with abroad, not in North America as Respondents suggest. (Godber, Tr. 145).

222. U.S. Battery holds itself out to the world as the leading manufacturer of deep-cycle batteries. (Wallace, Tr. 1955). U.S. Battery sells and ships batteries to more than 60 countries around the world from its plants in Corona, California and Augusta, Georgia. (Wallace, Tr. 1957-58).

**Complaint Counsel's Response to Finding No. 222:**

{ [REDACTED] }

(PX0023 at 003, *in camera*). { [REDACTED] } (PX0023 at 003, *in camera*). Therefore, the volume of sales { [REDACTED] } { [REDACTED] }

223. Based on the findings above, the Court finds that battery separator manufacturers and battery manufacturers operate in a global market and, therefore, the valid and proper relevant market is worldwide.

**Complaint Counsel's Response to Finding No. 223:**

Evidentiary support for finding a worldwide market is lacking. (CCRF 186-222; CCFOF 161-163). Respondent's legal conclusion is contrary to the weight of the evidence at trial concerning the North American market for the relevant separator products. (CCFOF 161-257).

**IV. The Parties**

A. Polypore/Daramic

a. Before the Acquisition

224. Polypore International, Inc. ("Polypore") is a global filtration company that specializes in the manufacturing of microporous membranes for use in separation and filtration processes. (PX2160 at 006).

**Response to Finding No. 224:**

Complaint Counsel has no specific response.

225. Polypore is a Delaware corporation with headquarters in Charlotte, North Carolina. (PX2160 at 006). Polypore operates a global business and has a presence in North America, Asia, Western Europe, and South America. (PX2160 at 055).

**Response to Finding No. 225:**

Complaint Counsel has no specific response.

226. Polypore is a publicly traded company which was previously owned by Warburg Pincus, a private equity firm. (Hauswald, Tr. 965; PX2160 at 060). Polypore went public in the summer of 2007. (Toth, Tr. 1424). { [REDACTED] } (Toth, Tr. 1599, *in camera*). In fact, Michael Graff, a partner and managing director of Warburg Pincus, has served as the Chairman of Polypore's Board of Directors since Warburg acquired Polypore in May 2004. (Graff, Tr. 4849-50).

**Response to Finding No. 226:**

Complaint Counsel has no specific response.

227. Polypore consists of four separate business divisions: 1) Liqui-Cel, 2) Membrana, 3) Celgard, and 4) Daramic. (Toth, Tr. 1498-99; PX0194; RX00635). Liqui-Cel manufactures specialty filtration products for liquid degasification and water purification. (RX00635 at 007). Membrana produces microporous membranes for medical applications such as hemodialysis, blood oxygenation and plasma separation. (Toth, Tr. 1498-99; RX00635 at 006). Celgard manufactures battery separators for high-performance lithium-ion batteries. (Toth, Tr. 1498-99; RX00635 at 008). Daramic, which is part of Polypore's energy storage segment, produces microporous separators for the flooded lead-acid battery industry. (Toth, Tr. 1385; Hauswald, Tr. 965-66; RX00635 at 009).

**Response to Finding No. 227:**

Complaint Counsel has no specific response.

228. Polypore has been led by its President and CEO, Robert Toth, since July 2005. (Toth, Tr. 1385). Toth has an extensive business background and a thorough understanding of the business at each of Polypore's four divisions. (Toth, Tr. 1500). He obtained a bachelor's degree in industrial science from Purdue University and a master's degree in engineering from Washington University in St. Louis. (Toth, Tr. 1490). Toth began his career at Monsanto Company and its spin-off company, Solutia. For 20 years, he held a variety of senior level positions at Monsanto and Solutia before accepting the CEO position at CP Kelco. (Toth, Tr. 1492-1495). When CP Kelco was acquired by a large strategic buyer, Toth was approached by Warburg and accepted the position of President and CEO of Polypore. (Toth, Tr. 1496).

**Response to Finding No. 228:**

Complaint Counsel has no specific response.

229. Polypore employs approximately 1,900 employees worldwide. (PX2160 at 016).

**Response to Finding No. 229:**

Complaint Counsel has no specific response.

230. Daramic, one of the four Polypore divisions, is a global manufacturer of lead-acid battery separators for a variety of applications. (Hauswald, Tr. 965-66). Daramic currently employs approximately 934 people worldwide, and 349 of those employees are located in the United States. (PX2160 at 16.)

**Response to Finding No. 230:**

Complaint Counsel has no specific response.

231. W.R. Grace, Daramic's predecessor, began manufacturing PE separators in 1954. (Hauswald, Tr. 957-59). In 1994, W.R. Grace sold the separator manufacturing arm of its business to Intertech Group, a private equity firm, and the new separator company became known as Daramic. (Hauswald, Tr. 963; Roe, Tr. 1669). Intertech sold Daramic to Warburg Pincus, a private equity firm, in 2004, and Daramic became a subsidiary of Polypore at that time. (Hauswald, Tr. 965; Roe, Tr. 1669).

**Response to Finding No. 231:**

Complaint Counsel has no specific response.

232. Although headquartered in Charlotte, North Carolina, Daramic serves customers all over the world. (Seibert, Tr. 4145-46). As part of Daramic's global strategy, it has manufacturing facilities located around the world. (Hauswald, Tr. 711-12). Having multiple worldwide facilities, however, is not a requirement for success in the battery separator industry. (Seibert, Tr. 4149).

**Response to Finding No. 232:**

The last sentence of this finding is contradicted by both Daramic's documents and

testimony. "To be a market leader in the lead acid separator market, you need several things:

global scale and service..." (PX0483 at 013 (elipses in original); Toth, Tr. 1434 ("Q: You were

telling people at the time that global scale was an advantage, right, sir? A: We were telling them

that it was an advantage.").

233. Prior to the acquisition of Microporous, Daramic had two manufacturing facilities in the United States and five manufacturing facilities abroad. (RX00814 at 003, *in camera*; Hauswald, Tr. 990). In the United States, Daramic's manufacturing facilities were located in Owensboro, Kentucky and Corydon, Indiana. (RX00814 at 010, *in camera*). The PE line operating at the facility in Owensboro is the same PE line which was originally installed in 1969. (Hauswald, Tr.

960-61). One of the first PE separator lines in the original line and is still running today. (Hauswald, Tr. 960-61). Prior to the acquisition, Daramic's five foreign manufacturing facilities were located in Selestat, France, Norderstadt, Germany, Potenza, Italy, Prachinburi, Thailand, and Tianjin, China. (RX00814 at 003, *in camera*; Hauswald, Tr. 990).

**Response to Finding No 233:**

Complaint Counsel has no specific response.

234. Prior to the acquisition, { [REDACTED] } (RX00814 at 003, *in camera*). { [REDACTED] } (Hauswald, Tr. 918, *in camera*; RX00814 at 003, *in camera*).

**Response to Finding No. 234:**

Complaint Counsel has no specific response.

b. Daramic Management

235. Daramic is led by Pierre Hauswald, Harry Seibert, Tucker Roe, and Tim Riney. (PX0971-006). Pierre Hauswald serves as the Vice President and General Manager of Daramic. (Hauswald, Tr. 629). He has over 27 years of experience in the lead-acid battery separator industry and a deep understanding of the separator manufacturing process. (Hauswald, Tr. 630, 666). After receiving a bachelor's degree in chemical engineering, Hauswald started working for Daramic in 1981 as a quality assurance manager working on the installation of a line in Selestat, France. (Hauswald, Tr. , 630, 666, 958). Hauswald was promoted to the position of production manager and then site manager of Selestat during the 1990s. (Hauswald, Tr. 962). In 1996, Hauswald was promoted to Director of Worldwide Manufacturing and relocated to Owensboro, Kentucky. (Hauswald, Tr. 964). He then moved back to Selestat as the Vice President of Manufacturing before assuming the position of General Manager of Daramic in 2004. (Hauswald, Tr. 630, 964). Thereafter, he moved to Daramic's headquarters in Charlotte, North Carolina. (Hauswald, Tr. 630).

**Response to Finding No. 235:**

Complaint Counsel has no specific response.

236. Harry Seibert serves as the Vice President and Business Director for Daramic. (Seibert, Tr. 4140). Seibert obtained a bachelor's degree in mechanical engineering from the University of Toledo and an M.B.A. from Xavier University. (Seibert, Tr. 4142-43). Before beginning work with Daramic, Seibert was employed for 13 years by Michelman followed by four and a half years at Avery Denison Corporation. (Seibert, Tr. 4141-42). Seibert began working for Daramic in August 2006 as Director of Marketing and New Business Development. (Seibert, Tr. 4141). A year later, he moved into a position with Polypore as Director of Enterprise Growth before transferring back to Daramic in 2008 to assume his current role of Vice President and Business Director. (Seibert, Tr. 4141). In his current position, Seibert is responsible for sales and marketing, technical service, product management, and technical service. (Seibert, Tr. 4143).

**Response to Finding No. 236:**

Complaint Counsel has no specific response.

237. Tucker Roe serves as Daramic's Vice President of Sales and Marketing for the Americas, Europe, Middle East, and Africa. (Roe, Tr. 1669-70). Roe obtained a bachelor's degree from Bowling Green State University in 1976 and an M.B.A. from the University of Dayton in 1981 before beginning work for General Motor's Delco Products division in Kettering, Ohio. (Roe, Tr. 1666-67). Roe left General Motors in 1984 to take a job as a purchasing manager for C&D Battery. (Roe, Tr. 1669). In 1998, Roe left C&D and joined W.R. Grace (now Daramic) as an account manager. (Roe, Tr. 1668). Roe was promoted to the position of Sales Manager in 1990 and then to General Sales Manager/Director of Sales and Marketing for the Americas in 1993. (Roe, Tr. 1668). After Daramic was sold to Warburg, Roe assumed the title of Vice President of Sales and Marketing for Daramic's worldwide operations. (Roe, Tr. 1669). In his current position, Roe supervises sales teams, customer service teams and technical service departments in both Europe and the U.S (Roe, Tr. 1669-70). In this role, Roe frequently calls upon customers, negotiates supply agreements and future pricing, and supervises other sales managers in their dealings with customers. (Roe, Tr. 1671).

**Response to Finding No. 237:**

Complaint Counsel has no specific response.

238. Tim Riney serves as the Vice President of Finance for Daramic. (Riney, Tr. 4907). Riney obtained a bachelor's degree from Breshner College and an M.B.A. from Murray State University. (Riney, Tr. 4907). Riney received his Certified Public Accountant certification in 1998 and Certified Management Accountant certification in 2005. (Riney, Tr. 4907-08). After working for a public accounting firm for two years and Commonwealth Aluminum Company for a brief period, Riney began working with Daramic in 1998 as a Cost and Financial Accounting Manager. (Riney, Tr. 4908-09). In 2002, Riney was promoted to the position of Plant Controller for both the Owensboro and Corydon plants. (Riney, Tr. 4910). In 2005, Riney was promoted to the position of Director of Finance for the Americas and officially assumed the role of Vice President of Finance in 2007. (Riney, Tr. 4911). As Vice President of Finance, Riney is responsible for all of Daramic's financial reporting, overseeing all financial and accounting employees, handling the budgeting process, and managing all financial aspects of Daramic's plants on a global basis. (Riney, Tr. 4911-12).

**Response to Finding No. 238:**

Complaint Counsel has no specific response.

c. Sales

239. Daramic's worldwide separator sales - including Darak - in 2007 were approximately { [REDACTED] } (RX01119, *in camera*). The total sales of Daramic's PE separators in 2007 for automotive applications was { [REDACTED] } (RX01119, *in camera*; RX01418, *in camera*). In 2007, sales of HD were { [REDACTED] }. (RX01119, *in camera*; RX01418, *in camera*). Daramic's sales of PE separators for industrial applications during the same time period totaled { [REDACTED] }, and sales of PE separators for specialty applications were { [REDACTED] } (RX01119, *in camera*; RX01418, *in camera*). { [REDACTED] } (RX01119, *in camera*); { [REDACTED] } (RX01119, *in camera*);.

**Response to Finding No. 239:**

Complaint Counsel has no specific response.

d. Contracts and Pricing

240. Daramic faces intense global competition as it sells lead-acid battery separators to the highly concentrated battery industry. (Seibert, Tr. 4149; Seibert, Tr. 4172, *in camera*). {

\_\_\_\_\_ } (Seibert, Tr. 4172, *in camera*; RX01084, *in camera*). {

\_\_\_\_\_ (Seibert, Tr. 4174, *in camera*; RX01084, *in camera*).

**Response to Finding No. 240:**

In the North American market for battery separators for lead-acid batteries Daramic now faces no competition for motive deep-cycle and UPS separators, and Daramic competes with only one other supplier for SLI separators in this geographic market. (see CCFOF at 273, 288-292, and 305).

241. Daramic, like other suppliers in the industry, prefers to enter into long term supply agreements with its customers. (Hauswald, Tr. 1038; Roe, Tr. 1729). Approximately 60% of Daramic's customers are currently under long-term supply agreements (i.e., contracts of three years or more) with Daramic. (Roe, Tr. 1728).

**Response to Finding No. 241:**

Testimony from two Daramic Employees is hardly sufficient to conclude what "other suppliers in the industry" prefer with regard to supply contracts.

242. { \_\_\_\_\_ } (Hauswald, Tr. 1038; Roe, Tr. 1729; RX1497, *in camera*; RX1498, *in camera*).

Long-term supply agreements provide consistency and cost optimization, savings which are passed on to customers. (Hauswald, Tr. 1038). Because it is expensive and wasteful to start and stop lines, long-term contracts help Daramic plan its production schedule in such a manner as to reduce waste and costs. (Hauswald, Tr. 1038). As Roe testified, "by having long-term contracts, we can establish a baseline of business so that we can better plan out capacities by region to be sure we can support the base-load business as we go forward." (Roe, Tr. 1729). {

\_\_\_\_\_ } (Hauswald, Tr. 1038-39; RX1062, *in camera*). To realize these reduced raw material costs, which are also passed along to customers, Daramic must plan the approximate amount of its raw material requirements in advance. (Hauswald, Tr. 1039).

**Response to Finding No. 242:**

The citations lend support only to Daramic's supposed rationale for having long term contracts but do not suggest that the alleged savings either occur or if so are then actually passed along to customers. [REDACTED]

[REDACTED] (Simpson, Tr. 3192-3194, *in camera*).

243. Long-term contracts also provide benefits to customers. (Hauswald, Tr. 1044; Roe, Tr. 1728-29). Long-term supply agreements create customer relationships which provide for reliability of supply, continuous product development and technology improvement programs. (Hauswald, Tr. 1044; Roe, Tr. 1729). Continuity and reliability of supply are especially important in the battery separator market where capacity has historically been constrained. (Roe, Tr. 1729).

**Response to Finding No. 243:**

While these are examples of the positive attributes of long term contracts, this finding fails to detail the more sinister aspects of long term contracts as used by Daramic. Daramic used long term contracts to erect barriers to entry and forestall customers' efforts to qualify and sponsor entry. (PX0758 at 017, *in camera*; PX0433 at 004). For instance, understanding the threat that the MPLP expansion posed, Daramic developed the MP Plan to offer beneficial terms to customers willing to enter into exclusive or near exclusive long term contracts with Daramic in order to prevent MPLP from gaining market share following their European expansion project. Roe, Tr. 1285-1286; 1291; *see also* PX0258 at 001 ("What do we want to achieve? Secure select [Long term] agreements to fight the [MPLP] threat.").

244. [REDACTED] (Riney, Tr. 4956, *in camera*). [REDACTED] (Riney, Tr. 4956, *in camera*). [REDACTED] (Riney, Tr. 4956, *in camera*). [REDACTED] (Riney, Tr. 4956, *in camera*).

**Response to Finding No. 244:**

Complaint Counsel has no specific response.

245. [REDACTED] (Riney, Tr. 4958-59, *in camera*). Pricing in Asia is lower than in North America. (Thuet, Tr. 4434); [REDACTED] (Riney, Tr. 4959, *in camera*). [REDACTED] (Riney, Tr. 4958-59, *in camera*). See RX1401, *in camera*.

**Response to Finding No. 245:**

This finding is contradicted by testimony of Mr. Thuet. [REDACTED]

[REDACTED].}

(Thuet, Tr. 4424, *in camera*).

246. [REDACTED] (Riney, Tr. 4942, *in camera*; RX00960, *in camera*; RX00994, *in camera*; RX00993, *in camera*; RX01519, *in camera*; RX00983, *in camera*; RX00976, *in camera*; RX00988, *in camera*). [REDACTED] (Riney, Tr. 4943, *in camera*). [REDACTED] (Riney, Tr. 4943, *in camera*).

**Response to finding No. 246**

Complaint Counsel has no specific response.

247. [REDACTED] (Riney, Tr. 4936-37, *in camera*; Seibert, Tr. 4189, *in camera*). [REDACTED] (Riney, Tr. 4936-37, *in camera*). [REDACTED] (Riney, Tr. 4937, *in camera*; Seibert, Tr. 4189-90, *in camera*).

**Response to Finding No. 247:**

Daramic's raw material and energy inputs are based on crude oil. (PX2068 at 001).

Several price indices can be used to estimate changes in the price of these raw material and energy inputs. (PX2068 at 001). The U.S. Bureau of Labor Statistics publishes price indices for crude petroleum – domestic production and fuels and related products and power on its website.

(Simpson, Tr. 3215-3216, 3217, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3217, *in camera*).

248. [REDACTED] (Riney, Tr. 4937, *in camera*). [REDACTED]

[REDACTED] (Riney, Tr. 4938-39, *in camera*). [REDACTED] (Riney, Tr. 4939, *in camera*). [REDACTED] (Riney, Tr. 4940, *in camera*). [REDACTED] (Riney, Tr. 4941, *in camera*).

**Response to Finding No. 248:**  
Complaint Counsel has no specific response.

249. [REDACTED] (Riney, Tr. 4941-42, *in camera*). [REDACTED] (Riney, Tr. 4952, *in camera*). [REDACTED] (Riney, Tr. 4942, *in camera*).

**Response to Finding No. 249:**  
See response to finding No. 247.

250. [REDACTED] (Riney, Tr. 4943-44, *in camera*). [REDACTED] (Riney, Tr. 4944, *in camera*). [REDACTED] (Riney, Tr. 4954, *in camera*).

**Response to Finding No. 250:**  
This finding is contradicted by documentary evidence that shows Daramic did raise prices in an effort to maintain overall gross margins at [REDACTED]. (PX0212, *in camera* ([REDACTED]

[REDACTED]  
[REDACTED]).

251. { [REDACTED] } (Riney, Tr. 4945, *in camera*;  
RX00927 at 14-16; *in camera*). { [REDACTED] }  
{ (Riney, Tr. 4945, *in camera*; RX00927 at 14-16; *in camera*). { [REDACTED] }  
{ (Riney, Tr. 4945, *in camera*;  
RX927 at 14-16, *in camera*).

**Response to Finding No. 251:**

Bulldog battery accepted its most recent price increase without balking. Mr. Benjamin testified that to argue the price increase demand was futile since there was no where else for Bulldog to go for its separator supply. (Benjamin, Tr. 3521-3522).

252. { [REDACTED] } (Riney, Tr. 4946, *in camera*). { [REDACTED] } (Riney, Tr. 4946, *in camera*). { Ad [REDACTED] } (Riney, Tr. 4946-47, *in camera*; RX00019). { [REDACTED] } (Riney, Tr. 4948, *in camera*). { [REDACTED] } (Riney, Tr. 4948, *in camera*).

**Response to Finding No. 252:**

This finding is contradicted by testimony of Daramic's own Head of Sales, Tucker Roe. According to Mr. Roe and substantiated by the actual contract, Daramic was obligated to provide the cost documentation to Exide rather than doing so voluntarily. (Roe, Tr. 1727). [REDACTED] (PX0911, *in camera* (Roe Dep. at 148-149)).

253. { [REDACTED] } (Riney, Tr. 4945, *in camera*). As a result, Daramic is being "squeezed from both ends" as it faces escalating raw material and energy costs and eroding margins. (Toth, Tr. 1502, 1573, 1559; Riney, Tr. 4931, *in camera*). { [REDACTED] } (Riney, Tr. 4933, *in camera*). { [REDACTED] } (Riney, Tr. 4934, *in camera*). For example, { [REDACTED] } (Riney, Tr. 4934, *in camera*). { [REDACTED] } (Riney, Tr. 4935, *in camera*). { [REDACTED] } (Riney, Tr. 4935, *in camera*).

**Response to Finding No. 253:**

{ [REDACTED] }  
[REDACTED] } (PX0294 at 006, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4983-4984, *in camera*). ). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4985, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4986, *in camera*).

With regard to Daramic's actual financial performance in 2008, one of the reasons Daramic's { [REDACTED] }  
[REDACTED] } (Riney, Tr. 5004, *in camera*; see also PX2160 at 034 (Polypore SEC Form 10-K for 2008 reporting that the decline in margins was primarily attributable to the acquisition of Microporous, which has lower gross profit margins)).

254. { [REDACTED] }  
[REDACTED] } (Riney, Tr. 4932-33, *in camera*). { [REDACTED] }

[REDACTED] (Riney, Tr. 4933, *in camera*). {  
[REDACTED] } (Riney, Tr. 4932, 4935, *in camera*). {  
[REDACTED] } (Riney, Tr. 4932, 4936, *in camera*). {  
[REDACTED] } (Riney, Tr. 4936, *in camera*).

**Response to finding No. 254:**  
Complaint Counsel has no specific response.

255. While Daramic has implemented several initiatives to eliminate costs without increasing prices, passing along rising costs increases through price increases is often necessary. (Toth, Tr. 1576-77). {  
[REDACTED] } (Riney, Tr. 4928, *in camera*). {  
[REDACTED] } (Riney, Tr. 4931, *in camera*).

**Response to Finding No. 255:**  
Complaint Counsel has no specific response.

256. {  
[REDACTED] } (Riney, Tr. 4949, *in camera*; Seibert, Tr. 4193, *in camera*; RX00927 at 5-13, *in camera*). {  
[REDACTED] } (Riney, Tr. 4949, *in camera*; RX00927 at 5-13, *in camera*). {  
[REDACTED] } (Riney, Tr. 4951, *in camera*). {  
[REDACTED] } (Riney, Tr. 4950, *in camera*).

**Response to Finding No. 256.**  
Complaint Counsel has no specific response.

257. {  
[REDACTED] } (Seibert, 4191-92, *in camera*; RX00542, *in camera*; RX00927 at 14-16, *in camera*).  
[REDACTED] (Seibert, Tr. 4194-95, *in camera*).

**Response to Finding No. 257.**  
In Dr. Simpson's opinion, {  
[REDACTED]}. (Simpson, Tr. 3213-3220, *in camera*). Moreover, {  
[REDACTED]}. (Weerts, Tr. 4510-4511, *in*

camera). Dr. Simpson noted that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (Simpson, Tr. 3465-3466, *in camera*).

e. Growth in Asia

258. Since 2000, Daramic has recognized Asia as a key area for growth and expansion. (Toth, Tr. 1434-35; Hauswald, Tr. 878-79, *in camera*). { [REDACTED]

[REDACTED] (Hauswald, Tr. 872, *in camera*). { [REDACTED]

[REDACTED]. (Hauswald, Tr. 872-73, 875, *in camera*; RX706 at 5, *in camera*; RX1314, *in camera*). This line was developed and operational in 15 months and through implementation of continuous improvement practices, this same size PE line currently produces 25 million square meters of product. (Hauswald, Tr. 1112).

**Response to Finding No. 258:**

Complaint Counsel has no specific response.

259. { [REDACTED]

[REDACTED] (Hauswald, Tr. 871-73, *in camera*). { [REDACTED]

[REDACTED] (Hauswald, Tr. 873, *in camera*). This project was referred to internally as RAMA II, and it involved moving existing lines from Austria to Thailand. (Hauswald, Tr. 871-73, *in camera*, *in camera*; Thuet, Tr. 4322; RX699, *in camera*). { [REDACTED]

[REDACTED] (Hauswald, Tr. 873, *in camera*; RX706 at 5, *in camera*; RX1314, *in camera*). RAMA III, the third phase of installation in Prachinburi, involved the construction of a new 30 million square meter line. (Hauswald, Tr. 875, *in camera*; Thuet, Tr. 4323). { [REDACTED]

[REDACTED] (Hauswald, Tr. 880, 883, 940, *in camera*; RX1038, *in camera*; RX1050, *in camera*; RX553 at 8, *in camera*; RX555 at 7 *in camera*). Following this latest expansion, the total production capacity at the Prachinburi facility is approximately 80 million square meters. (Thuet, Tr. 4323).

**Response to Finding No. 259:**

The proposition of the sixth sentence is contradicted by the evidence. Respondent's own

documents state that the { [REDACTED]

[REDACTED] (PX0241, *in camera*;

PX0338 at 014, *in camera*; PX0640; PX0967 at 023, *in camera*). Moreover, the Pranchinburi

Plant already had in place a { [REDACTED] } (RX1050 at 003, *in camera*).

260. Recognizing the growth opportunities in Asia, Daramic entered into a joint venture agreement with Nippon Sheet Glass (“NSG”) in Tianjin, China. (Hauswald, Tr. 1107-08). Daramic has a 60% interest in the venture, and NSG has a 40% interest. (Toth, Tr. 1396; Thuet, Tr. 4324). At the time Daramic entered into the joint venture agreement in February 2007, NSG was only producing 500,000 square meters of product on a 10 million square meter line. (Hauswald, Tr. 1108; Thuet, Tr. 4323). Today, the facility is running at full capacity. (Thuet, Tr. 4328). Daramic expects to increase the capacity of the line in Tianjin through the implementation of continuous improvement practices. (Thuet, Tr. 4326).

**Response to Finding No. 260:**

Complaint Counsel has no specific response.

f. The Acquisition of Microporous

261. On February 29, 2008, Polypore { [REDACTED] } (PX0059 at 001, *in camera*; RX01227, *in camera*).

**Response to Finding No. 261:**

This proposed finding contradicts Respondent’s Proposed Finding No. 3 above, which states in part: “Polypore acquired Microporous for approximately \$76 million, \$29 million in cash and \$47 million in assumed debt.” (RFOF 3).

262. { [REDACTED] } (RX00814 at 010, *in camera*). { [REDACTED] } (Hauswald, Tr. 821, *in camera*). { [REDACTED] } (RX00814 at 010, *in camera*). { [REDACTED] }

(RX00814 at 010, *in camera*). In addition, Daramic struggled for years to obtain more business with deep cycle customers, first with Daramic DC, then Daramic HD, with little success. (Hauswald, Tr. 656-57, 744, 1196; Whear, Tr. 4777). The acquisition of Microporous allowed Polypore the chance to diversify its product line, gain access to Microporous’ rubber technology, and enter the niche rubber market. (Hauswald, Tr. 652; Hauswald, Tr. 896, *in camera*, 1057, 1060-61; Roe, Tr. 1735; RX01630; RX1097-3; *in camera*; PX0433 (“The addition of Flex-Sil and Ace-Sil would broaden our portfolio of products into two niche markets we do not supply today.”).

**Response to Finding No. 262:**

The proposed finding is inaccurate on three main points. First, Daramic's HD separator and MPLP's CellForce separator are both made of PE and rubber. (Hauswald, Tr. 664, 671-672; Gilchrist, Tr. 312). (See also CCFOF 80-82 (same)). These are similar products used in the same applications, such as golf cart and floor scrubber batteries. (E.g., CCFOF 97-99).

Second, { [REDACTED] } as Respondent suggests. As the evidence about the industry's structure and competitive interaction shows, { [REDACTED] } { [REDACTED] } (See CCFOF 535-539). In these circumstances, it is simply not credible for Daramic to claim that it had no influence over the markets in which it concentrated its efforts.

Third, Daramic has indeed "struggled for years to obtain more business with deep cycle customers, first with Daramic DC, then Daramic HD," but with more than just a little success. (See, e.g., CCFOF 335-339, 350-353, 372-373, 386-390, 394). Mr. Roe of Daramic admitted that the company successfully increased its HD sales every year between the product's introduction and Daramic's acquisition of MPLP. (Roe, Tr. 1209). He also acknowledged telling customers that Daramic was "aggressively pursuing" the deep-cycle battery market. (Roe, Tr. 1209-1211; PX1071 at 001-002). Daramic was gaining market share in the deep-cycle market in part through customers converting from Flex-Sil to HD for use in their deep-cycle batteries. (Roe, Tr. 1212-1213; 1277-1278). Both Exide and U.S. Battery switched from Flex-Sil to HD for a portion of their deep-cycle golf car batteries. (Roe, Tr. 1212-1213).

263. Daramic believed that the addition of Microporous' rubber technology would complement existing research and development programs, leading to new product development and existing product enhancements. (Hauswald, Tr. 1059-60; Roe, Tr. 1735). { [REDACTED] } (Hauswald, Tr. 1176, in

camera). { [REDACTED] } (Hauswald, Tr. 1176-77, *in camera*).

**Response to Finding No. 263:**

The assertion that Daramic was acquiring MP to complement its own technology is contradicted by the fact that Daramic and Microporous were competitors in PE/Rubber separators for deep-cycle and SLI applications. Daramic HD is a hybrid separator product made of rubber and PE. (Hauswald, Tr. 664). (See also CCFOF 77 (describing Daramic rubber technology and products)). In developing and improving its HD product over the years, Daramic used its own rubber technology and resources, thus competing with Microporous for innovation as well as sales in the deep-cycle market. (See CCFOF 347-357, 366-367, 703-705). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gilchrist, Tr. 440-441, *in camera*; see also PX0601 at 002, *in camera* (April 2, 2008 email from Daramic (after the acquisition) reporting that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] })).

264. { [REDACTED] } (Seibert, Tr. 4161, *in camera*). { [REDACTED] } (Seibert, Tr. 4161, *in camera*).

**Response to Finding No. 264:**

This proposed finding is contradicted by the weight of the evidence, much of which is in the form of Daramic's own words. Respondent's assertion that { [REDACTED] } is patently false. As early as 2003, { [REDACTED]

[REDACTED] } (PX0758 at 017, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0744 at 001; PX0908 (Amos, Dep. at 148, *in camera*)). (See generally CCFOF 553-555, 569, 575, 586, 588-592). In 2005, Mr. Hauswald told Mr. Toth that MPLP was a “real threat” in the automotive market. (PX0168 at 002).

Prior to the acquisition, Microporous had manufactured and sold SLI separators in North America and considered itself a competitor in that market. (Gilchrist, Tr. 308, 311, 313, 341-342). Although Daramic did not record Microporous's sales of SLI separators in its World Wide Market Study, Daramic documents did include Microporous in market share charts for SLI in North America, giving MPLP a 4 percent share of SLI sales, Entek 49 percent, and Daramic 47 percent, but nothing to any Asian producer. (PX0264 at 003). [REDACTED]  
[REDACTED] } (PX0080 at 060, *in camera*). Daramic feared that Microporous would take market share from it. (CCFOF 526-527). In fact, Daramic had responded to Microporous's entry into the SLI market by lowering the price of its SLI separators to at least one customer. (PX0258).

More recently, Daramic conceived “Project Titan” in 2007 in part to stop MPLP from gaining automotive separator business. (See CCFOF 764-772). In particular, Mr. Hauswald's speaker notes for the October 2007 Project Titan Board presentation showed, [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0174 at 003, *in camera*, Hauswald, Tr. 788-789, *in camera*). And Mr. Hauswald confirmed that Daramic anticipated [REDACTED]  
[REDACTED] } (Hauswald, Tr. 788-789, *in camera*; PX0174 at 003, *in camera*). One of the more revealing pieces of evidence from Project Titan was that

Daramic predicted { [REDACTED]  
[REDACTED]  
[REDACTED] }

(PX0174 at 003, *in camera*).

Respondent's proposed finding fails to specify which page, or even which document, might support their naked assertion. And Mr. Seibert's testimony is plainly self-serving, as well as contrary to contemporaneous Daramic documents. For example, in a series of emails in November 2007, { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0215 at 002, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Roe, Tr. 1350, *in camera*; PX0215 at 002, *in camera*; see also CCFOF 742-745).

265. The discussion with Microporous about a possible acquisition actually began as early as 2005 when Microporous' former owners approached Warburg Pincus about acquiring the company. (PX00748; Trevathan, Tr. 3591-92) Intrigued by Microporous' niche position and foothold in the production of rubber separators, Warburg Pincus expressed a sincere interest in a possible acquisition of the company. (Trevathan, Tr. 3591-92). At the time, however, Warburg could not financially undertake the proposed acquisition. (Toth, Tr. 1503).

**Response to Finding No. 265:**

The proposed finding is incorrect, to the extent it suggests the motivation for acquiring Microporous was its rubber product line. The reason Daramic, Polypore, Polypore's Board, and its largest shareholder, Warburg Pincus, wanted to acquire MPLP was to remove a growing competitive threat. (*See, e.g.,* CCFOF 751, 753-754, 756, 762, 769, 773-775).

266. Daramic and Polypore leadership continued to discuss the benefits and value of a potential acquisition of Microporous after Warburg was approached in 2005. (Toth, Tr. 1504-05). During these discussions, Toth emphasized to his management team that defensive acquisitions are never profitable, and that the only acquisitions that should be considered are

those that add value to the company's existing business units. (Toth, Tr. 1504-05). Toth especially emphasized many of these basic principles with Hauswald, who offers tremendous insight in manufacturing and operations but is weaker with regard to financial matter. (Toth, Tr. 1506).

**Response to Finding No. 266:**

Again, Daramic's leadership pursued the acquisition of Microporous to avoid losing future sales volumes to MPLP, to raise prices, and to protect its market power. Before a scheduled Board meeting in September 2005, Mr. Hauswald recommended to Mr. Toth that Daramic "buy [MPLP], as a defensive action" because it was "a real threat for our business, not only in the industrial market, but, later, in the automotive market . . ." (PX0168 at 002; *see also* CCRF 265). There is no contemporaneous evidence that Mr. Toth told Mr. Hauswald or other managers that Daramic should not acquire MPLP for defensive reasons. The evidence concerning Project Titan is further proof that Daramic purchased the Microporous assets for defensive reasons, namely:

( [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] )

(PX0203 at 088, *in camera*).

But that isn't all. In October 2005, Mr. Nasisi informed Mr. Hauswald by email that Daramic "must do everything possible to stop this process" of MPLP expansion, and Mr. Hauswald agreed, responding that Daramic should "solve the [MPLP] case definitively." (PX0694 at 001). And Daramic finally pulled the trigger on February 29, 2008 (RX01227 at 001, *in camera*).

267. Daramic interest in acquiring Microporous was rekindled during the course of settlement discussions between the parties in August 2007 related to a pending arbitration proceeding. (Roe, Tr. 1758; Graff, Tr. 4854-55). The arbitration involved a contractual dispute between Daramic and Microporous concerning equipment and technology for a PE line which was purchased by

Microporous from Jungfer in 2001. (Roe, Tr. 1758; PX2237). Roe, Hauswald, and Daramic's in-house legal counsel attended on behalf of Daramic, and Trevathan, Gilchrist, and Microporous' outside legal counsel attended on behalf of Microporous. (Roe, Tr. 1758). A variety of settlement options were discussed at the meeting, including: (1) Daramic selling its industrial business to Microporous; (2) Daramic acquiring Microporous; and, (3) Microporous acquiring Daramic. (Trevathan, Tr. 3615). During the course of settlement discussions, Daramic never conditioned the sale of its industrial business, or any other settlement options, on the promise by Microporous to stay out of the SLI business. (Roe, Tr. 1759).

**Response to Finding No. 267:**

This proposed finding is unobjectionable until the final sentence. Several contemporaneous documents from the Daramic/MPLP settlement discussions reveal that Daramic proposed a market division agreement to Microporous. (*See, e.g.*, PX1106 at 035; PX1103 at 001; *see also* CCFOF 1097-1100). Mr. Trevathan, now a loyal Daramic employee, attended this “[a]mazing conversation” on behalf of Microporous in 2007 and acknowledged that the clear implication of the conversation was that Microporous should stay out of the automotive (SLI) separator business. (Trevathan, Tr. 3707-3708; PX1103 at 001). Daramic, of course, has a history when it comes to market division agreements. (*See* CCFOF 1180-1188, 1191 (detailing Daramic's non-compete agreement with H&V)).

268. [REDACTED] (Gilchrist, Tr. 470, *in camera*; Toth, Tr. 1552-56). As discussions continued, Daramic became excited about the great potential for capitalizing on the synergies between the two companies. (Toth, Tr. 1564). [REDACTED] (RX01097, *in camera*; Hauswald, Tr. 897, *in camera*). While Daramic was interested in acquiring the rubber technology, they did not want to pay more than asset value for the remainder of Microporous' business, which would merely provide additional capacity for Daramic. (PX0978; Toth, Tr. 1551-52, 1564-65).

**Response to Finding No. 268:**

To the extent the proposed finding suggests the only motivation for Daramic acquiring Microporous was to gain substantial synergies and enter markets where Daramic was not already present, it is abundantly false. (*See* CCRF 265). [REDACTED]

[REDACTED] } (*See* CCFOF 764-772). Daramic believed, and

Mr. Hauswald also reported to the Polypore Board, that a { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0203 at 088, *in camera*; PX0738 at 010, *in camera*). In contrast, { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0203 at 085, *in camera*).

The proposition that Daramic { [REDACTED] } is not supported by the evidence. Daramic was a full and active participant in the deep-cycle, motive and stationary (UPS) markets prior to the acquisition, and competed with MPLP head-to-head. (*See, e.g., CCFOF 273-275, 277-279, 287-292*). With respect to the deep-cycle market in particular, Mr. Roe acknowledged telling customers that Daramic was “aggressively pursuing” that market. (Roe, Tr. 1209-1211; PX1071 at 001-002). Daramic was gaining market share in the deep-cycle market in part through customers converting from Flex-Sil to HD for use in their deep-cycle batteries. (Roe, Tr. 1212-1213; 1277-1278).

269. { [REDACTED] }  
[REDACTED] } (RX00814 at 003, *in camera*; Hauswald, Tr. 906-07, *in camera*). { [REDACTED] }  
[REDACTED] } (Hauswald, Tr. 907, *in camera*). The addition of Microporous’ facilities in Piney Flats, Tennessee and Fiestritz, Austria would help to immediately alleviate the mounting capacity concerns at Daramic. (Toth, Tr. 1564-65).

**Response to Finding No. 269:**

Daramic’s only real “capacity concerns” were with the impending expansion of Microporous, which had { [REDACTED] }

[REDACTED] } (PX0462 at 005, *in camera*;  
PX0738 at 013, *in camera*; PX0463 at 002, *in camera*). (See also CCRF 265; CCFOF 769-770,  
772).

270. { [REDACTED]  
} (Graff, Tr. 4862-63, *in camera*). { [REDACTED]  
} (Graff, Tr. 4862-63, *in camera*). In fact, { [REDACTED] }  
(Graff, Tr. 4863, *in camera*). { [REDACTED]  
} (Graff, Tr. 4862-63, *in camera*). { [REDACTED]  
} (Graff, Tr. 4862-63, *in camera*).

**Response to Finding No. 270:**

As detailed above in CCRF 268, { [REDACTED]

[REDACTED] } Furthermore, Respondent has no  
valid efficiency claims. Dr. Kahwaty and Dr. Simpson both agree that that pecuniary raw  
material savings that Daramic achieved were { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3240, *in camera*;  
Kahwaty, Tr. 5252-5254, *in camera*). Dr. Kahwaty { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5249-5250, *in camera*). Overall, { [REDACTED]  
[REDACTED]  
[REDACTED] } or not factually supported. (CCFOF  
1054; see generally CCFOF 1051-1053, 1055-1057).

271. { [REDACTED]  
} (Toth, Tr. 1587-89, *in camera*; RX546, *in camera*; RX724). { [REDACTED]  
} (Toth, Tr. 1587, *in camera*). { [REDACTED]  
} (Toth, Tr. 1589, *in camera*). { [REDACTED]

[REDACTED] (Toth, Tr. 1589-90, *in camera*).

**Response to Finding No. 271:**

This proposed finding is contradicted by evidence that {Daramic actually raised its estimates of the MPLP income figures after reviewing the “Black Box” information. After Daramic presented to the Polypore Board its own projections, [REDACTED] [REDACTED] [REDACTED] } (PX2018-001, *in camera*; Riney, Tr. 5012-5014, *in camera*). [REDACTED] [REDACTED] } (Riney, Tr. 5013-5014, *in camera*).

Moreover, this finding is vague and ambiguous because Daramic { [REDACTED] [REDACTED] [REDACTED] } and the testimony does not reference which version of the scenario is being referenced. (Riney, Tr. 5012-5013, *in camera*).

272. [REDACTED] [REDACTED] } (PX0059 at 001, *in camera*; RX01227, *in camera*). At all times, Daramic’s rationale for acquiring Microporous was to obtain the benefits of the rubber technology and access to the deep cycle segment. (Toth, Tr. 1554-55, 1564; Toth, Tr. 1587, *in camera*).

**Response to Finding No. 272:**

Once again, Respondent contradicts its earlier factual assertion that { [REDACTED] [REDACTED] } (See CCRF 261, RFOF 3). The second sentence is also wrong, but on a much more material point. The self-serving statements of Mr. Toth cannot come close to rebutting the overwhelming evidence that Daramic’s motivations in acquiring MPLP were anticompetitive. (See CCRF 265-271).

g. Synergies Following the Acquisition

273. After the Acquisition, Daramic improved Microporous' existing plants, processes, and equipment. (Hauswald, Tr. 1061). At the Piney Flats facility, Daramic created a task force of engineers from Daramic's Owensboro facility to decrease costs and improve yields on Microporous' existing lines. (Hauswald, Tr. 1062-63; RX628). Prior to the Acquisition, the CellForce line had a yield of approximately 76%. (Hauswald, Tr. 1062). This yield was improved to approximately 90% through the efforts of the Daramic task force. (Hauswald, Tr. 1062). In order to achieve higher efficiency, the team of engineers applied Daramic's best practices to the lines in Piney Flats, which improved safety and environmental standards, reduced costs and improved quality. (Hauswald, Tr. 1063). For example, Daramic changed the oil used in the manufacturing process in Piney Flats to a higher grade to improve the quality of the product. (Hauswald, Tr. 1064). Daramic also improved the solvent recovery system in order to reduce solvent consumption by approximately 25%, which reduced costs and waste. (Hauswald, Tr. 1065).

**Response to Finding No. 273:**

First, the proposition in the sixth sentence about oil is contradicted by Mr. Riney's deposition testimony. Mr. Riney, who has a role in determining what efficiencies Polypore could achieve by acquiring Microporous, did not know why using { [REDACTED] } (PX0912 (Riney, Dep. at 43, 104, in camera)). Second, pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; see also CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). { [REDACTED] } (CCFOF 1054; see generally CCFOF 1051-1053, 1055-1057).

274. Daramic personnel also worked to improve costs and efficiency at the Fiestritz facility. For example, the solvent recovery system was improved like it had been in Piney Flats. (Hauswald, Tr. 1066). Daramic engineers also increased the capacity of the lines by fixing glitches in the winding and finishing areas. (Hauswald, Tr. 1065-66). These improvements allowed Daramic to fill the second line with pure SLI product. (Hauswald, Tr. 1065-66). Additionally, Daramic found ways to reduce the smell of sulfur originating from the product process and plaguing the surrounding Austrian community. (Hauswald, Tr. 1065).

**Response to Finding No. 274:**

First, the proposition in the third sentence that Daramic's improvements allowed for the line to be filled with SLI separators is contradicted by the fact that Microporous was trying to fill

the line as early as 2007 with customers SLI separator purchases. (Gaugl, Tr. 4626; *see also* CCFOF 631-632). Tucker Roe considered Microporous to be a competitor in SLI as evidenced by Microporous's quoting for Fiam's SLI separator business. (Roe, Tr. 1307-1308; *see also* CCFOF 692). Additionally, Daramic's improvements to the line [REDACTED] [REDACTED] [REDACTED] } (Riney, Tr. 4963-4964, *in camera*). In fact, Mr. Gaugl stated "we [Microporous] had the capability to produce separators for automotive" without Daramic acquiring Microporous. (Gaugl, Tr. 4626-4627).

Second, pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). [REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

275. At both former Microporous facilities, Daramic found ways to reduce and recycle scrap material. (Hauswald, Tr. 1067). Instead of simply throwing the scrap away, as Microporous had done, Daramic now regrinds and reuses the material to create new product. (Hauswald, Tr. 1067). This practice not only reduces waste, but also results in cost savings for both plants. (Hauswald, Tr. 1067).

**Response to Finding No. 275:**

Pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). [REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

276. { [REDACTED] } (Hauswald, Tr. 904, *in camera*; RX1603, *in camera*). { [REDACTED] } (Hauswald, Tr. 904, *in camera*; Riney, Tr. 5020, *in camera*; RX1427, *in camera*; RX1428, *in camera*). { [REDACTED] } (Hauswald, Tr. 904, *in camera*; RX1431, *in camera*; RX1432, *in camera*; RX1433, *in camera*; RX1473, *in camera*).

**Response to Finding No. 276:**

First, the proposition in the first sentence about significant raw material savings is contradicted by several pieces of evidence in the record. Daramic has not passed along any raw material savings to { [REDACTED] } (PX0912 (Riney, Dep. 200-201, *in camera*)). Moreover, the efficiencies that Daramic has achieved by acquiring Microporous is rather trivial, when compared to either the \$76 million Daramic paid to acquire Microporous or the { [REDACTED] } in litigation expenses that Daramic has spent as of January 3, 2009, which does not include the time period where Daramic engaged in an onslaught of extensive discovery and a thirty day trial. (PX0954 at 006, *in camera*; PX2160 at 041).

Second, the proposition in the second sentence is contradicted by the fact that { [REDACTED] } [REDACTED] [REDACTED] } it was originally paying for silica from { [REDACTED] } (Riney, Tr. 5021-5022, *in camera*). Third, the proposition in the third sentence is contradicted by the fact Daramic { [REDACTED] } passed along any of these alleged "significant" savings in ultra high molecular weight to { [REDACTED] } (PX0912 (Riney, Dep. at 200, *in camera*)). Instead of Daramic passing along the cost savings to its customers, Daramic increased prices in 2009. (PX0371).

Lastly, pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466,

472-490, 501-507, 526-527, 529, 1044). { [REDACTED]

[REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

h. Daramic's Difficulties In the Current Market

277. The current lead-acid battery separator market is a "tough business." (Toth, Tr. 1568). { [REDACTED] } (Toth, Tr. 1568; RX00927 at 5-16, *in camera*). As a result, Daramic has been experiencing continuous declines in its margins (PX3016 at 010; Toth, Tr. 1649).

Response to Finding No. 277:

Respondent's assertion that the battery separator business is a tough business from the perspective of separator producers and that its customers possess market power is belied by the evidence that battery producers have few alternative sources of supply. (*See generally* CCFOF 258-323). Daramic's own documents confirm that battery manufacturers lack buying power.

{ [REDACTED]

[REDACTED] }. (PX0265 at 008, *in camera*).

According to Daramic, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }. (PX0265 at 004, 007-008, *in camera*). { [REDACTED]

[REDACTED] }

(PX0265 at 010, *in camera*). { [REDACTED]

[REDACTED] } (PX0265 at 011, *in*

*camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (CCFOF 1079-1080; PX0832

at 004 (“demonstrate pricing power in the marketplace regardless of movements in material and energy costs.”); PX0468 at 001, *in camera* (Mr. Toth’s goals for 2008 included { [REDACTED] }); PX0467 at 002, *in camera* (CEO Company Goals for 2006 { [REDACTED] }); PX0469 at 003, *in camera* (CEO Company Goals for 2007); PX0204 at 002 (Mr. Hauswald’s 2006 goals included “Raise Daramic prices where possible to demonstrate pricing power regardless of cost movements”).

Daramic’s assessment that battery manufacturers lack buying power is confirmed by customer testimony at trial. (*See e.g.*, Gillespie, Tr. 3002, *in camera* (Exide believes that negotiations with Daramic are [REDACTED] )); Gillespie, Tr. 3066-3068 (Exide has not used its size as leverage in negotiations with Daramic); Gillespie, Tr. 3097-3098 (Exide has not used pressure points to negotiate and get their will); Craig, Tr. 2565 (EnerSys does not consider itself a power buyer, “not at all, not close.”); Benjamin Tr. 3525, 3522 (Bulldog Battery received a 10% post-acquisition price increase, which Bulldog considered “pretty exorbitant” but “[t]here was no way to try to negotiate a lower price. There was no place to go.”); Godber, Tr. 242, *in camera* (Trojan concerned about Daramic’s acquisition of Microporous because { [REDACTED] }); Godber Tr. 133, 232-233, 239-242, *in camera* (notwithstanding the fact that Trojan is the world’s largest manufacturer of deep cycle batteries, { [REDACTED] })).

With regard to this findings assertion that Daramic has been experiencing continuous declines in its margins, the finding cites a document that was not in evidence. (See Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document’s admissibility based on Respondent’s objection

of surprise). Moreover, the testimonial evidence of Mr. Toth is contradicted by Daramic's financial statements, which show steady margins. (PX0294 at 006; See CCRF 278). Moreover, Polypore's majority owner, Warburg Pincus, advised that in a presentation to JP Morgan, Daramic needed to [REDACTED]

[REDACTED] } (PX1715 at 002, *in camera*; CCFOF 991). Mr. Toth heeded Warburg Pincus's advice and jotted down the advice almost word-for-word on an agenda for a meeting with those that made the presentation: "Be clear that price was out in front & consistent w/cost escalation . . . no margin erosion." (PX0485 at 001).

i. Daramic is Experiencing Declining Margins and Rising Costs

278. [REDACTED]

[REDACTED] } (Riney, Tr. 4924-4929, *in camera*). {

[REDACTED] } (Riney, Tr. 4927-4928, *in camera*). {

[REDACTED] } (Riney, Tr. 4924, *in camera*). {

[REDACTED] } (Riney, Tr. 4928, *in camera*).

Response to Finding No. 278:

Respondent's testimonial-only evidence to support this finding is contradicted by the documentary evidence of actual contribution margins found in its financial statements, which Daramic presented to the Polypore Board. (PX0294 at 006, *in camera*; Riney, Tr. 4981, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4982-4983).

Moreover, [REDACTED]

[REDACTED] } (PX0294 at 006, *in camera*). [REDACTED]

[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0294 at 006,  
*in camera*). { [REDACTED]  
[REDACTED] }  
(PX0294 at 006, *in camera*; Riney, Tr. 4983-4984, *in camera*). ). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4985, *in*  
*camera*). { [REDACTED]  
[REDACTED] } (PX0294 at 006, *in camera*; Riney, Tr. 4984, *in camera*).  
{ [REDACTED]  
[REDACTED] }  
(PX0294 at 006, *in camera*; Riney, Tr. 4986, *in camera*).

With regard to Daramic's actual financial performance in 2008, one of the reasons  
Daramic's { [REDACTED]  
[REDACTED] } (Riney, Tr. 5004, *in*  
*camera*; see also PX2160 at 034 (Polypore SEC Form 10-K for 2008 reporting that the decline in  
margins was "primarily attributable to the acquisition of Microporous, which has lower gross  
profit margins."))

279. { [REDACTED]  
[REDACTED] } (Riney, Tr. 4924, *in camera*). { [REDACTED]  
[REDACTED] } (Riney, Tr. 4924, *in camera*).  
{ [REDACTED]  
[REDACTED] } (Riney, Tr. 4929, *in camera*).

**Response to Finding No. 279:**

The assertion in this finding contradicts the record evidence. (See CCRF 278 (Showing actual contribution margins remained steady with little fluctuation between 2005 and 2008 budgeted financial forecast)).

280. { [REDACTED] } (Riney, Tr. 4926, *in camera*). { [REDACTED] } (Riney, Tr. 4930, *in camera*). { [REDACTED] } (Riney, Tr. 4926-27, *in camera*).

**Response to Finding No. 280:**

Complaint Counsel has no specific response.

281. { [REDACTED] } (Riney, Tr. 4930, *in camera*). { [REDACTED] } (Riney, Tr. 4930-31, *in camera*). { [REDACTED] } (Riney, Tr. 4931, *in camera*).

**Response to Finding No. 281:**

Respondent's testimonial-only evidence to support this finding is contradicted by the documentary evidence of actual adjusted EBITDA margin found in its financial statements, which Daramic presented to the Polypore Board. { [REDACTED] } (PX0294 at 006, *in camera*; see also CCRF 278 (multi-million dollar increases in adjusted EBITDA dollar). With regard to Respondent's contention that Daramic incurred { [REDACTED] } in 2008 after the acquisition, when Daramic and Microporous quit competing. (Riney, Tr. 4930-4931, *in camera*). Capacity in Owensboro was moved to



the company going public, Warburg Pincus, advised that in a presentation to JP Morgan,

Daramic needed { [REDACTED] } (PX1715 at 002, *in camera*; CCFOF

991). Mr. Toth heeded Warburg Pincus's advice and jotted down the advice almost word-for-word on an agenda for a meeting with those that made the presentation: "Be clear that price was out in front & consistent w/cost escalation . . . no margin erosion." (PX0485 at 001).

283. One reason for the decline in gross profits has been the increased cost of raw materials and escalating energy costs. (PX2160 at 034; Toth, Tr. 1390-1391). Raw materials make up about a third of Polypore's cost of sales. (PX3016 at 038).

**Response to Finding No. 283:**

Respondent's statement that raw materials make up a third of Polypore's cost of sales, relies on a document that was not admitted into evidence. (See Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document's admissibility based on Respondent's objection of surprise). Moreover, the finding's assertion regarding cost as it relates to Daramic's business is ambiguous, because approximately half of Polypore is made up of businesses that are not related to lead acid battery separators. (CCFOF 3-6). With regard to the finding's assertion that gross profits declined, Polypore's 10-K contradicts this and shows gross profits for Polypore increasing from \$197 million in 2007 to \$215.7 million in 2008. (PX2160 at 28). With regard to the Energy and Storage segment's decline in gross profits as a percent of sales from 2007 to 2008 the other reason, as stated in its Polypore's 2008 SEC form 10-K, was "primarily attributable to the acquisition of Microporous, which has lower gross profit margins than our other lead-acid battery separator production facilities . . . and costs associated with the strike at our Owensboro, Kentucky facility." (PX2160 at 034).

284. { [REDACTED] } (Riney, Tr. 4933, *in camera*). { [REDACTED] } (Riney, Tr. 4934, *in camera*). { [REDACTED] }

[REDACTED] (Riney, Tr. 4934, *in camera*). [REDACTED] (Riney, Tr. 4934-35, *in camera*). [REDACTED] (Riney, Tr. 4934-35, *in camera*).

**Response to Finding No. 284:**

Respondent cites testimonial-only evidence as the basis for this finding, which is not supported by contemporaneous documentary evidence. Moreover, Dr. Simpson testified that based on producer price indices from the Bureau of Labor statistics, which showed oil and energy costs falling after September 2008, in his opinion input cost increases would not justify the price increases that Daramic was putting through to its customers given the fall-off in input prices. (Simpson, Tr. 3215-3218; PX0033 at 023-26, *in camera*, PX0033 at 045; *see also* CCFOF 794-796).

285. [REDACTED] (Riney, Tr. 4932, *in camera*). Polypore as a whole has attempted to offset Daramic's declining margins by restructuring and reducing discretionary spending. (PX3016 at 010-11; Toth, Tr. 1649). These efforts were partially offset by the FTC expenses and the considerable administrative expenses that were inherited from the acquisitions. (PX3016 at 019). [REDACTED] (Riney, Tr. 4932, *in camera*). [REDACTED] (Riney, Tr. 4932, *in camera*).

**Response to Finding No. 285:**

This findings proposition that margins are declining steadily is refuted by Daramic's financial statement presented to the Polypore Board. (*See* CCRF 278-279; 281-283). Moreover, the finding relies on a document that was not admitted into evidence. (*See* Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document's admissibility based on Respondent's objection of surprise). With regard to the remainder of this finding, Complaint Counsel has no specific response.

286. [REDACTED] (Riney, Tr. 4933, *in camera*). [REDACTED] (Riney, Tr. 4933, *in camera*).

**Response to Finding No. 286:**

This findings contention that { [REDACTED]

[REDACTED]  
[REDACTED].

(See CCRF 278). { [REDACTED]

[REDACTED] } (Riney, Tr. 4933, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]. }

(Riney, Tr. 4933, *in camera*).

287. { [REDACTED]  
[REDACTED] } (Riney, Tr. 4954, *in camera*). { [REDACTED]  
[REDACTED] } (Riney, Tr. 4954-4955, *in camera*).

**Response to Finding No. 287:**

Respondent's contention in this finding that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Gillespie, Tr. 2999-3000, *in camera*; see also CCFOF1068). Moreover,

notwithstanding Daramic's claim that it has { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3000, *in camera*). In fact, Daramic

actually { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3148-3149, *in camera*).

{ [REDACTED]  
[REDACTED]

[REDACTED] } (Gillespie, Tr. 3151-3152, *in camera*).

288. Based on the foregoing, the Court finds that Daramic has experienced declining margins and increasing costs since at least 2005.

**Response to Finding No. 288:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 277-287.

j. **Daramic Operates In a Stagnant Industry**

289. [REDACTED] } (Riney, Tr. 4931, *in camera*). The PE technology used by Daramic has been in existence for many years. (Toth, Tr. 1568). Daramic is currently using a line that was built in 1969, and the patents protecting much of its intellectual property expired in the 1980s. (Toth, Tr. 1569).

**Response to Finding No. 289:**

This finding is contradicted by evidence that in order to have the competitive advantage of meeting the widest range of customer needs, Daramic has patents and know-how, product customization, technical support, sales, support, and battery expertise. (Hauswald, Tr. 825-826, *in camera*; PX0194 at 036, *in camera*). Daramic owns 18 active patents. (PX2074). Its PE patent portfolio includes patents on HD and CellForce. (Gilchrist, Tr. 382; PX2161; PX2166). In industrial applications, Daramic uses a special patented "clean" oil that reduces the presence of black scum, which can interfere with the proper maintenance and function of these types of batteries. (Whear, Tr. 4807; PX0582 at 050).

In addition Daramic recognizes that separator competitors are differentiated, which is not consistent with a mature industry. In assessing the performance of its technology compared to other battery separator manufacturers, Daramic views [REDACTED] [REDACTED] } (PX0194 at 030, *in camera*). [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (PX0194 at 025, *in camera*).

290. Because of the lack of leverage with both suppliers and customers, as well as the proliferation of competition in the marketplace, Daramic has sustained more than \$100 million in restructuring expenses over the last four years. (Toth, Tr. 1569).

**Response to Finding No. 290:**

This finding is contradicted by evidence found in Polypore's Form 10-K reporting Polypore's financial results for Fiscal year ending January 3, 2009. (PX2160). Polypore's 10-K details the company's restructuring plans for each of the years between 2005 and 2009. (PX2160 at 038). According to the 10-K, the restructuring plan had nothing to do with the lack of leverage or the proliferation of competition, but rather Polypore's attempt "to align lead-acid battery separator production capacity with demand, reduce costs and position ourselves to meet future growth opportunities." (PX2160 at 038).

Moreover, the \$100 million dollars testified to by Mr. Toth, is off by a factor of \$30 million, as the only two restructurings affecting the energy storage segment, according to Polypore's 10-K, were \$61.7 million in 2008, and \$9.1 million in 2005. (PX2160 at 038). With respect to the \$9.1 million in 2005, that restructuring was "to better accommodate customer growth and related demand" and lower the cost of production for lead-acid separators by transferring the Jungfer assets to Daramic's Thailand facility. (PX2160 at 038; Riney, Tr. 4932, *in camera*). With regard to the \$61.7 million in 2008, [REDACTED]

[REDACTED] } (Riney, Tr. 4933, *in camera*). In describing the environmental contamination at the Potenza, Polypore's 10-K does not mention either customers or competitors as the reason for setting aside money to remediate the Potenza site. (PX2160 at 076).

With regard to the findings contention that Daramic lacks leverage with its customers as a result of competition, Daramic's own documents confirm that battery manufacturers have little leverage in negotiations with suppliers and that competitive rivalry among separator suppliers is low. (CCRF 277). ([REDACTED])

[REDACTED]}. (PX0265 at 008, *in camera*). According to Daramic, { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]}. (PX0265 at 004, 007-008, *in camera*). { [REDACTED] }  
[REDACTED] }  
(PX0265 at 010, *in camera*). { [REDACTED] }  
[REDACTED] } (PX0265 at 011, *in camera*).

291. Polypore's energy storage segment, which includes Daramic, has been declining in gross profit in the current economic climate. (Toth, Tr. 1390-1391). Between 2007 and fiscal year 2008, the energy storage segment has declined 3.7%. (PX2160 at 034; Toth, Tr. 1390-1391).

**Response to Finding No. 291:**

With regard to Daramic's actual financial performance in 2008, one of the reasons Daramic's { [REDACTED] }  
[REDACTED] } (Riney, Tr. 5004, *in camera*; see also PX2160 at 034 (Polypore SEC Form 10-K for 2008 reporting that the decline in margins was primarily attributable to the acquisition of Microporous, which has lower gross profit margins.)

292. In recent times, the lead-acid battery separator business has remained "soft." (PX3016 at 007; Toth, Tr. 1649).

**Response to Finding No. 292:**

This findings contention that the lead-acid battery business has remained "soft" in recent times is contradicted by the fact that its most recent strategic audit Daramic states that industry demand is expected to increase by { [REDACTED] }  
(PX0194 at 023, *in camera*). In fact, demand in Asia has not declined since the most recent economic recession. (Hall, Tr. 2852- 2853, *in camera* ({ [REDACTED] }

[REDACTED]). Moreover, the finding relies on a document that was not admitted into evidence. (See Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document's admissibility based on Respondent's objection of surprise).

293. As of May 7, 2009, Polypore's energy storage sales were down 29% over the same period in 2008. (PX3016 at 010). This loss was mainly concentrated in the lead-acid business, as Polypore's lithium business (Celgard) has been performing relatively well. (Toth, Tr. 1649). Specifically, first quarter 2009 sales in the lead-acid battery separator business declined 30% over the prior year due to the weak economy, the declining dollar, the loss of JCI's business, and the lowering of customer inventory. (PX3016 at 011).

**Response to Finding No. 293:**

The document cited does not support the "declining dollar" as a reason for the reduction in first quarter sales. The finding relies on a document that was not admitted into evidence. (See Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document's admissibility based on Respondent's objection of surprise). Moreover, the document actually states that the sales reduction was a result of the "negative impact of the euro to dollar exchange rate," which means the strengthening dollar had a negative impact when selling separators in Euros. (PX3016 at 011). Exchange rate fluctuations can have either a positive or negative impact on sales. In 2008, it had a positive impact according to Polypore's 10-K for fiscal 2008. (PX2160 at 034).

294. Based on the findings above, the Court finds that the flooded lead-acid battery separator industry is a mature, stagnant growth industry. The Court further finds that Daramic's sales and profits are declining in the current market.

**Response to Finding No. 294:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 289-293.

k. **Burden of Acquiring Microporous**

295. Another reason for the decline in gross profits for the energy storage segment of Polypore was Daramic's acquisition of Microporous, which had lower gross profit margins than Daramic. (PX2160 at 034; Toth, Tr. 1390-1391).

**Response to Finding No. 295:**

Complaint Counsel has no specific response.

296. { [REDACTED] } (Riney, Tr. 4960, *in camera*). { [REDACTED] } (Riney, Tr. 4960, *in camera*). { [REDACTED] } (Riney, Tr. 4960, *in camera*).

**Response to Finding No. 296:**

This finding is contradicted by the fact that after Daramic presented to the Polypore Board its own projections, { [REDACTED] } (PX2018 at 001, *in camera*; Riney, Tr. 5012-5014, *in camera*). { [REDACTED] } (Riney, Tr. 5013-5014, *in camera*).

Moreover, this finding is vague and ambiguous because Daramic { [REDACTED] } and the testimony does not state which version of the various scenario is being referenced. (Riney, Tr. 5012-5013, *in camera*).

297. { [REDACTED] } (Riney, Tr. 4961, *in camera*). { [REDACTED] } (Riney, Tr. 4961, *in camera*).

**Response to Finding No. 297:**

This finding is contradicted by Mr. Riney's own testimony that Daramic { [REDACTED] } (Riney, Tr. 5012-5013, *in camera*). Without reference to a particular scenario, any comparison, including the scope and magnitude of the differences between the information received pre and post-merger, is meaningless.

298. { [REDACTED] }

[REDACTED] } (Riney, Tr. 4961, *in camera*).

**Response to Finding No. 298:**

This finding is contradicted by the fact that Microporous was controlled by Daramic for 10 months during 2008 and did not have its own actual sales as an independent entity. (See RX01589 at 003 (stating that Microporous was acquired by Daramic on February 29, 2008.) After February 29, 2008, the two firms no longer competed with one another. Respondent also fails to point to any documentary evidence to support its contention that { [REDACTED] [REDACTED] [REDACTED] }

In addition, this finding is also contradicted by evidence that Daramic plants kept sales volume that, but for the acquisition, would have gone to Microporous's facilities. In 2008, { [REDACTED] [REDACTED] } (PX0203 at 086, *in camera*; PX0294 at 002, 008, 013, *in camera*; Riney Tr., 4986-4987). Mr. Riney testified that the { [REDACTED] [REDACTED] } (Riney, Tr. 4986-4987). The evidence shows that a portion of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Axt, Tr. 2210-11, *in camera*).

299. { [REDACTED] [REDACTED] } (Riney, Tr. 4961, *in camera*). { [REDACTED] [REDACTED] } (Riney, Tr. 4961, *in camera*).

**Response to Finding No. 299:**

The assertion in this finding is contradicted by the record evidence. (See CCRF 298).

300. { [REDACTED] } (Riney, Tr. 4962, *in camera*).  
{ [REDACTED] } (Riney, Tr. 4962, *in camera*).

**Response to Finding No. 300:**

The contention that { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Gilchrist Tr. 467, *in camera*). { [REDACTED] }  
[REDACTED] } (Weerts,  
Tr. 4522-4523, *in camera*).

301. { [REDACTED] } (Riney, Tr. 4962, *in camera*).  
{ [REDACTED] } (Riney, Tr. 4962-4963, *in camera*). { [REDACTED] }  
[REDACTED] } (Riney, Tr. 4969, *in camera*).

**Response to Finding No. 301:**

This finding is contradicted by the evidence. A CellForce production line is a polyethylene line capable of running pure PE separators for SLI. (RFOF at 185). At the Feistritz plant facility, Microporous built two production lines both of which could produce CellForce separators or plain polyethylene separators for SLI batteries. (Gilchrist, Tr. 332). Microporous planned to produce polyethylene (PE) separators for automotive batteries on one of the two production lines at its recently built plant in Feistritz, Austria. (Gilchrist, Tr. 331-332).

{ [REDACTED] }  
[REDACTED]  
[REDACTED] }

(PX2001 at 001-002, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (PX2001 at 003-004, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (PX2001 at 005, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (PX2001 at 006, *in camera*).

With regard to Respondent's claim that the an independent Microporous would have significant excess capacity today, does not square with the testimony. According to Peter Gaugl, the capacity utilization of the Feistriz facilities two lines is 70% today, and 30% of the two lines is being run for CellForce. (Gaugl, Tr. 4569-4570). Thus the capacity utilization on one line running only CellForce would be much greater than testified to by Mr. Riney. The evidence also indicates that Piney Flats capacity for CellForce would be more fully utilized but for the acquisition, and certainly much greater than 38% that Respondent claims it is today. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Axt, Tr. 2210-2211, *in camera*).

Respondent's contention that Microporous would have negative net income at both its facilities, but for the changes made by Daramic following the acquisition is contradicted by the evidence that prior to the acquisition Microporous was profitable, growing and it was all upside potential. (Gilchrist, Tr. 403). Prior to the acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). A Microporous document prepared

two weeks before the merger for an IGP investor conference shows that Microporous had growing sales and steady EBITDA. (PX0078 at 019-020). Microporous's offering memorandum also shows Microporous to be in healthy financial shape, with significant potential for EBITDA growth from the expansion. (PX0072 at 059, 064, 066).

302. { [REDACTED] } (Riney, Tr. 4970, *in camera*). { [REDACTED] } (Riney, Tr. 4970, *in camera*). { [REDACTED] } (Riney, Tr. 4970, *in camera*). { [REDACTED] } (Riney, Tr. 4971, *in camera*).

**Response to Finding No. 302:**

Respondent's contention that the former Microporous plants operate as stand-alone entities and do not rely upon each other or any of Daramic's other plants is contradicted by the evidence that CellForce produced in both U.S. and in Austria, uses Ace-Sil dust. In fact, Mr. Riney testified that { [REDACTED] } (Riney, Tr. 4971, *in camera*). The Ace-Sil dust is produced in Piney Flats and shipped to Austria in 500 pound bags. (Gaugl, Tr. 4552). Moreover, Microporous's two plant strategy with a facility in Austria, was a key component in Microporous's plans to expand sales in North America, as well as in Europe. (See CCFOF 678-681).

303. { [REDACTED] } (Riney, Tr. 4973, *in camera*). { [REDACTED] } (Riney, Tr. 4973, *in camera*). { [REDACTED] } (Riney, Tr. 4973, *in camera*).

**Response to Finding No. 303:**

Complaint Counsel objects to all but the first sentence of this finding. At trial, Complaint Counsel objected to the cost saving figures testified to by Respondent's witness because Complaint Counsel was not provided this information. (Riney, Tr. 5024-5025, *in camera*).

Your Honor granted Complaint Counsel's motion, in part, stating that he would disregard the exact numbers. (Riney, Tr. 5024-5025, *in camera*).

304. Based on the foregoing findings, the Court finds that the acquisition of Microporous has caused additional declines in Daramic's profits and margins, despite efforts by Daramic to achieve synergies and reduce costs.

**Response to Finding No. 304:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 296-302.

305. The Court further finds that Microporous provided inaccurate information to Daramic about its 2008 projected sales and EBITDA figures prior to the acquisition. Because Microporous' own internal budgeted sales and EBITDA figures were lower than the projections provided to Daramic, it is clear that Microporous provided false information to Daramic.

**Response to Finding No. 305:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 296-302.

In addition, there is no evidence to support the findings contention that Microporous provided inaccurate or false information to Daramic prior to the merger. And, if in fact the information did turn out to not be a hundred percent correct, there is no evidence to support the findings contention that Microporous knew it to be inaccurate or intended to mislead Daramic. As the findings above explicitly state, Microporous provided Daramic with its projected or budgeted sales. (*See e.g.*, RFOF295; 296). Respondent is well aware that budgeted projections may not always turn out to be accurate. (*See Riney, 5011-5012, in camera* (stating that the budget is { [REDACTED] }))).

I. **Loss of Important Customers**

306. { [REDACTED] } (Hauswald, Tr. 909, *in camera*). JCI represented 15-16% of Daramic's total sales. (Hauswald, Tr. 1118). As of December 31, 2008, Daramic lost all of its battery separator business with JCI. (Toth, Tr. 1535). This constitutes a loss of \$55 million in annual revenue. (Toth, Tr. 1535; RX998, *in camera*).

**Response to Finding No. 306:**

The third sentence is contradicted by Mr. Hall's testimony at trial that JCI continues to use Daramic as its supplier of separators for golf cart batteries. (Hall, Tr. 2705, 2874, *in camera*).

307. [REDACTED] (Riney, Tr. 4973, *in camera*).

**Response to Finding No. 307:**

Complaint Counsel has no specific response.

308. As a result of the loss of JCI's business, Daramic was forced to shut down its Potenza, Italy plant, which was a main supplier to JCI. (Toth, Tr. 1535; Hauswald, Tr. 908, *in camera*; RX997). While it was operating, the Potenza plant had a capacity of [REDACTED] (Hauswald, Tr. 922, *in camera*). The closing of that plant resulted in the termination of more than 125 employees. (Toth, Tr. 1535). Due to the loss of JCI's business, Daramic was also forced to restructure its Owensboro plant and shut down some of the production lines located there. (Toth, Tr. 1535). Owensboro's production capacity has been reduced from 105 million square meters to 65 million square meters. (Hauswald, Tr. 923).

**Response to Finding No. 308:**

Complaint Counsel has no specific response.

309. Additionally, due to the world-wide economic downturn, there has been a decline in the volume of separators that existing customers are ordering. (PX3016 at 024). While Daramic is hopeful about the future, there has been no noticeable improvement in ordering patterns. (Toth, Tr. 1653). Moreover, replacement sales have been flat to slightly down. (PX3016 at 034).

**Response to Finding No. 309:**

The finding's assertions that the separator demand is down because of the economic downturn and that replacement sales are flat relies on a document that was not admitted into evidence. (See Toth, Tr. 1647, 1654, 1656-1657 (No ruling on document's admissibility based on Respondent's objection of surprise).

310. Daramic's ten year contract with Exide is set to expire at the end of 2009. (Hauswald, Tr. 1117). Daramic does not have a new contract in place with Exide and does not know whether it will continue to supply separators to Exide after the contract expires. (Hauswald, Tr. 1117; Roe, Tr. 1719-20). Daramic has been attempting to negotiate a new agreement with Exide since early 2007. (Roe, Tr. 1713).

**Response to Finding No. 310:**

The fifth sentence mischaracterizes the evidence and is contradicted by Exide's testimony at trial. Exide will have no choice but to continue to purchase separators from Daramic after

2009 because { [REDACTED] }  
[REDACTED]}. (Gillespie, Tr. 2953-2954 (only one provider today of deep cycle separators), 3037-  
3039, *in camera* ({ [REDACTED] }  
[REDACTED]  
[REDACTED] )) 3041, *in camera* ({ [REDACTED] }  
[REDACTED] ), 3049, *in camera* ({ [REDACTED] }  
[REDACTED] ).

311. Based on the foregoing, the Court finds that the loss of JCI's business has had a significant negative impact on Daramic's business. The loss of this business has caused Daramic's margins to decline.

**Response to Finding No. 311:**

Complaint Counsel has no specific response.

m. Effect of the Strike

312. The Owensboro strike lasted 55 days during the fall of 2008. (Hauswald, Tr. 1071). At that time, Daramic HD was only being produced at the Owensboro facility. (Hauswald, Tr. p. 1072). The labor stoppage had a major negative impact on all of Daramic's production, and specifically on Daramic HD. (Hauswald, Tr. 1072-1073). Product had to be shipped from other global locations in order to satisfy the demand, and Daramic had to reorganize its supply chain. (RX001167; Hauswald, Tr. 1075-1076). The expenses incurred during the strike have contributed to Daramic's recent decline in gross profit. (Toth, Tr. 1393).

**Response to Finding No. 312:**

The findings contention that product was shipped to North America from other locations at Daramic's expense is contradicted by the evidence that EnerSys was forced to ship a container of separators to its Monterrey plant from Daramic's Feistritz facility during the Owensboro strike at a high freight and time cost. (PX1285). The cost of the separator was approximately 20 percent more because EnerSys had to pay in Euros, stock, carry, and freight the material to Mexico. The duties that EnerSys had to pay from Austria were approximately 6.5 percent. (Burkert, Tr. 2402).

n. Daramic's Future

313. If margins continue to decline and costs continue to increase, Daramic will be forced to shed additional overhead costs and find other ways to reduce the costs of production. (Riney, Tr. 4974). Because there are limited cost factors which Daramic can control, Daramic may be forced to move its production lines to lower-labor-cost locations. (Riney, Tr. 4974). Daramic will also have to consider further workforce consolidation due to the poor condition of the battery separator industry. (Toth, Tr. 1635).

**Response to Finding No. 313:**

The findings contention that Daramic's margins have been in decline for years prior to 2008 is refuted by the evidence presented to Polypore's board. (See CCFOF 278-279; 281-283; 285). Moreover, in March 2009 Polypore reported to its shareholders that Daramic "implemented a restructuring plan to align lead-acid battery separator production capacity with demand, reduce costs and position us to meet future growth opportunities." (PX2160 at 034). Nowhere, other than to this Court, has Respondent stated that it fears declining margins and lower sales will result in further restructuring.

B. **Microporous Products, L.P.**

a. **Background**

314. Microporous was a "niche" player in the battery separator industry until it was acquired by Polypore on February 29, 2008. (RX00741 at 003; RX01452 at 005). Microporous developed and manufactured rubber and rubber-based battery separators for the lead-acid battery industry. (RX00741 at 003).

**Response to Finding No. 314:**

The proposition in this finding is contradicted by the record evidence. Although the Harris Williams & Company marketing book stated Microporous was a niche player, it also stated "MPLs strong brand reputation high-quality products and leading customer relationships have also positioned the Company to capture substantial share of the automotive SLI market, the largest segment of the lead-acid battery industry." (RX00741 at 017).

315. Originally founded in 1898 as the American Hard Rubber Corporation, Microporous developed and patented the ACE-SIL® rubber separator in 1935 and later developed the FLEX-SIL® rubber separator in 1980. (Gilchrist, Tr. 313-14; RX01452 at 005).

**Response to Finding No. 315:**

Complaint Counsel has no specific response.

316. Up until the time of the Acquisition, Microporous' Piney Flats plant was the only plant in the world where rubber separators are manufactured. (PX2231 (Heglie, Dep. 96)). The Piney Flats plant remains the only such plant today. (Toth, Tr. 1423).

**Response to Finding No. 316:**

The proposition in this finding is contradicted by the record evidence. To the extent that Respondent is including PE/rubber separators in their definition of rubber separators, Microporous's Feistritz, Austria facility possessed lines that were capable of producing PE/rubber separators. (Gilchrist, Tr. 312, 558-59; Trevathan, Tr. 3714; Gaugl, Tr. 4551).

317. Not until 1999 did Microporous expand its product line beyond traditional pure rubber technology by introducing the CellForce® product, a polyethylene ("PE") separator with a rubber additive. (RX01452 at 005).

**Response to Finding No. 317:**

Complaint Counsel has no specific response.

318. At the time of the acquisition, Microporous sold no pure PE separators. (Gilchrist, Tr. 557).

**Response to Finding No. 318:**

The proposition in this finding is contradicted by the record evidence. Prior to the acquisition, Microporous had manufactured and sold SLI separators in North America and considered itself a competitor in that market. (Gilchrist, Tr. 308, 311, 313, 341-342). Daramic market share charts for SLI in North America give MPLP a 4 percent share of SLI sales, Entek 49 percent, and Daramic 47 percent, but nothing to any Asian producer. (PX0264 at 003).

b. **Ownership History**

319. As a "niche" company having been bought and sold several times over the years by private equity firms, Microporous was familiar with acquisitions. (RX01452 at 005; RX00741 at 003).

**Response to Finding No. 319:**

The proposition in this finding is contradicted by the record evidence. Although the Harris Williams & Company marketing book stated Microporous was a niche player, it also stated "MPL's strong brand reputation high-quality products and leading customer relationships

have also positioned the Company to capture substantial share of the automotive SLI market, the largest segment of the lead-acid battery industry.” (RX00741 at 017).

320. At one time, Trojan Battery had an ownership interest in Microporous. (McDonald, Tr. 3784).

**Response to Finding No. 320:**

Complaint Counsel has no specific response.

321. In 1997, several friends of, and investors in, the private equity firm, Kelso & Company (“Kelso”), banded together to purchase Microporous. (McDonald, Tr. 3784; Trevathan, Tr. 3574; PX2300 (Heglie, IH at 20)).

**Response to Finding No. 321:**

Complaint Counsel has no specific response.

322. After approximately 9 years of ownership, the Kelso investors decided to sell Microporous because significant capital investment was needed to sustain any hopes of expansion, and the Kelso investors were not interested in personally funding an expansion. (Trevathan, Tr. 3589-90). The Kelso investors first contacted Warburg Pincus (“Warburg”), the private equity owners of Polypore, but at that time Warburg was unable to finance the proposed acquisition. (Trevathan, Tr. 3591-92; PX0908 (Amos, Dep. 139), *in camera*). The Kelso investors also approached JCI, but the multi-billion dollar battery company chose not to pursue the proposed investment. (Trevathan, Tr. 3592).

**Response to Finding No. 322:**

The proposition in this finding is contradicted by the record evidence. The assertion in the first sentence is not supported by the citation. No where within the pages cited does Mr. Trevathan say that Kelso investors decided to sell Microporous because significant capital investment was needed to sustain any hopes of expansion is not supported by the citation provided. (Trevathan, Tr. 3589-3590).

323. Ultimately, the Kelso investors hired the Harris Williams & Company as an agent and investment banker to sell the company. (RX00741 at 001). Harris Williams marketed the company as a successful “niche” player in the battery separator business: “[t]he company has succeeded in leveraging its superior product technology to establish leading positions in a number of niche market segments within the lead-acid battery industry where the electrochemical properties of rubber have technological and operating performance advantages.” (RX00741 at 005). Additionally, the report states that “Microporous has established leading market share positions in segments of the lead-acid battery separator industry where rubber separators have proven technological operating performance advantages over competing battery separator technologies. (RX00741 at 016).

**Response to Finding No. 323:**

The proposition in this finding is contradicted by the record evidence. Although the Harris Williams & Company marketing book stated Microporous was a niche player, it also stated "MPLs strong brand reputation high-quality products and leading customer relationships have also positioned the Company to capture substantial share of the automotive SLI market, the largest segment of the lead-acid battery industry." (RX00741 at 017).

324. On November 6, 2006, International Growth Partners ("IGP") acquired Microporous. (RX00741; Trevathan, Tr. 3757, 3592-93; McDonald, Tr. 3785). Eric Heglie, Jeff Webb, Jerry Jukiewicz, Matt Antaya, and Mike Beaumont were the principles at IGP in charge of the purchase of Microporous. (PX2300 (Heglie, IH at 15)).

**Response to Finding No. 324:**

Complaint Counsel has no specific response.

325. IGP purchased Microporous because of its unique rubber product technology, "niche" position within the lead-acid battery separator industry, 100% supply position for OE golf cart manufacturers, and the possibility of some growth opportunities. (RX00741 at 005). Microporous was an attractive investment to IGP because of its "differentiated products" and opportunity for growth of these products. (PX2300 (Heglie, IH at 125-126)).

**Response to Finding No. 325:**

Respondent's assertion for why IGP purchased Microporous is purely speculation and is not supported by RX00741 at 5. Mr. Heglie stated that IGP saw growth potential for Microporous in golf cart, reserve power, motive power markets, and automotive markets. (PX2300 (Heglie, IH at 23-24)).

326. Less than two years later, on February 29, 2008, { [REDACTED] } (Gilchrist, Tr. 476-77, *in camera*; RX01227 at 009, *in camera*; RX1572, RX00916 at 4, *in camera*).

**Response to Finding No. 326:**

Complaint Counsel has no specific response.

c. Microporous Management

327. At the time of the Acquisition, Microporous principal management included Mike Gilchrist, CEO, Larry Trevathan, VP of Operations, Matt Wilhjem, CFO, and Steve McDonald, Director of Sales. (RX00741 at 074; Gilchrist, Tr. 418) Gilchrist, Trevathan, and Wilhjem regularly participated in Board of Directors meetings in their respective roles. (PX2300 (Heglie, IH at 43)).

**Response to Finding No. 327:**

The assertion in the first sentence is not supported by the Gilchrist citation.

328. Mike Gilchrist was the President and CEO of Microporous. (Gilchrist, Tr. 297). While Gilchrist served as CEO from 1998 until the Acquisition, Gilchrist's performance was under strict scrutiny by both the Kelso investors and IGP. (Gilchrist, Tr. 297; RX00244 at 003; PX2300 (Heglie IH at 59-60); Trevathan, Tr. 3569). Gilchrist worked in a product strategy role at Daramic for several months before becoming the CEO for Altraverda Limited in Wales. (Gilchrist, Tr. 297, 531-532).

**Response to Finding No. 328:**

The proposition in this finding is contradicted by the record evidence. There are no references in the record from IGP or Mr. Gilchrest that his position as CEO was in jeopardy or that IGP no longer had trust in his decision making ability. Contrary to Respondent's inaccurate claim in this finding, Mr. Heglie stated "[IGP] thought the management team was sufficient to make a -- to ultimately generate a good investment outcome to us." (PX2300 (Heglie, IH at 126)). Mr. Gilchrist had been in the industry for 32 years and at Microporous for 11 years. (RX00741 at 074).

329. Larry Trevathan served as the Vice President of Operations for Microporous. (Trevathan, Tr. 3569). He was hired by the Microporous Board under the direction of the Kelso investors in November of 2004. (Trevathan, Tr. 3568). At the time he was hired, Trevathan was "made aware that part of the reason why this position was open and the search was in place was there was an opportunity to move into the -- and backfill the president's position eventually and replace Mike Gilchrist." (Trevathan, Tr. 3569). Trevathan currently serves as the Vice President of Operations for Daramic. (Trevathan, Tr. 3566).

**Response to Finding No. 329:**

Mr. Trevathan's finding is self-serving and inaccurate. The proposition in this finding is contradicted by the record evidence. There are no references in the record from IGP or Mr. Gilchrest that his position as CEO was in jeopardy or that his successor would be Mr. Trevathan. Contrary to Respondent's inaccurate claim in this finding, Mr. Heglie stated "[IGP] thought the management team was sufficient to make a -- to ultimately generate a good investment outcome to us." (PX2300 (Heglie, IH at 126)). Mr. Gilchrist had been in the industry for 32 years and at Microporous for 11 years. (RX00741 at 074).

330. Matt Wiljhelm served as CFO for Microporous. (Gilchrist, Tr. 418).

**Response to Finding No. 330:**

Complaint Counsel has no specific response.

331. Steve McDonald served as the Director of Sales for Microporous from 2002 to the Acquisition. (McDonald, Tr. 3781). Prior to becoming Director of Sales, McDonald had served as a sales representative for Microporous since August of 1997. (McDonald, Tr. 3780). Microporous' salesmen, Roger Berger and Cobb Rogers, reported directly to McDonald. (McDonald, Tr. 3782). McDonald currently serves at Daramic as a Sales Manager, North America. (McDonald, Tr. 3783).

**Response to Finding No. 331:**

Complaint Counsel has no specific response.

d. Manufacturing Plants

332. Prior to the Acquisition, Microporous supplied separators from its only manufacturing facility in Piney Flats, Tennessee. (Godber, Tr. 276-78; PX1788 at 004; Gaugl, Tr. 4601; McDonald, Tr. 3791). This manufacturing facility first became operational in 1974. (PX1788 at 004).

**Response to Finding No. 332:**

The proposition in this finding is contradicted by the record evidence. Microporous also has a facility in Feistritz, Austria, which has two PE lines capable of producing both CellForce and pure PE product. (Gilchrist, Tr. 312, 558-59; Trevathan, Tr. 3714; Gaugl, Tr. 4551). At the time of the acquisition, Mr. Gilchrist considered Microporous at the preoperational phase where it was making sure the equipment was aligned properly, the motors turned in the right directions, the different components functioned as they should have. Moreover, he thought "within a few days even, maybe no more than a week after the acquisition, we actually ran the first product through the line." (Gilchrist, Tr. 334-35). In fact, Daramic first produced separators on one of those lines in March of 2008. (Gaugl, Tr. 4601).

333. The facility actually consists of two plants. (Gilchrist, Tr. 311). The first plant (the "rubber plant") houses the ACE-SIL® and FLEX-SIL® lines. (Gilchrist, Tr. 311; Hauswald, Tr. 999-1000).

**Response to Finding No. 333:**

The proposition in this finding is contradicted by the record evidence. The plant in Piney Flats includes a building for the manufacture of Flex-Sil and Ace-Sil, and an adjoining building for the manufacture of CellForce. The CellForce separators made in the adjoining building consist of PE and Ace-Sil dust, which is ground up Ace-Sil product from next door. (Gilchrist, Tr. 312). The two buildings have never operated "independently." (Gaugl, Tr. 4641). At the Piney Flats plant facility, Microporous operated three production lines - one line for each of its three products (*i.e.*, Flex-Sil, Ace-Sil and CellForce). (Gilchrist, Tr. 311; *see* PX0078, *in camera*). The two buildings share the same plant manager and same administrative office. (Gilchrist, Tr. 311, 539).

334. The second plant (the "PE plant") houses a PE line on which CellForce is made. (Gilchrist, Tr. 311; Hauswald, Tr. 999-1000). The PE plant became operational in 2001. (McDonald, Tr. 3790). It houses a single PE line purchased from Jungfer in 2000 for \$5.4 million. (Gilchrist, Tr. 549-50; Gaugl, Tr. 4533-34). Jungfer was an Austrian company that manufactured separators as well as sold turn-key PE lines for purchase by other separator manufacturers. (Gaugl, Tr. 4531). The PE line at Piney Flats was installed under the direction of Hans-Peter Gaugl in 2000. (Gilchrist, Tr. 320; Gaugl, Tr. 4533-34)

**Response to Finding No. 334:**

The proposition in this finding is contradicted by the record evidence. The plant in Piney Flats includes a building for the manufacture of Flex-Sil and Ace-Sil, and an adjoining building for the manufacture of CellForce. The two buildings have never operated "independently." (Gaugl, Tr. 4641). The CellForce separators made in the adjoining building consist of PE and Ace-Sil dust, which is ground up Ace-Sil product from next door. (Gilchrist, Tr. 312). At the Piney Flats plant facility, Microporous operated three production lines - one line for each of its three products (*i.e.*, Flex-Sil, Ace-Sil and CellForce). (Gilchrist, Tr. 311; *see* PX0078, *in camera*). The two buildings share the same plant manager and same administrative office. (Gilchrist, Tr. 311, 539).

335. The rubber plant and PE plant in Piney Flats are distinct plants producing unique products - the production lines are not interchangeable and the products are not economic substitutes. (Gilchrist, Tr. 349). While it would be possible for personnel at the PE plant to

operate another PE plant, it would be impossible for the people who run the PE line to run the ACE-SIL® or FLEX-SIL® lines at the rubber plant. (Gilchrist, Tr. 349).

**Response to Finding No. 335:**

The proposition in this finding is contradicted by the record evidence. The plant in Piney Flats includes a building for the manufacture of Flex-Sil and Ace-Sil, and an adjoining building for the manufacture of CellForce. The two buildings have never operated “independently.” (Gaugl, Tr. 4641). The CellForce separators made in the adjoining building consist of PE and Ace-Sil dust, which is ground up Ace-Sil product from next door. (Gilchrist, Tr. 312). At the Piney Flats plant facility, Microporous operated three production lines - one line for each of its three products (*i.e.*, Flex-Sil, Ace-Sil and CellForce). (Gilchrist, Tr. 311; *see* PX0078, *in camera*). The two buildings share the same plant manager and same administrative office. (Gilchrist, Tr. 311, 539). The record evidence demonstrates CellForce is an economic substitute for Flex-Sil. (PX0033 at 38-39, *in camera*; Simpson, Tr. 3315-3316, *in camera*).

336. The PE line is capable of producing both CellForce and a pure PE product (e.g., SLI), but Microporous’ only significant sales from the line were of the CellForce product. (McDonald, Tr. 3903; Gilchrist, Tr. 300-01, 312; Gaugl, Tr. 4551) Microporous had not been successful in producing a pure PE product. One commercial run of pure PE was produced for Johnson Controls in late-2003 into early-2004 for an SLI end use, but Johnson Controls ultimately did not purchase these separators. (McDonald, Tr. 3792-95; RX77). The product was then tested and approved by both Douglas Battery and Voltmaster. (McDonald, Tr. 3795-96). Consequently, Microporous made a one time sale of the product to Voltmaster with no intention of making any future sales at that time. (McDonald, Tr. 3796-98; PX0921 (McDonald IH at 34-37), *in camera*).

**Response to Finding No. 336:**

The assertion that Microporous had not been successful in producing a pure PE product is contradicted by the record evidence. Prior to the acquisition, Microporous had manufactured and sold SLI separators in North America and considered itself a competitor in that market. (Gilchrist, Tr. 308, 311, 313, 341-342). Daramic market share charts for SLI in North America give MPLP a 4 percent share of SLI sales, Entek 49 percent, and Daramic 47 percent, but nothing to any Asian producer. (PX0264 at 003).

337. In February of 2008, Microporous was in the process of building a second manufacturing facility in Feistritz, Austria. (Gilchrist, Tr. 334). The facility in Feistritz currently has two PE lines capable of producing both CellForce and pure PE product. (Gilchrist, Tr. 312, 558-59; Trevathan, Tr. 3714; Gaugl, Tr. 4551). Both lines were installed under the direction of Gaugl. (Gaugl, Tr. 4536-37). As of the time of the acquisition, the plant in Feistritz, Austria was not yet operational. (Gilchrist, Tr. 334-35). Daramic first produced separators on one of those lines in March of 2008. (Gaugl, Tr. 4601). { [REDACTED] } (Hauswald, Tr. 923-24, *in camera*).

**Response to Finding No. 337:**

The proposition that the second line was not operational until Daramic moved production from its existing plants is contradicted by the record evidence. At the time of the acquisition, Mr. Gilchrist considered Microporous at the preoperational phase where it was making sure the equipment was aligned properly, the motors turned in the right directions, the different components functioned as they should have. Moreover, he thought “within a few days even, maybe no more than a week after the acquisition, we actually ran the first product through the line.” (Gilchrist, Tr. 334-335). In fact, Daramic first produced separators on one of those lines in March of 2008. (Gaugl, Tr. 4601).

e. Sales

338. Before its Acquisition by Polypore, all of Microporous sales were of rubber or rubber-based separators. (Gilchrist, Tr. 557). In 2007, { [REDACTED] } (RX01120, *in camera*). { [REDACTED] } (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*). { [REDACTED] } (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*).

**Response to finding No. 338:**

The first sentence of this finding is contradicted both by Daramic employee testimony and its documents. Prior to the acquisition, MPLP made commercial PE separator sales to a company called Voltmaster for the automotive SLI application. (PX0921 (McDonald, IHT. at 34, *in camera*); PX0131 at 016; PX0264 at 003).

339. { [REDACTED] } (RX01120, *in camera*). { [REDACTED] }

[REDACTED] } (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*).

[REDACTED] } (RX01120, *in camera*).

**Response to Finding No. 339:**

Complaint Counsel has no specific response.

340. Historical worldwide sales of [REDACTED]

[REDACTED]

[REDACTED] } (RX01120, *in camera*; McDonald, Tr.3855-57, *in camera*).

**Response to Finding No. 340:**

Complaint Counsel has no specific response.

341. [REDACTED] } (RX01120, *in camera*; McDonald, Tr. 3854-57, *in camera*). In fact, in 2008, [REDACTED]

[REDACTED] } (RX01120, *in camera*; McDonald, Tr. 3854-57, *in camera*).

**Response to Finding No.341:**

Complaint Counsel has no specific response.

342. Microporous shipped products from its facility in Piney Flats, Tennessee to Mexico, South America, Europe, Asia, and Africa prior to the acquisition. (McDonald, Tr. 3790-91; Gilchrist, Tr. 540-41). In fact, approximately 60 to 75 percent of the volume produced on the PE line at Piney Flats was shipped to Europe prior to the Acquisition. (Gilchrist, Tr. 540; Trevathan, Tr. 3774; Gaugl, Tr. 4555).

**Response to Finding No. 342:**

The vast majority of the product shipped to Europe from Piney Flats prior to the acquisition [REDACTED] (PX0949 at 224-233). This shipping pattern was part of the reason for MPLP's expansion into Europe initially. [REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2142, *in camera*). MPLP and Enersys

{ [REDACTED] } (PX1200 at 001, *in camera*). { [REDACTED] }

[REDACTED]

[REDACTED] } (Axt, Tr. 2141, *in camera*). { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

(PX1200 at 002-003, *in camera*).

343. Based on the above findings concerning its sales, the Court finds that any competition Microporous generated in PE separators in North America was insignificant.

**Response to Finding No. 343:**

MPLP participated in the PE separator market prior to its acquisition by Daramic. (*See*

response to Finding No. 338.)

f. **Pricing**

344. Prior to 2004, Microporous had not increased prices for approximately 10-years despite escalating energy and raw material costs. (Trevathan, Tr. 3576-77). Consequently, Microporous experienced a steady decline in margins throughout this period. (Trevathan, Tr. 3577).

**Response to Finding No. 344:**

Prior to its acquisition by Daramic, MPLP was a profitable company. (Trevathan, Tr.

3577).

345. Starting in July of 2004, Microporous announced a series of price increases to cover escalating costs. (McDonald, Tr. 3803-05; McDonald, Tr. 3850, *in camera*; RX01272, *in camera*). Microporous never supplied cost documentation to any customer to justify those increases. (McDonald, Tr. 3805). Microporous announced the following price increases from 2004 until 2006:

- a. In July of 2004, Microporous announced a price increase of 6.5% on FLEX-SIL® and ACE-SIL® products to all customers.

(RX00859; McDonald, Tr. 3803). This increase became effective on August 30, 2004. (McDonald, Tr. 3803-04).

b. In August of 2005, Microporous announced a 15% increase on the ACE-SIL® product. (RX00861; McDonald Tr. 3804). This increase became effective on October 17, 2005. (RX00861; McDonald, Tr. 3804).

c. In January of 2006, Microporous announced a price increase of 6.5% for FLEX-SIL® and 5.5% for CellForce. (RX00860; McDonald, Tr. 3804-05). This price increase became effective on March 6, 2006. (RX00860; McDonald, Tr. 3805).

d. In August of 2007, Microporous not only raised prices but also announced a rubber surcharge component for future pricing. (RX00084; McDonald, Tr. 3805-06). In its price increase letter to customers, Microporous announced a 12% increase for FLEX-SIL® and 4% increase for CellForce effective October 15, 2007. (RX00084; McDonald, Tr. 3806-07). The rubber surcharge was to become effective on January 1, 2008. (RX00084; McDonald, Tr. 3807). The rubber surcharge sought to offset the volatile nature of the price of rubber at the time. (McDonald, Tr. 3806).

**Response to Finding No.345:**

Complaint Counsel has no specific response.

346. Despite these attempts to recover costs through price increases and surcharges, Microporous was not always successful. (McDonald, Tr. 3907-08; Gilchrist, Tr. 376, 378-379). Customers, particularly Trojan, approached each announced price increase as a negotiation. (Gilchrist, Tr. 377-379, 515-517). Some customers refused to pay any increase at all. (Gilchrist, Tr. 572, 377-79; McDonald, Tr. 3807-10).

**Response to Finding No. 346.**

Complaint Counsel has no specific response.

347. EnerSys, Exide, and Trojan each resisted the price increase and rubber surcharge announced in August 2007. (McDonald, Tr. 3807-16; RX00856, RX01034; RX00228, *in camera*; RX00084; RX00210; RX00653; RX00560).

**Response to Finding No. 347:**

Complaint Counsel has no specific response.

348. EnerSys refused to accept the price increase or the rubber surcharge. (McDonald, Tr. 3807). Microporous attempted to negotiate with EnerSys, but EnerSys was not receptive to these attempts. (McDonald, Tr. 3852-53; RX0028, *in camera*; RX00228, *in camera*; RX00210) [REDACTED]

{ (McDonald, Tr. 3852-53, *in camera*). }

{ (McDonald, Tr. 3852, *in camera*). }

{ (McDonald, Tr. 3853, *in camera*).

When Microporous again approached EnerSys about the surcharge in a December 13, 2007 email, Larry Axt responded on behalf of EnerSys stating, "I am not accepting this rubber escalator regarding CellForce. Do not push EnerSys further or else your volume will be in jeopardy." (RX00210 at 001; McDonald, Tr. 3807-08).

**Response to Finding No. 348:**

Complaint Counsel has no specific response.

349. Exide was unhappy with the price increase and a negotiation between the parties resulted. (McDonald, Tr. 3808). Microporous agreed to a delay for the increase until December and split it up into two time frames. (RX00653; McDonald, Tr. 3808-09). The first part of the increase became effective December 1, 2007, and was 4% for FLEX-SIL® and 10% for ACE-SIL®. (RX00653; McDonald, Tr. 3809). The second part of the increase became effective April 1, 2008, and was 1.5% for FLEX-SIL® and 2% for ACE-SIL®. (RX00653; McDonald, Tr. 3809). Despite this agreement, around February of 2008, Exide started to short pay invoices by the amount of the increase. (McDonald, Tr. 3810).

**Response to Finding No. 349:**

Complaint Counsel has no specific response.

350. Trojan also bucked the increase despite its long-standing relationship with Microporous. (RX00856; Godber, Tr. 201; Gilchrist, Tr. 515-16, *in camera*; McDonald, Tr. 3812-3816).

When Microporous first announced the increase, Trojan responded:

Roger – I know that you claim that you are just the messenger here but you can send a message to the board that this one will not fly, and will permanently change our relationship going forward. This is a 100% slap in Trojan's face. There is absolutely no justification for this increase, and we know it. This is the most broad, lame price increase letter I have ever read.

(RX00560 at 001).

**Response to Finding No. 350:**

Complaint Counsel has no specific response.

351. When Microporous tried to explain the increase, Rick Godber, Trojan's CEO, responded "This is bullshit – probably an outgrowth of our meetings and greedy new owners." (RX00856).

**Response to Finding No. 351:**

Complaint Counsel has no specific response.

352. While Trojan never tested other products as substitutions for Microporous, they continued to refuse the increase. (RX00558 at 001). After much resistance, a negotiation ensued and Trojan and Microporous agreed to delay the price increase to December 2007 and then split the price increase between December 2007 and December 2008. (PX1664 at 001; McDonald, Tr. 3812-3816). This increase was only effective through 2008, not through 2009 as well. (McDonald, Tr. 3816).

**Response to Finding No. 352:**

The contention in this finding is patently false. While Trojan was resisting MPLP price increases it had qualified Daramic's HD separator. Trojan successfully used HD as leverage in negotiations with Microporous **in 2007 when Microporous attempted to impose a base price increase of 6 percent on all of Trojan's Flex-Sil separators, and 4% on all of Trojan's CellForce separators.** (Godber, Tr. 293-295; PX1664; PX0428 at 001, 003, *in camera*). The price increases covered all of the separators that went into Trojan's OE and aftermarket golf batteries. (Godber, Tr. 293-295). { [REDACTED] [REDACTED] [REDACTED] } (Godber, Tr. 204-205; *see also* PX0428 at 001, *in camera* { [REDACTED] [REDACTED] [REDACTED] }). A Trojan internal email exchange confirms that at this time, Trojan was contemplating HD as an alternative on some of its product lines and was also contemplating giving up the exclusive separator design that Microporous provided Trojan in return for its sole source commitment. (Godber, Tr. 206-207; PX1663).

{ [REDACTED] } (Godber, Tr. 214-215; Gilchrist, Tr. 408-

410, 526, *in camera*; PX1664,

).

[REDACTED] } (Gilchrist, Tr. 410, 526, *in camera*). Mr. Godber's testimony and documentary evidence is further corroborated by testimony from Mr. Gilchrist who testified that Trojan used HD as leverage in pricing negotiations with Microporous, and indicated that Trojan would bring up HD "every time there was us instigating the need for a price increase." (Gilchrist, Tr. 371-372, 406).

353. Based on the foregoing findings, the Court finds that EnerSys, Exide and Trojan had significant power derived from their size and purchasing power and that they used such size and power to reject or reduce bona fide Microporous price increases and to constrain prices.

**Response to Finding No. 353:**

This finding is contradicted by evidence highlighted in previous responses. (*See Responses to Findings Nos. 344-352*).

g. Development Projects

(a) Project Einstein

354. [REDACTED] } (McDonald, Tr. 3862, *in camera*). Microporous also discovered that this technology was not suited for PE separators because of the additives and was better suited for AGM separators. (Whear, Tr. 4735-37). [REDACTED] } (McDonald, Tr. 3862, *in camera*). In fact, George Brilmyer, Director of Research and Development, was never ever asked by Complaint Counsel about Project Einstein during his testimony at the hearing. (*See Brilmyer, Tr. 1825-1927*).

**Response to Finding No. 354.**

The citation does not support the proposition that Einstein was not going to be used in PE applications. The testimony cited states Mr. Whear's opinion of what Dr. Brilmyer thought. This is hardly evidence worthy of establishing a factual finding. Dr. Brilmyer was not questioned on the innovation projects other than LENO due to severe time restrictions.

(b) Project LENO

355. { [REDACTED] } (McDonald, Tr. 3863, *in camera*). LENO stood for "low ER, no oil." (Brilmyer, Tr. 1836).

**Response to Finding No. 355:**

Project LENO was conceived by Rick Wimberly and George Brilmyer at the request of EnerSys who had asked for a MPLP to create a product to replace Daramic's Darak separator used primarily in gelled stationary batteries in Europe. (Gilchrist, Tr. 353-354; Brilmyer, Tr. 1835-1836). After developmental work had begun, the idea to leverage the LENO team's efforts to develop a replacement for Daramic PE in the North American flooded UPS market was embarked upon as a parallel effort within the overall LENO project. (Brilmyer, Tr. 1836-1837, 1839-1840).

356. Project Leno, the Darak replacement project, was specifically directed at gel products. (Brilmyer, Tr. 1856).

**Response to finding No. 356:**

Project LENO *began* as a DARAK replacement project. As previously stated, efforts quickly turned to developing a PE separator for flooded lead-acid batteries that would not suffer from the black scum formation as PE separators are known to do. This 'White PE' was another name for the LENO project. Part of the LENO project goal was to find a solution to the black scum problem inherent in UPS batteries that used PE separators. White PE was a variation on the low ER no oil theme originally intended to become a replacement- for Daramic's DARAK product, commonly used in gelled batteries. (Brilmyer, Tr. 1837, 1839-1840).

357. Microporous developed this concept after being approached by EnerSys, which was looking to find a substitute for DARAK. (McDonald, Tr. 3863, *in camera*; Brilmyer, Tr. 1839). This project started at Microporous in November or December of 2006. (Brilmyer, Tr. 1836).

**Response to Finding No. 357:**

Complaint Counsel has no specific response.

358. { [REDACTED] } (McDonald, Tr. 3863, *in camera*).

**Response to Finding No. 358:**



2407-08, *in camera*). The internal estimates of LENO's success were so high in fact that Microporous had already made capital expenditures in its European facility, and was planning on additional expenditures at its United States facility, in anticipation of separator sales from project LENO as early as late 2008 or early 2009. (Brilmyer, Tr. 1858; PX0664 at 002, *in camera*). The testing that the LENO project team had conducted was progressing very well before the merger. (Brilmyer, Tr. 1856-1857). The suggestion that LENO did not meet expectations is belied by the fact that the testing necessary for definitively deciding whether or not LENO met expectations had not yet been complete. Life-testing takes two years to complete for UPS batteries. (Brilmyer, Tr. 1902). The fact was, Daramic had decided that their own Darak product, which is twice as expensive and [REDACTED] was all it was willing to offer Enersys for its black scum problem. (Gagge, Tr. 2528-2529, *in camera*; PX0579 at 003, *in camera* (October 06, 2008 internal Daramic email discussing the LENO project and its potential importance at EnerSys) ([REDACTED] [REDACTED])).

361. [REDACTED] (Hauswald, Tr. 1099; Burkert Tr. 2407-08, *in camera*; RX1293, *in camera*; RX1296, *in camera*; Whear, Tr. 4736).

**Response to Finding No. 361:**

This finding contradicts the previous finding and mischaracterizes the testimony of Mr. Burkert. For instance, Mr. Burkert testified that as far as EnerSys's *internal* testing of the material revived from MPLP, *that* testing was still ongoing and was proceeding without the contribution of Daramic, who [REDACTED] [REDACTED] (PX0913 (Whear, Dep. at 197, *in camera*); Whear, Tr. 4825, *in camera*). As a final solution Daramic offered the Darak product as an alternative to EnerSys. (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200, *in camera*)). Daramic had little incentive to find a fix since it saw [REDACTED] separators in UPS.

(PX0579 at 003, *in camera* [REDACTED])

[REDACTED]

[REDACTED])

(c) White PE

362. [REDACTED] (Brilmyer, Tr. at 1837; Whear, Tr. 4729; PX663-0024, *in camera*; RX1299, *in camera*). [REDACTED] (McDonald, Tr. 3865, *in camera*).

**Response to Finding No. 362:**

See response to Finding No. 356.

363. [REDACTED] (McDonald, Tr. 3866, *in camera*). [REDACTED] (McDonald, Tr. 3866, *in camera*). [REDACTED] (McDonald, Tr. 3866, *in camera*). [REDACTED] (McDonald, Tr. 3866-67, *in camera*). [REDACTED] (McDonald, Tr. 3867, *in camera*). [REDACTED] (McDonald, Tr. 3868-69, *in camera*; RX1297, *in camera*) and samples were delivered to EnerSys. (RX1028; RX1299, *in camera*).

**Response to Finding No. 363:**

The building of the pilot extractor was the last effort Dr. Brilmyer succeeded in implementing before leaving the company. (Brilmyer, Tr. 1919-1920). The material that EnerSys is testing was created by MPLP as an independent entity.

364. [REDACTED] (McDonald, Tr. 3869, *in camera*).

**Response to Finding No. 364:**

The preliminary results confirm that MPLP had created a successfully competitive product with which to challenge Daramic's hegemony in the UPS market and win first EnerSys's business and then that of other UPS customers in North America. (See Brilmyer, Tr. 1834 (Dr. Brilmyer stated that Daramic held 95% of the north American market for separators for flooded

UPS batteries)). The LENO team at Microporous was eventually successful in discovering the root cause and a solution to the black scum problem and was committed to creating a product that would end EnerSys's black scum problem and would have continued to collaborate with EnerSys on this problem had MPLP not been acquired by Daramic. (Brilmyer, Tr. 1855). MPLP had in fact discovered what it believed to be a solution to the black scum problem but had not the opportunity due to the acquisition to follow-up on it. (Brilmyer, Tr. 1855).

365. The White PE project is ongoing today. (Hauswald, Tr. 1099; Burkert Tr. 2407-08, *in camera*; RX1293, *in camera*; RX1296, *in camera*; Whear, Tr. 4736).

**Response to Finding No. 365:**

{ [REDACTED] } (PX0913 (Whear, Dep. at 197, *in camera*); Whear, Tr. 4825, *in camera*)). As a final solution it offered the Darak product as an alternative to EnerSys. (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200, *in camera*)). There is little support for the LENO project among Daramic management since the goal of the project was to replace the costly, "very high-margin" Darak product with a less expensive, lower margin PE based separator. (Brilmyer, Tr. 1863-1864).

(d) CellForce in SLI

366. Prior to the Acquisition, Microporous had partnered with JCI to do some testing on CellForce for use in a unique and specialized SLI application called a "start-stop" battery. (PX2300 (Heglie, IH at 123); Gaugl, Tr. 4558). { [REDACTED] } (Whear, Tr. 4748-49, *in camera*). But it became clear as the project was underway that it "wasn't a high priority for JCI, and that we weren't working with the most important people at JCI. And in our [IGP's] opinion is they were viewing it as a speculative project, so they were dedicating minimal time and resources to it." (PX2300 (Heglie, IH at 130)). Neither JCI nor any other battery manufacturer ever approved CellForce for these specialized start-stop SLI applications. (Gaugl, Tr. 4558).

**Response to Finding No. 366:**

Complaint Counsel has no specific response.

367. Results from the testing varied and Microporous "was getting some positive results out of the tests, and then at different points, they weren't as positive." (PX2300 (Heglie, IH at 125)). { [REDACTED] }

(Whear, Tr. 4750, *in camera*). [REDACTED]  
[REDACTED] (Whear, Tr. 4750, *in camera*). Currently, [REDACTED]  
[REDACTED] (Whear, Tr. 4753, *in camera*).

**Response to Finding No. 367:**

Complaint Counsel has no specific response.

368. Based on the foregoing findings, the Court finds that no change has occurred with regard to development as the result of Polypore's acquisition of Microporous.

**Response to Finding No. 368:**

This is a legal conclusion unsupported by the evidence.

h. The Expansion

369. Discussions of expansion began around 2005. During this period the FLEX-SIL® line was running at nearly full capacity and the CellForce line began to approach full capacity. (Trevathan, Tr. 3579; PX0920 (Gilchrist, IH at 10-11), *in camera*).

**Response to Finding No. 369:**

This finding's contention that discussions of expansion began around 2005 is contradicted by the evidence that Microporous was considering expanding at the time it hired Peter Gaugl in mid-2001. Mr. Gaugl agreed that one of the reasons he took the job with Microporous was because Microporous was interested in expanding by putting in additional lines. (Gaugl, Tr. 4580). In May 2005, Daramic was aware that Microporous was considering expanding stating that the main disadvantage "if we do not acquire Amerace is that Amerace may continue their plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins." (PX0433 at 004 (emphasis in original)).

370. In late 2005, EnerSys approached Microporous about a possible long-term contract for supplying CellForce separators for motive applications out of Europe. (Trevathan, Tr. 3598). [REDACTED] (RX00206, *in camera*).

[REDACTED] (RX00207 at 010, *in camera*). [REDACTED]

[REDACTED] (RX00207 at 010, *in camera*).

**Response to Finding No. 370:**

This finding's suggestion that months passed between the EnerSys/Microporous MOU and the two signing a supply agreement, fails to recognize that a Force Majeure event delayed Microporous from obtaining several pieces of EnerSys's business until much later than the two had planned. (See CCFOF 1155-1165). In addition, the amendment to the Supply Agreement not only committed additional EnerSys business to Microporous, but also committed

{ [REDACTED] } (See CCFOF 672  
- 673; RX00207 at 010, *in camera*).

371. Despite the fact that capital would be required to execute the expansion required to fulfill this contract with EnerSys, Microporous did not obtain approval from its Board before entering into the Amendment. (PX2300 (Heglie, IH at 138-139, 164)). Board members were unhappy with Management, but they supported the contract because EnerSys was a very important customer. (PX2300 (Heglie, IH at 138-139, 164)).

**Response to Finding No. 371:**

This finding's proposition that capital would be required to execute the expansion is ambiguous and not supported by the testimony cited. Mr. Heglie testified that the EnerSys expansion "probably would involve the investment of additional capital," but he didn't state how much capital, or whether it was above the amount that would require Board approval. (PX2300 (Heglie, IH at 138)). Prior to entering into the amendment with EnerSys, the Microporous Board had already authorized the purchase of three lines (RFOF 374), and Mr. Gilchrist testified that the third line { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0920 (Gilchrist, IH at 57-58), *in camera* ; see also CCRF 373).

Moreover, the proposition that the Microporous's management had an obligation or duty to get Board approval is not supported by the evidence or the testimony cited. Mr. Heglie, a member of the Microporous Board, stated that although the amendment to the EnerSys contract committing Microporous to add a line in Piney Flats was a "surprise," he thought that Mike

Gilchrist as an officer of the company had the legal authority to execute the agreement.)

(PX2300 (Heglie, IH at 138).

In addition, there is no evidence that the Board members were “unhappy” with Microporous management and, contrary to Respondent’s contention, no Board member testified to being unhappy. First, Mr. Heglie testified that he was “surprised,” not “unhappy.” (PX2300 (Heglie, IH at 138, 164). Second, Mr. Gilchrist and Matt Wilhjelm, President and CFO of Microporous, respectively, sat on the Microporous Board. (Gilchrist, Tr. 419). There is no evidence that these Board members were “unhappy” with management. After all, they were the management. Finally, the propositions that the Microporous Board was not happy with management is contradicted by the draft mandate to Mr. Gilchrist from Mr. Heglie, “I would like to reinforce our confidence in the company at this time, as evidenced by the fact that we have supported the company (and provided the bulk of the capital) through the single biggest capital spending program in its history.” (PX092 at 001).

372. In early 2006, JCI also approached Microporous about the possibility of a seven-year supply agreement to supply approximately 22 million square meters of PE-separators for SLI applications. (McDonald, Tr. 3827; Trevathan, Tr. 3587, 3596). An MOU was signed in March of 2006. (McDonald, Tr. 3827). At this time, Microporous approached JCI about making an investment in Microporous, but JCI refused. (McDonald, Tr. 3827).

**Response to Finding No. 372:**

Complaint Counsel has no specific response.

373. The above discussions about adding one additional line in Tennessee became discussions of a three line expansion in Europe to supply EnerSys and JCI. (Trevathan, Tr. 3599). By 2006, at the request of JCI, the plan shifted to a three line expansion with one line in the U.S. and two in Europe. (Trevathan, Tr. 3601). There were also discussions of placing the third line in Austria. (Gaugl, Tr. 4561-4562).

**Response to Finding No. 373:**

This finding’s contention that none of the PE lines planned by Microporous for its three PE line expansions was slated to be installed in Piney Flats is contrary to the evidence. Mr. Gaugl testified that the third PE line, which was put on hold, was “ordered in a way to be

installed in the United States.” (Gaugl, Tr. 4563). Mr. Trevathan stated that “when we started ordering equipment, the plan for installation involved two complete lines going into the facility in Europe and one in the U.S.” (Trevathan, Tr. 3601). Moreover, Mr. Gilchrist testified that the third machine, which was basically purchased but not installed, became phase two of the expansion “which would be a second [PE/CellForce] machine in Piney Flats to { [REDACTED] } (PX0920 (Gilchrist, IH at 57-58), *in camera*). { [REDACTED] } (RX00207 at 010, *in camera*).

For purposes of this CCRF and the ones immediately below, reference to the “third line” means the line slated for Piney Flats, TN, which was one of the three lines authorized by IGP, and ordered and purchased for the Microporous expansion plan. (Gilchrist, Tr. 374-375 (“we bought three machines at one time, two for Austria and one to come into the United States”); Trevathan, Tr. 3600-3601; Gaugl, Tr. 4564; PX0950 at 067-069, *in camera*). In CCFOF 698, Complaint Counsel refers to this line as the fourth PE line, because had it been installed, Microporous would have had four PE/CellForce lines -- two PE/CellForce lines in Piney Flats, and two PE/CellForce lines in Austria. (CCFOF 698). In response to Complaint Counsel’s Interrogatories, Respondent refers to the third line as the { [REDACTED] } (PX0950 at 067, *in camera*). Microporous had spent approximately { [REDACTED] } on the third line. (PX0910 (Trevathan Dep. at 80-81), *in camera*). { [REDACTED] } (PX0957 at 007, *in camera*). Today, the third line { [REDACTED] }

[REDACTED]  
[REDACTED] }

(PX0910 (Trevathan Dep. at 83), *in camera*); see also CCFOF 698; PX0950 at 067-069, *in camera*; Trevathan, Tr. 3728).

374. In early December 2006, shortly after the acquisition of Microporous by IGP, management was given the authorization to begin purchasing equipment for three additional PE lines. (Trevathan, Tr. 3600).

**Response to Finding No. 374:**

Complaint Counsel has no specific response.

375. Around December 1, 2006, Larry Trevathan began to order the larger equipment requiring longer lead times, such as the extruder, the dryer, and the calender system for all three lines. (Trevathan, Tr. 3600; Gaugl, Tr. 4561). Other than ordering this equipment with long lead times, no other steps were taken to install the third line either in the United States or Austria. (Gaugl, Tr. 4563-64).

**Response to Finding No. 375:**

This finding is contradicted by the evidence. In addition to ordering the equipment for the third line, Microporous took additional steps to install the third PE line in Tennessee. Microporous hired an engineering firm, J.A. Street, to do designing and planning work, including drawing up blueprints, in preparation of installing the third line at Piney Flats. (Gaugl, Tr. 4574-4575). In fact, Mr. Trevathan agreed that he had done a lot of work on the expansion at Tennessee. (Trevathan, Tr. 3725). This included hiring J.A. Street to draft plans for the expansion and meeting with two people from the firm on four separate occasions. (Trevathan, Tr. 3725-26). Mr. Gilchrist testified { [REDACTED]

[REDACTED]  
[REDACTED] }

(Gilchrist, Tr. 374-375; PX0920 (Gilchrist, IH at 58-59), *in camera*). Respondent has admitted as much: { [REDACTED]

[REDACTED] } (PX0957 at 007, *in camera*).

376. Plans of expansion began to slow in early 2007 as negotiations with JCI became shaky. (Trevathan, Tr. 3601-02). Shortly after the February Board meeting, the Microporous Board instructed Larry Trevathan to discontinue or slow down the orders wherever possible for the third line planned for the U.S. (Trevathan, Tr. 3602-04, 3764; PX2300 (Heglie, IH at 185); PX0905 (Gaugl, Dep. 94)).

**Response to Finding No. 376:**

The evidence cited does not support the finding's assertion that "negotiations with JCI became shaky." In addition, the contention that Microporous's expansion plans slowed are contradicted by evidence that Microporous committed to [REDACTED] [REDACTED] } (RX0207 at 010, *in camera*), and would have continued its expansion plans, including those with Exide, had Daramic not acquired it. (Trevathan Tr. 3753-3754).

Expansion, including obtaining a position in SLI, was part of Microporous's Strategic Plan, which its Board supported. (CCFOF 664). In the fall and early winter of 2007, MPLP moved ahead with plans to expand. MPLP met several times with a building contractor, J. A. Street, and hired them to draw plans for additional PE capacity in their Piney Flats Facility. (Trevathan, Tr. 3725-3726, 3735-3736).

Specifically, with regard to the third line, Mr. Trevathan never stated that Microporous did not plan to take delivery of the equipment for the third line or install the third line. In fact, he testified that [REDACTED]

[REDACTED] } (PX0910 (Trevathan Dep. at 80-81), *in camera*). Microporous prepared for the installation of the third line and hired an engineering firm to draw up plans to accommodate the third line in Piney Flats. (Gaugl, Tr. 4574-4575). [REDACTED]

[REDACTED] } (PX0910 (Trevathan Dep. at 82), *in camera*).

By contract, Microporous was obligated to install another PE/CellForce line at Piney Flats for { [REDACTED] } (RX00207 at 010, *in camera*). Mr. Gilchrist testified that the third line

{ [REDACTED]

[REDACTED]

{ [REDACTED] } (PX0920 (Gilchrist, IH at 57-58), *in camera*).

{ [REDACTED]

[REDACTED] } (Gilchrist, Tr. 374-375, PX0920 (Gilchrist, IH at 58-59), *in camera*).

Respondent has admitted as much: { [REDACTED]

[REDACTED]

{ [REDACTED] } (PX0957 at 007, *in camera*).

377. { [REDACTED] } (Gilchrist, Tr. 503-04, *in camera*). The Microporous Board was also concerned about unattractive pricing under the contract proposed by JCI. (PX2300 (Heglie, IH at 151); PX2301 (Heglie, Dep. 132); RX00730). "JCI demanded lower prices than [Microporous] could produce and generate an acceptable profit." (PX2300 (Heglie, IH at 151)). Shortly after negotiations grew stagnant, JCI notified Microporous that they would not continue to negotiate a long-term supply agreement with Microporous and would pursue other supply options. (Trevathan, Tr. 3608-09; Gilchrist, Tr. 504, *in camera*; RX00047).

**Response to Finding No. 377:**

The finding's contention that JCI and Microporous did not reach a supply agreement because of the Microporous Board's concern regarding the prohibition on the sale of Microporous to a competitor, fails to take into account that JCI was also concerned about Daramic's arbitration against Microporous (Hall, Tr. 2699-2700). Likewise, the finding's contention that negotiations for supply ended are also contradicted by the evidence. While discussions about the possible supply of pure PE SLI separators to JCI did not continue past June 2007, discussions about Microporous possibly supplying deep cycle separators to JCI for use in JCI's golf cart batteries continued right up until the acquisition. (Hall, Tr. 2704-2705). Indeed, prior to the acquisition of Microporous, JCI was testing Microporous' CellForce separator for

use in JCI's golf cart applications because JCI wanted "to see competition" in its acquisition of golf cart separators. (Hall, Tr. 2704-2707). In addition, { [REDACTED]

[REDACTED] }  
(Gilchrist, Tr. 440-441, *in camera*; see also PX0601 at 002, *in camera* (April 2, 2008 email from

Daramic (after the acquisition) reporting that { [REDACTED]

[REDACTED] } )).

378. In March 2007, Microporous established a European entity Microporous Products GmbH and began taking strides to build a facility in Feistritz, Austria. (Trevathan, Tr. 3571-72).

**Response to Finding No. 378:**

This finding is contradicted by the testimony cited and by contemporaneous documents.

Microporous Products GmbH was established in March of 2006, not 2007. (Trevathan Tr. 3571-3572; PX0611 at 004). The Feistritz facility began producing commercial product two years later in March 2008 and started operating on a regular schedule in June 2008. (Gaugl, Tr. 4603).

379. Prior to the termination of negotiations with JCI, Exide approached Microporous regarding possible scenarios for an expansion opportunity if Microporous could supply separators at a reasonable price. (PX2300 (Heglie, IH at 152)). Exide approached Microporous about supplying approximately 22 million square meters of volume of SLI and industrial-type product. (McDonald, Tr. 3832, 3840; Trevathan, Tr. 3609-3610).

**Response to Finding No. 379:**

Complaint Counsel has no specific response.

380. From the beginning, discussions with Exide were tainted due to Exide's troubled financial past<sup>3</sup> and questions about its future viability. (Trevathan, Tr. 3610) Microporous required "very strong assurances" from Exide prior to undertaking an expansion so as to avoid "not having them either as a viable company to do business with or not following through on their agreement." (Trevathan, Tr. 3610).

**Response to Finding No. 380:**

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<sup>3</sup> In 2002, Exide filed Chapter 11 Bankruptcy. (RX01285).

The finding's statement that discussions with Exide were "tainted" is not supported by the evidence cited. (See Trevathan, Tr. 3610 (no suggestion that discussions were "tainted")). Mr. Trevathan testified that Microporous management had some concerns regarding Exide because it had just emerged from bankruptcy. (Trevathan, Tr. 3610). Nevertheless, Microporous worked with Exide up until the acquisition to become a supplier to Exide. (See CCFOF 604 – 623). Moreover, because Mr. Trevathan stated that Mr. Gilchrist was the point person in negotiations with Exide on the expansion, Mr. Gilchrist's testimony should be accorded greater weight on the Exide negotiations. (Trevathan, Tr. 3756). { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Gilchrist, Tr. 443-444, *in camera*).

381. [REDACTED] (Gilchrist, Tr. 525, *in camera*; Trevathan, Tr. 3611; RX01034 at 001).

**Response to Finding No. 381:**  
Complaint Counsel has no specific response.

382. After meetings in the late-spring and summer of 2007, Microporous sent an MOU and contract draft to Exide. (Trevathan, Tr. 3611). By its own terms, the MOU expired on August 31, 2007. Exide did not sign and return the non-binding MOU to Microporous until late September of 2007, long after it had expired by its own terms on August 31, 2007. (PX0056; Gilchrist, Tr. 474-76, *in camera*; RX399). Exide never returned or commented on the contract draft sent by Microporous. (McDonald, Tr. 3835; Trevathan, Tr. 3612, 3626, 3724). Through the fall 2007, no progress was made on an agreement with Exide. (McDonald, Tr. 3834). Exide's behavior was consistent with its past conduct. { [REDACTED] [REDACTED] } (Gilchrist Tr. at 487-90; *in camera*; RX1331; RX748).

**Response to Finding No. 382:**

Respondent's contention that Exide's behavior is consistent with its past conduct is ambiguous because it is unclear what conduct Respondent is referring to. To the extent Respondent is alleging that Exide was not negotiating in good faith with Microporous, such allegation is contradicted by substantial evidence. (See CCFOF 604-605, 609-611; 615-619; 621-623).

The reason Exide did not sign the MOU until late September 2007, was due to concerns at Exide over the potential for MPLP to have to disclose Exide's name to Daramic in connection with Daramic's lawsuit against MPLP. (Gillespie, Tr. 2971-2972; PX1080 at 007). However, after negotiating the MOU, Exide went forward with testing of MPLP's separator samples and developing specific pricing for the separators. (Gillespie, Tr. 2974). Exide personnel also met with MPLP personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. (Gillespie, Tr. 2975). Additionally, Exide was working throughout this period of time to get internal buy-in for the strategy to move forward with MPLP, including working on a red-lined draft of a supply contract. (Gillespie, Tr. 3075, 3077). In February 2008, Exide and MPLP extended their MOU. (Gillespie, Tr. 2976). At that point in time, Exide had every intention that they would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). At the February 2008 meeting between Exide and Microporous, just days before the acquisition, Microporous's president testified that { [REDACTED] } (Gilchrist, Tr. 447, *in camera*).

383. Because negotiations ceased with JCI, and an Exide commitment had not materialized, Microporous began looking for customers in both the U.S. and Europe in the fall 2007. (McDonald, Tr. 3830). Microporous had brief discussions with East Penn regarding SLI separators in the U.S., which Microporous had not produced commercially. (Trevathan, Tr. 3623; PX2300 (Heglie, IH at 186-187)). Discussions never went beyond preliminary stages and no MOUs, letters of interest, or contract drafts were exchanged. (Trevathan, Tr. 3623; Gilchrist, Tr. 503, *in camera*). Microporous had no discussion with Douglas Battery in 2007 or 2008. (Douglas, Tr. 4063).

**Response to Finding No. 383:**

The first sentence of this finding is not supported by the testimony cited. First, Mr. McDonald did not testify about Exide at the pages cited. (McDonald, Tr. 3830). Second, the testimony cited states that Microporous began approaching European customers in June or July, 2007, not in the Fall of 2007, and further, the testimony does not make any reference to U.S. customers at all. (McDonald, Tr. 3830). Third, any reference to an Exide commitment not materializing in June or July 2007, would make no sense because Exide had only begun its search for suppliers in the Spring of 2007, and Microporous only first responded to Exide's RFP in July 2007 with an MOU. (See CCFOF 604-605, 609, 611). Thus, for Respondent to allege that an Exide commitment had not materialized before there was an opportunity for a commitment to materialize is disingenuous. In fact, Microporous and Exide worked together to enter into a supply relationship up until the date of the acquisition. (See CCFOF 604 – 623). After negotiating the MOU, Exide went forward with testing of MPLP's separator samples and developing specific pricing for the separators. (Gillespie, Tr. 2974). Exide personnel also met with MPLP personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. (Gillespie, Tr. 2975). Additionally, Exide was working throughout this time period time to get internal buy-in for the strategy to move forward with MPLP, including working on a red-lined draft of a supply contract. (Gillespie, Tr. 3075, 3077). On February 14, 2008, just two weeks before the acquisition, Exide and MPLP extended their MOU. (Gillespie, Tr. 2976). At that point in time, Exide had every intention that it would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976).

With regard to the assertions in the second and third sentences that discussions with East Penn were "brief," the evidence contradicts this fact. (See CCFOF 624 – 629). Microporous and East Penn representatives visited each other's facilities to discuss the possible supply of PE SLI separators to East Penn in the Fall of 2007. (CCFOF 624-626). The East Penn representatives

that came to Microporous's facility included Roger Barr, VP of Automotive Manufacturing and Purchasing responsible for purchasing SLI separators, and Davis Knauer, VP of Automotive Engineering responsible for testing and qualifying of SLI products. (Leister, Tr. 3971-3976; 4011). The East Penn representatives indicated that East Penn might be willing to enter a long term contract with MPLP for the supply of PE SLI separators. (Leister, Tr. 4016-4017).

Following East Penn's visit to Piney Flats, Mr. Leister requested a price quote on 11 million square meters of PE SLI product from MPLP. (Leister, Tr. 4018). MPLP provided a price quote soon thereafter. (Leister, Tr. 4018). In late 2007, East Penn saw MPLP as a viable supplier for SLI separators. (Leister, Tr. 4018-4019). Up to the time of Daramic's acquisition of MPLP, East Penn had not ruled out the possibility of buying SLI separators from MPLP. (Leister, Tr. 4019).

Finally, the last sentence stating that Microporous had no discussion with Douglas Battery in 2007 or 2008, is also contradicted by the evidence. Douglas actually sought separators from Microporous in 2007 because it felt that Daramic's prices were "extremely high" and received lower prices from Microporous than from Daramic. (PX1810 at 001-002).

Douglas also sought a quote from Entek, but Entek was not interested. (PX1810 at 001-002).

Mr. Douglas testified that prior to the acquisition, both Daramic and Microporous made motive power separators, but that today, other than Daramic, there is no one else who sells a motive separator in North America. (Douglas, Tr. 4081, 4076).

384. Microporous solicited battery manufacturers throughout Europe to supply both SLI-type separators or separators for motive applications. (McDonald, Tr. 3830). These customers included: TAB Battery, Midac, Moll Battery, Fiamm, Inci Aku, Mutlu, Aktex, WESTA, ISTA, and Banner Batterie. (PX0126 at 002-04). Microporous was unable to secure a single MOU, commitment or supply agreement with any of these customers. (McDonald, Tr. 3831; Gilchrist, Tr. 539).

**Response to Finding No. 384:**

This finding's contention that Microporous was unable to secure a commitment to supply separators to any European customer is contradicted by the fact that just prior to the acquisition, Microporous had planned on selling SLI battery separators from its Feistritz facility, and it would have continued to pursue SLI separator business out of that facility had the acquisition not occurred. (Gaugl, Tr. 4626). It had ongoing discussion with customers and it was beginning customer trials. (Trevathan, Tr. 3631-32). Moreover, Daramic specifically identified various European customers who were at risk of loss to MPLP, including Midac, Germanos, TAB and Nuova Brescia (PX0258 at 002), and offered them the same contractual terms that it had offered to the North American customers identified in the MP Plan. (Roe, Tr. 1294). Daramic then entered contracts with { [REDACTED] } in Europe under the terms of the MP Plan. (Roe, Tr. 1353-1354, *in camera*): [REDACTED]

[REDACTED]  
[REDACTED] } (PX2001 at 003-004, *in camera*).

385. Because of its failure to secure any further business, Microporous never resumed consideration of the third line in either the U.S. or Austria (Trevathan, Tr. 3613-14).

**Response to Finding No. 385:**

This finding is contradicted by the fact that Microporous did in fact secure further business in the form of an amendment to the EnerSys contract requiring that an { [REDACTED] } (RX00207 at 010, *in camera*). Mr. Gilchrist stated that the third line was to become phase two of the MPLP expansion plan "which would be a second [PE/CellForce] machine in Piney Flats { [REDACTED] } (PX0920 (Gilchrist, IH at 57-58), *in camera*; Gilchrist, Tr. 374-375). { [REDACTED] } (Gilchrist, Tr. 374-375, PX0920 (Gilchrist, IH at 58-59), *in camera*). Respondent has admitted as much: { [REDACTED]

[REDACTED]

[REDACTED] } (PX0957 at 007, *in camera*).

(a) The Microporous Board's Pullback

386. At Microporous' Board's October 2007 meeting, significant Board concerns were discussed, including:

- a. Entek's European expansion and the impact that that would have on the Feistritz plan.
- b. The viability and health of the Microporous business. Microporous at that time was tracking below budget and was not meeting financial expectations set during the budgeting process.
- c. Microporous was experiencing significant increases in costs of raw materials which was contributing to a deterioration of the margins which were not being offset by price increases or reduction of costs on other parts of Microporous' operations.
- d. The necessity of reducing overhead including the possibility of cutting jobs.
- e. Whether there should be a pullback on Microporous' so-called expansion plans.

(Trevathan, Tr. 3623-24, 3628-30).

**Response to Finding No. 386:**

This finding's contention that the above "concerns" were discussed is

{ [REDACTED]

[REDACTED] } (PX0081, *in camera*). With regard to the findings last point, "Whether there should be a pullback on Microporous' so-called expansion plans,"

The Board presentation lists as { [REDACTED]

[REDACTED] } (PX0081 at 002, *in camera*). Nothing in the Board presentation discusses a pullback of the expansion. (PX0081, *in camera*).

Moreover, in the testimony Respondent points to for support for the "pullback" proposition, Mr. Trevathan stated twice that he did not believe that IGP would support an expansion while proposed merger talks with Daramic were pending: "IGP, the Board

members from IGP, were focusing on this entirely on selling the business and would very likely not move forward with expansion.” (Trevathan, Tr. 3623). Mr. Trevathan’s testimony is supported by Mr. Heglie from IGP, who testified that although the a draft mandate (*see* CCRF 387) did not state that IGP would not invest capital in Microporous while it was talking to Daramic, he “had a view that if we weren’t going to get paid by Daramic or get compensation for the capital investments, that we wouldn’t make them, and I believe Daramic understood that.” (PX2300 (Heglie, IH at 206)). Mr. Trevathan also testified that not only were the pending merger talks an issue that affected the expansion, but also the then pending arbitration was also of concern: “Well, the sale of the business to Daramic obviously was the key item there, but there was also concern expressed by the Board regarding the arbitration and whether or not Microporous would prevail in that arbitration . . . .” (Trevathan, Tr. 3623-3624). [REDACTED]

[REDACTED]  
[REDACTED] } (PX0081 at 002, *in camera*).

With regard to the findings allegation that the Entek expansion was a concern, the Board presentation suggests otherwise. The presentation references the Entek expansion and presents a slide showing [REDACTED] (PX0081 at 017-018, *in camera*). [REDACTED]

[REDACTED]  
[REDACTED] }  
(PX0081 at 018, *in camera*). [REDACTED]

[REDACTED]  
[REDACTED] } (PX0081 at 018, *in camera*).

Regarding Microporous's viability and health, deteriorating margins, or potential job cuts, the Board presentation is { [REDACTED] } (PX0081, *in camera*). However, any assertion that Microporous's ongoing viability was in question is clearly dispelled by its president, Mike Gilchrist, who testified that prior to the acquisition Microporous was in good financial shape, was profitable, and was not going to fold or go under because of the expansion that was taking place in Europe. (Gilchrist, Tr. 403). In fact, he stated: "We were growing. It was all upside potential for us." (Gilchrist, Tr. 403).

387. In fact, because of these circumstances, the Board had become very concerned about the expansion and made its position against further expansion clear in a memorandum titled Board Mandate dated November 14, 2007 ("the Mandate"), to Mike Gilchrist. (RX00401 at 001; PX2300 (Heglie, IH at 194-195)). The Mandate detailed the specific strategic direction for Microporous with specific instructions to Gilchrist as to what he could do, what he should be doing and what he could not do (RX00401 at 001):

**Response to Finding No. 387:**

This finding's contention that concern about the expansion led to "the mandate" are contradicted by the evidence that the Board never expressed the expansion as a "concern." (See CCRF 386; *see generally* CCFOF 684-691; 700-702). To the extent the Board considered an expansion pullback, it was in the context of the ongoing merger discussions with Daramic, which had begun three months earlier. (See CCRF 386; CCFOF 684, 700). Moreover, the document Respondent refers to as the "mandate" was a correspondence from Eric Heglie, who was Mike Gilchrist's main contact at IGP, "delineating a potential Board mandates to what the management team at Microporous should be focused on in the near term around this date [November 14, 2007]." (Gilchrist, Tr. 433-434). The draft itself speaks from the perspective of its primary author, Mr. Heglie (*e.g.*, "I am hopeful," I would also like), not from the perspective of the Board. (RX00401 at 001; PX2300 (Heglie, IH 194-195)). { [REDACTED] } (Gilchrist, Tr. 435, 498-501, *in camera*). In fact, on its face the document

states: "Mike, let's discuss this when you have a chance. I would like to add this as a resolution to the Board minutes from the October 17<sup>th</sup> meeting but welcome discussing these points with you prior to formalizing." (RX00401 at 002). [REDACTED] [REDACTED] (Gilchrist, Tr. 434, *in camera*).

Moreover, the finding's contention that the draft mandate was a set of specific instructions to Mr. Gilchrist on what he could and could not do, or what he should do, is also contradicted by the testimony of the mandate's principal author, Mr. Heglie. (PX2300 (Heglie, IH at 194-195)). Mr. Heglie testified that the draft mandate was not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65)). Nor did the draft mandate mean the Microporous should stop the work that it was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66)). There is nothing in the draft mandate that eliminated the possibility of Microporous moving forward in its desire to compete in the automotive separator market. (PX2301 (Heglie, Dep. at 67)). In fact, Mr. Heglie testified that he does not recall the Microporous Board ever communicating that Microporous could not compete in the automotive market. (PX2301 (Heglie, Dep. at 68)). Mr. Heglie further agreed that the draft mandate was not the last word on possible expansion for Microporous. (PX2301 (Heglie, Dep. at 69); RX00401 at 002; PX2300 (Heglie, IH at 197)).

388. The Board set out specific long-term strategic goals emphasizing Microporous' role as a "specialist player" in the battery separator industry (RC00401 at 001-002) encouraging Management to "grow upon Microporous' position as a *specialist* separator player, using Flex-Sil and CellForce as the foundation of growth." (RX00401 at 001 (emphasis in original)). The Board further clarified:

We continue to believe more long-term value will be created by focusing on growing through products that are materially differentiated from competing products. Clearly Microporous' understanding and knowledge of rubber-based technologies, as well as the proven electrochemical benefits of rubber, are core strengths that create meaningful differentiation from competition, and should continue to be leveraged as much as possible.

(RX00401 at 001).

**Response to Finding No. 388:**

The finding's contention that the draft mandate set out specific long term goals emphasizing MPLP's role as a "specialist player" is not supported by the evidence. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist, and it was never adopted by the Microporous Board as a resolution. (See CCRF 387). In addition, the draft mandate had a number of "Key Elements of Long-Term MPLP Strategy" that also included focusing on new products and improving productivity. (RX00401 at 001). It also stated that a pure PE strategy may be endorsed "where economically attractive long-term contracts are available." (RX00401 at 001).

389. The Board directed Microporous to leverage its existing strengths, not just become another player in the crowded PE market. (RX00401 at 001).

**Response to Finding No. 389:**

This evidence cited does not support Respondent's contention that the draft mandate directed Microporous not just to become another player in the crowded PE market. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist, and it was never adopted by the Microporous Board as a resolution. (See CCRF 387, 396). Far from discussing a "crowded" PE market, the draft mandate discusses only Daramic and Entek as other PE competitors. (RX00401 at 002).

390. Even more explicitly, the Board demanded that Management "avoid competition with larger, entrenched competitors with products that are not differentiated; this is particularly important when such strategies require large capital commitments. (RX00401 at 002).

**Response to Finding No. 390:**

This finding's contention that the Board "demanded" that MPLP "avoid competition . . ." is not supported by the evidence. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist, and it was never adopted by the Microporous Board as a resolution. (See CCRF 387, 396). In addition, had the Board issued a blanket demand, as

Respondent states, it then would not have needed to clarify when it applies. Second, the Board listed exceptions to the draft mandate, which included “where economically attractive long-term contracts are available.” (RX00401 at 002). According to Mr. Heglie, had “Microporous management brought the Board a long-term contract that the Board viewed as economically viable for an expansion into the PE SLI market, the Board would have still contemplated expanding.” (PX2301 (Heglie, Dep. at 72)).

391. The Board was explicit that:

Other than filling the 2<sup>nd</sup> line in Austria, the Board does not endorse a pure PE growth strategy competing head-to-head with larger competitors (i.e., Daramic, Entek). Some exceptions may be made to this (particularly in instances where PE is a bridge to a longer-term CellForce/differentiated product solution and where economically attractive long-term contracts are available), but these and any other exceptions must be approved by the Board on a case by case basis.”

(RX00401 at 002 (emphasis added)).

**Response to Finding No. 391:**

This finding’s contention that the “Board was explicit . . .” is not supported by the evidence. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist, and it was never adopted by the Microporous Board as a resolution. (See CCRF 387, 396). Moreover, the finding is contradicted by the testimony of Eric Heglie, the Microporous Board member who authored the mandate. (PX2300 (Heglie, IH 194-195)). Mr. Heglie stated that the Board was still open to the possibility of adding new PE lines in order to move into the PE SLI market. (PX2301 (Heglie, Dep. at 71-72)); *see also* PX2300 (Heglie, IH at 183)), (“I think the Board’s, my view, and I believe this is true of the IGP part of the Board’s view, is the SLI automotive market wasn’t as attractive as other market opportunities available for the company, but it was still a potential growth opportunity. It’s something that we continually evaluated and considered investment in at different points.”); CCFOF 685; 689; 691).

Moreover, but for the acquisition of Microporous by Daramic, the Microporous Board believed that growth opportunities would have continued to be a focus of IGP and Microporous. (PX2300 (Heglie, IH at 220-221)). In reaching that conclusion, Mr. Heglie and other Board members from IGP discussed where they saw Microporous going if there was not an acquisition by Daramic. (PX2300 (Heglie, IH at 219)). With regard to those discussions, Mr. Heglie provided the following testimony:

[W]e were still moving forward on at least a broad view of the investment thesis in the strategic plan. . . . evaluating growth opportunities with the company, trying to grow the company, trying to grow the cash flow, trying to improve the margins, trying to generate cash to pay down debt.

I'm sure we would have continued attempting to move forward on some of these customer opportunities that we had.

So I don't know that there was a major deviation from the original strategy. . . . But, again, it's really case-by-case, and we had plenty of opportunities on the radar screen, as we talked about.

(PX2300 (Heglie, IH at 219-220)).

392. The Board also set forth several "near-term" mandates related to the Austrian expansion. (RX00401 at 002).

Management must "fill out Line 1 with CellForce and Line 2 with PE in 2008 in volumes and pricing levels that generate attractive profits for the company. The longer term objective in Austria should be to convert Line 2 to CellForce or other specialty separator products."

Management must "prove out the financial viability of Lines 1 and 2 in Austria before further capital will be committed to the business in either Europe or the United States." (RX00401 at 002). (Emphasis added).

**Response to Finding No. 392:**

The finding's contention that the "Board also set forth . . ." is not supported by the evidence. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist and it was never adopted by the Microporous Board as a resolution. (See CCRF 387, 396).

393. The Board made clear that "Microporous cannot enter into sales contracts that bind the company to capital commitments without Board approval." (RX00401 at 002). Gilchrist understood the concerns raised by the Board and the need to fillout the Austria lines. (Gilchrist Tr. 494-95, 498-99).

**Response to Finding No. 393:**

The finding's contention that the "Board made clear that . . ." is not supported by the evidence. The mandate was a draft document that was a correspondence between Eric Heglie and Mike Gilchrist, it was never adopted by the Microporous Board as a resolution. (See CCRF 387, 396).

394. The Microporous Board was particularly concerned about further investments in the two lines to be built at Feistritz because of the company's financial performance relative to projections, the doubt regarding management's abilities to successfully execute the expansion plan, and particularly with respect to management's ability to fill the new lines. (Trevathan, Tr. 3630-31).

**Response to Finding No. 394:**

This findings contention that the MPLP Board was "concerned" about further investments in the two lines to be built at Feistritz is not supported by the testimony cited.

Moreover, this findings assertion is {

[REDACTED] } (PX0081, *in camera*; see also

CCRF 386). In addition, had the deal with Daramic fallen through, MPLP would have continued with its expansion plans including negotiations to expand for Exide. (Trevathan, Tr. 3753-3754).

Mr. Trevathan thought that MPLP was on its way to further improve profitability in the event that the merger with Daramic fell through. (Trevathan, Tr. 3750).

395. Of further concern was the fact that Microporous had only a "partial commitment" from EnerSys for one of the two Feistritz lines, and with respect to the Feistritz SLI line, Feistritz had no commitment or signed contract for that line. (Trevathan, Tr. 3631).

**Response to Finding No. 395:**

The assertion that the Board was concerned because the EnerSys business would have only partially filled a line at Feistritz and that the other line at Feistritz had no commitments is

{ [REDACTED]

[REDACTED] } (PX0081, *in camera*). Moreover, the evidence that the second line had no commitments or signed contracts, is contradicted by the fact that just prior to the acquisition, Microporous had discussions ongoing and had trials that were beginning with customers. (Trevathan, Tr. 3632). Microporous had planned on selling SLI battery separators from its Feistritz facility, and it would have continued to pursue SLI separator business out of that facility had the acquisition not occurred. (Gaugl, Tr. 4626). Moreover, Daramic specifically identified various European customers who were at risk of loss to MPLP, including Midac, Germanos, TAB and Nuova Brescia (PX0258 at 002), and offered them the same contractual terms to these customers that it had offered to the North American customers identified in the MP Plan. (Roe, Tr. 1294). Daramic then entered contracts with [REDACTED] [REDACTED] (Roe, Tr. 1353-1354, *in camera*). [REDACTED] [REDACTED] [REDACTED] } (PX2001 at 003-004, *in camera*).

396. As Complaint Counsel's compliant witness, Mike Gilchrist, tried to minimize the Mandate, characterizing it as a "draft." Gilchrist's testimony and Complaint Counsel's position on the Mandate are not credible for the following reasons:

- a. The clear language of the Mandate itself. (RX00401; RX00752, *in camera*; RX001174; Gilchrist, Tr. 435, *in camera*; RX00248)
- b. Trevathan's testimony about the Mandate and the emails he and Gilchrist exchanged about it. (RX00283-01-02; RX00402; Gilchrist, Tr. 435, *in camera*; RX00248; RX00284).

**Response to Finding No. 396:**

This finding's assertion that Mr. Gilchrist's statements regarding the mandate, including his statement that the mandate was a draft, are not credible is contradicted by the weight of the evidence. This finding is tantamount to a charge that Mr. Gilchrist had some motive to fabricate his testimony at trial. At trial, Respondent did not show Mr. Gilchrist was biased, nor could it since Mr. Gilchrist no longer works in the battery separator industry. (Gilchrist, Tr. 603). With

regard to Respondent's contention that the language of the mandate, or that Mr. Trevathan's testimony and the email exchanges between him and Mr. Gilchrist, somehow prove that Mr. Gilchrist's testimony is not credible, is not supported by the evidence, and is in fact contradicted by the evidence.

The problem with Respondent's allegation that Mr. Gilchrist is not credible or that Mr. Gilchrist had some improper motive to fabricate his testimony is that Mr. Gilchrist provided prior consistent testimony regarding the mandate at his investigational hearing when he was employed by Respondent and authorized by Respondent to make admissions on its behalf.

PX0920 (Gilchrist, IH 146), *in camera*). At his Investigational Hearing, Mr. Gilchrist stated that the { [REDACTED]

[REDACTED] } PX0920 (Gilchrist, IH 146), *in camera*). Moreover, the findings citation to Mr. Gilchrist's trial testimony is also consistent with his sworn investigational hearing testimony { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 435, *in camera*). Mr. Gilchrist testified: { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 435, *in camera*). Mr. Gilchrist testified at

trial that the { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 498, *in camera*; see also PX0089, *in*

*camera* ({ [REDACTED] }). On cross examination,

Respondent's counsel { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Gilchrist, Tr. 500-501, *in camera*).

Finally, Mr. Gilchrist's testimony and Complaint Counsel's position regarding the draft mandate are totally consistent with the testimony from Mr. Heglie, the author of the mandate and an MPLP Board member. (See generally CCFOF 684-691). Mr. Heglie testified that the mandate was not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65)). Nor did the mandate mean the Microporous should stop the work it was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66)). There is nothing in the mandate that eliminated the possibility of Microporous moving forward in its desire to compete in the automotive separator market. (PX2301 (Heglie, Dep. at 67)). In fact, Mr. Heglie testified that he does not recall the Microporous Board ever communicating that Microporous could not compete in the automotive market. (PX2301 (Heglie, Dep. at 68)). Mr. Heglie further agreed that the mandate was not the last word on possible expansion for Microporous. (PX2301 (Heglie, Dep. at 69); RX00401 at 002; PX2300 (Heglie, IH at 197)).

397. These same points were restated in ever more detail by the Board in reporting to the owners at IGP. In fact, many of these same points were restated in a subsequent document titled "Notes on Key Areas of Focus: IGP – Microporous Interaction" and dated December 3, 2007 ("December 3<sup>rd</sup> Memorandum"). (RX00248 at 001). While this memorandum was not circulated to Microporous management, it confirms and reiterates directives in the Mandate. (RX00248 at 001). For example:

a. Microporous Management was chastised for creating a "combative" relationship with the Board through "many mini-bomblets in communication", "digging up old bones", "lengthy emails that distract management and all recipients", and "a sense that many operating problems are the Board's to resolve." (RX00248 at 001).

b. The Board "cannot and will not tolerate the buildout of a management 'camp' vs. a Board 'camp' mentality (e.g. formal, 5-page, written response from 'management' on the Microporous Strategy Mandates memorandum)." (RX00248 at 001; *see also* RX00752, *in camera*).

c. The Board reiterated its commitment to the positions in the Mandate: [the] "Board (rightfully) expects positive and constructive implementation of decisions mutually taken and under-written, without constant resistance/feedback/interference." (RX00248 at 001).

**Response to Finding No. 397:**

Respondent's assertion that "these 'same points' were restated in even more detail by the Board in reporting to the owners at IGP" is meaningless, ambiguous, and not supported by the record. Respondent does not state what "same points" it is referring to. Assuming it is referring to all the "same points" it has attempted to make in its findings regarding the draft mandate, Complaint Counsel's reply findings have addressed those. (*See* CCRF 386-396).

Moreover, there is no evidence that RX00248 at 001, the document in which Respondent claims that many of these "same points" were restated "by the Board in reporting to the owners at IGP" was a Board document, or was ever presented to IGP. The IGP witness, Mr. Heglie, testified that he did not recognize the document. (PX2301 (Heglie, Dep. at 159-160)). While Respondent states that the document was not provided to Microporous management, it does not



would have discontinued its growth strategy through expansion as expressed in its strategic plans. As Mr. Trevathan stated twice, he did not believe that IGP would support an expansion while proposed merger talks with Daramic were pending: "IGP, the Board members from IGP, were focusing on this entirely on selling the business and would very likely not move forward with expansion." (Trevathan, Tr. 3623; *see also* Trevathan, Tr. 3624 (stating that "the sale of the business to Daramic was the key item" in his thinking as to why there would not be any movement forward with expansion.)). Mr. Trevathan's testimony is supported by Mr. Heglie from IGP, who testified that while merger discussions were occurring he "had a view that if we weren't going to get paid by Daramic or get compensation for the capital investments, that we wouldn't make them, and I believe Daramic understood that." (PX2300 (Heglie, IH at 206)).

399. Contrary to Gilchrist's belief that Microporous was in "good financial shape," the evidence indicates otherwise. (Gilchrist, Tr. 403; RX00248 at 001-002). While Management seemed content with growth in revenues only, IGP was "predominantly focused on cash flow growth" which takes into account those expenses associated with revenue. (PX2300 (Heglie IH at 62)). Inconsistently with the Board, Gilchrist, particularly, seemed to want "to grow for the sake of growth, and was not as focused on profitability as we [IGP] were." (PX2301 (Heglie, Dep. 149)).

**Response to Finding No. 399:**

The finding's assertion is not supported by the evidence relied on by Respondent. There is no question that Microporous was profitable prior to the merger. (Gilchrist, Tr. 403; Trevathan, Tr. 3577, 3652). There is simply no evidence that contradicts that Microporous was profitable prior to the merger. Moreover, as a matter of accounting, Mr. Heglie's testimony that the IGP was predominantly focused on cash flow growth is not inconsistent with growing revenues, as Respondent seems to claim. In addition, Respondent appears to have intentionally misquoted Mr. Heglie's testimony to the Court in order to support its false accusation that Mr. Gilchrist was not focused on profitability. Mr. Heglie did not testify that Mr. Gilchrist "was not as focused on profitability as we were." Rather, he testified that Mr. Gilchrist "wasn't as focused

on the profitability of that growth as we were.” (PX2301 (Heglie, Dep. 149)). The distinction is significant, and Respondent should know better.

400. Microporous’ revenues were below where IGP had projected upon acquiring the company in 2006 and also below Management’s internal forecasts. (Trevathan, Tr. 3628-29, PX 2300, (Heglie, IH at 72-73)). For example, during 2007, sales were below budget and not generating a return on capital for many of its products as expected by IG (RX00248 at 002; Trevathan, Tr. 3628-29). As sales declined in 2007 raw material costs continued to escalate contributing to the deterioration of margins. (Trevathan, Tr. 3629). Additionally, the Board questioned the financial viability of the Austrian expansion as the costs of the expansion soared substantially over budget without any long-term supply commitments in place. (RX00248 at 002).

**Response to Finding No. 400:**

This finding’s assertions are not supported by any of the documents or testimony cited.

Respondent’s finding states revenues were below forecasts, sales were below budget, and sales declined. The evidence cited makes no reference to sales or revenue numbers. The references speak to financial projections, without much mention of the specific type of measure, *e.g.*, profits, expenses, cost, or EBITDA. In fact, Microporous was selling all it could make and was expanding because it was running out of capacity. (Trevathan, Tr. 3578-3579, 3581-3582, 3773). In addition, Respondent’s contention that “sales declined in 2007” is without merit.

{ [REDACTED] } (See PX0078 at 019, *in camera*  
( { [REDACTED]  
[REDACTED] }); see also PX0949 at 224-  
225, *in camera* ( { [REDACTED] })). In addition, Respondent’s  
reference to RX00248 for support relating to what the Board thought, is misplaced. (See  
Response to CCRF 397; RX00248 at 001 (the Board’s “ultimate decision on strategy” is a “joint  
decision” only “after full discussion and vote” between the Board and MPLP management.)

401. The Microporous Board had also lost confidence in Management, particularly Mike Gilchrist. (RX00244; RX00401; RX00248, PX2300 (Heglie, IH at 58); PX2301 (Heglie, Dep. 161)). As Eric Heglie stated in his Investigation Hearing, “I think we generally discovered through our ownership that we had philosophical differences with Mike Gilchrist and the management team.” (PX2300 (Heglie, IH at 59)). These philosophical differences arose because

IGP's "view was a lot more driven by financial results and return on investment for different growth areas that we were contemplating. And I think there became a general view that management wasn't as focused on the return on investment and on the numbers or at least the risks associated with those numbers." (PX2300 (Heglie IH at 60)).

**Response to Finding No. 401:**

Respondent's assertion that the Microporous Board lost confidence in Management, is not supported by the documents or testimony cited. In fact, the one document Respondent cites to states "I would like to reinforce our confidence in the company at this time, as evidenced by the fact that we have supported the company (and provided the bulk of the capital) through the single biggest capital spending program in history." (RX00401 at 001). In addition Respondent's reference to the documents or testimony cited for any support relating to what the Board thought, is misplaced. (See Response to CCRF 397; RX00248 at 001 (the Board's "ultimate decision on strategy" is a "joint decision" only "after full discussion and vote" between the Board and MPLP management.)

402. IGP Board members had multiple discussions with Gilchrist "disagreeing with his general assessment of the competitive landscape of the market." (PX2301 (Heglie, Dep. p. 91)). IGP's Board members questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (PX2301 (Heglie, Dep. 164)). "Mike [Gilchrist] frequently blew comments out of proportion" (PX2300 (Heglie, IH at 84)).

**Response to Finding No. 402:**

The finding's assertion that Board members had multiple discussions with Gilchrist regarding his assessment of the competitive landscape is not supported by the testimony cited. Mr. Heglie stated that he recalls generally having discussions about the topic, but could not recall specific conversations. (PX2301 (Heglie, Dep. at 91-92)). There is absolutely no support for the proposition that multiple Board members had multiple discussions. In fact, Mr. Heglie testified that "I don't recall specific conversations with Gilchrist or with other Board members about that dynamic, but I don't -- but I don't know if I had those conversations or not." (PX2301 (Heglie, Dep. at 91-92)). With regard to the findings statement that Mr. Gilchrist blew things out of proportion, the witness that made that claim, stated that he was "totally speculating" with regard

to the document he was being questioned about. With regard to Mr. Gilchrist's veracity, the evidence supports finding that Mr. Gilchrist presented credible testimony throughout these proceedings. Mr. Trevathan, who reported to Mr. Gilchrist, testified that Mr. Gilchrist was honest with him. (Trevathan, Tr. 3649).

403. Yet, as Complaint Counsel's compliant witness, { [REDACTED] } (Gilchrist, Tr. 435, *in camera*). Most important, Gilchrist did not follow the Board's instructions and mandates. (RX00244 at 001; PX2301 (Heglie, Dep. 143)).

**Response to Finding No. 403:**

This finding's contention that IGP had lost confidence in Mr. Gilchrist or that the Board issued mandates and instructions that Mr. Gilchrist ignored are without merit. (See CCRF 396, 401). Mr. Gilchrist testified { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 436, *in camera*). { [REDACTED] } (Gilchrist, Tr. 435-436, *in camera*).

404. Mike Beaumont, an active Board member, wrote in an memorandum to Eric Heglie and Jeff Webb on October 19, 2007, "MG [Mike Gilchrist] does not (or will not) internalize the mandate from his shareholders." (RX00244 at 001; PX2301 (Heglie, Dep. 143)). Beaumont also stated that Mike Gilchrist does not seem to be "financially savvy" and that perhaps "we should put out feelers for a new CEO." (RX00244 at 003).

**Response to Finding No. 404:**

The finding's assertion that Mr. Beaumont is an "active" Board member is not supported by the evidence. With regard to the memo's comment about Mr. Gilchrist's inability to internalize the mandate, the memo states that it was "partly a communication issue on our side.... I didn't get the impression that Mike was given much direction at the last Board meeting." (RX00244 at 001). Importantly, this memo, supports Mr. Gilchrist's testimony that the mandate issued was a draft and not formalized or voted on by the Board (RX00244 at 001).

405. Instead of replacing Gilchrist, IGP sold the company to Daramic in part because of “philosophical differences with management.” (PX2301 (Heglie, Dep. 123-24)).

**Response to Finding No. 405:**

The assertion that the IGP sold Microporous to Daramic because it had philosophical difference with management is not supported by the evidence. Mr. Heglie listed a number of factors regarding why IGP sold the company to Daramic. (PX2301 (Heglie, Dep. 122-124). The primary reason according to Mr. Heglie was the significant time spent on the investment relative to its size. (PX2301 (Heglie, Dep. 122-124).

406. The Board also questioned a pure-PE growth strategy and felt that it was “just not practical to grow in every market.” (PX2300 (Heglie, IH at 62)). Board members from IGP were generally hesitant about producing pure PE separators since pricing is very competitive and margins are typically thin. (PX2300 (Heglie, IHT 196)). The Board saw the possibility of supplying CellForce or other differentiated products for SLI end uses only as a possible long-term goal for Microporous and that a successful outcome on the investment could be achieved without this type of expansion. (PX2300 (Heglie, IH at 161-62, 196-198); PX2301 (Heglie, Dep. 70)).

**Response to Finding No. 406:**

The finding’s contention that the Board questioned a pure-PE strategy is not supported by the evidence cited. (PX2300 (Heglie, IH at 62) (no mention of Board questioning pure-PE strategy)). Nor did the draft mandate represent the view of the Board regarding expanding into pure-PE for SLI. (CCRF 387, 390, 396). After the issuance of the “mandate” on November 14, 2007, the Microporous Board was still open to the possibility of moving into the . . . PE SLI market.” (PX2301 (Heglie, Dep. at 71)). Moreover, the Board was “still open to the possibility of adding new lines in order to move into the PE SLI market.” (PX2301 (Heglie, Dep. at 72); *see also* PX2300 (Heglie, IH at 183 (“I think the Board’s, my view, and I believe this is true of the IGP part of the Board’s view, is the SLI automotive market wasn’t as attractive as other market opportunities available for the company, but it was still a potential growth opportunity. It’s something that we continually evaluated and considered investment in at different points.”))). Had “Microporous management brought the Board a long-term contract that the Board viewed as



The finding's assertion that Exide and EnerSys were the only customers with significant enough volume to justify the expansion is also contrary to the evidence. In the United States, East Penn was a significant customer with which Microporous was discussing a supply relationship. (See generally, CCFOF 624-629). In fact, East Penn requested a quote on 11 million square meters, the equivalent of one MPLP PE line. (CCFOF 627).

The evidence also contradicts the finding's contention that the Board questioned Exide's viability as a customer and the negotiations went nowhere. Microporous worked with Exide up until the acquisition to become a supplier to Exide. (See CCFOF 604 - 623). Moreover, because Mr. Trevathan stated that Mr. Gilchrist was the point person in negotiations with Exide on the expansion, Mr. Gilchrist's testimony should be accorded greater weight on the Exide negotiations. (Trevathan, Tr. 3756). According to Mr. Gilchrist there was {

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gilchrist, Tr. 443-444, in camera).

409. Based on the above findings, the clear language of the Mandate, the Court finds that Gilchrist's testimony about the Mandate is not credible, that the Mandate was the specific instruction of the Microporous Board of Directors to management, and that the Microporous Board of Directors had determined that the policy and strategic elimination of Microporous was as set forth in the Mandate. Accordingly, the Court further finds that any expansion beyond Feistritz was unlikely, particularly by expansion in North America.

**Response to Finding No. 409:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 369-408. In addition, the finding's conclusion that the Microporous Board of Directors had determined the "strategic elimination" of Microporous is not supported by the language of the draft mandate.

Daramic was the entity that instigated the strategic elimination of Microporous as a competitor. (See CCFOF 646-656, 764-787).

410. Thus, Trevathan, Gilchrist and Wilhjeim continued their "smokescreen." (RX00402).

**Response to Finding No. 410:**

This finding is meaningless, nonsensical and contradicted by the evidence that Microporous management was proceeding in "good faith" with Exide on its potential expansion to supply it with PE SLI separators. (PX2301 (Heglie, Dep. at 75-76)). Because Mr. Gilchrist was concerned that the acquisition by Daramic { [REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 447-449, *in camera*; RX00403). As Mr. Gilchrist testified:

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 449, *in camera*).

411. As a result of the discussions at the Board level and ongoing, Gilchrist and Trevathan began to communicate among themselves about what they later referred to as "our ruse" and "smokescreen." (RX00283 and RX00402). Trevathan and Gilchrist had decided that Microporous needed to have "parallel stories" on parallel paths to tell Microporous employees, Microporous suppliers and Daramic, with whom Microporous had not revealed any change in plans. (Trevathan, Tr. 3621, 3637).

**Response to Finding No. 411:**

This finding's assertion that "parallel stories" were embarked upon because Microporous had changed its expansion plans, but intentionally failed to reveal such changes to its employees, suppliers, and Daramic, is contradicted by the evidence. Microporous never changed its expansion plans. (See generally CCRF 369-409). Right up to the date of the deal, MPLP had no assurance that the deal would be consummated with Daramic. (Trevathan, Tr. 3753). And had the deal fallen through, MPLP would have continued with its expansion plans including those

with Exide. (Trevathan, Tr. 3753-3754). Mr. Gilchrist testified that he and Mr. Trevathan discussed plans for Microporous should its acquisition by Daramic not occur. (Gilchrist, Tr. 612). Specifically, he stated: "We'd continue to work on it [the Exide deal] as well as massage the time frames to be able to accommodate customer needs for whatever eventuality. It's just continued planning as you move through managing the business." (Gilchrist, Tr. 612).

In addition, this finding's contention that Microporous management was engaged in deliberate deception, based on Larry Trevathan's choice of words to describe Microporous's negotiations to sell the company to Daramic while it also sought to enter into contracts with Daramic's largest SLI customers in case a sale to Daramic did not materialize, is contradicted by the evidence. Mr. Trevathan first used the word "ruse" in a November 9, 2007 email to Michael Gilchrist. (RX00283 at 002; Gilchrist, Tr. 582-583 (Ruse is Larry's [Trevathan] word). Mr. Trevathan explained that Microporous had to have "parallel stories" on "parallel paths" because it was involved in potential supply agreement discussions with multiple customers, all of which "were being held confidential under nondisclosure agreements." (Trevathan, Tr. 3621). He also stated that the discussions with Daramic, which were being held at the same time, were also protected under a nondisclosure agreement. (Trevathan, Tr. 3621). Mr. Trevathan stated that as far as he knew, he never lied to anybody. (Trevathan Tr. 3751.) He also stated that part of the reason that Microporous had to be careful about what it said was because it had contractual obligations to keep certain things confidential. (Trevathan, Tr. 3751). He further agreed that the primary reason driving Microporous to "parallel paths" and causing it to be so careful about what was said was that it could not tell each of the different parties the whole story of what was going on. (Trevathan, Tr. 3751-3752 ("That was a key reason, yes.")).

412. Further, Gilchrist and Trevathan believed that management had to "demonstrate clear, favorable change and remove . . . doubt" to persuade the Microporous Board to continue to support management's expansion plan. (Trevathan, Tr. 3630-3632 and RX00283 at 001). Trevathan and Gilchrist knew that Microporous management had to address Microporous'

financial performance, remove the doubt in the Board's mind about management's ability to successfully execute the expansion plan and remove the doubt as to how the arbitration with Daramic would proceed. (Trevathan, Tr. 3630-3631).

**Response to Finding No. 412:**

The finding's assertion that Microporous management had to convince its Board to support the expansion plan is contradicted by the fact that the Microporous Board had already authorized the purchase of three lines. (RFOF 374). Mr. Gilchrist testified that Microporous had bought three machines at one time, two for Austria and one to come into the United States.

(Gilchrist, Tr. 374). [REDACTED]

[REDACTED] (Gilchrist, Tr. 374-375, *in camera*; see also PX0920 (Gilchrist, IH at 57-58), *in camera*; ([REDACTED]

[REDACTED])).

With regard to further expansion into SLI, Mr. Heglie testified that the Microporous Board was supportive of management's activity with Exide, "[b]ecause it could generate a fair amount of capital, good return on the investment if it worked." (PX2300 (Heglie, IH at 153)). Mr. Heglie also testified that the Microporous management was working in good faith with Exide and that at no point was it working in something other than good faith with Exide on potential expansion for PE SLI separators. (PX2301 (Heglie, Dep. at 75-76)).

However, while the potential acquisition of Microporous was pending, Microporous's Board was unlikely to move forward with the further expansion. For example, Mr. Trevathan testified that IGP and its Board members "were focusing on this entirely on selling the business and would very likely not move forward with expansion." (Trevathan, Tr. 3623-3624 ("the sale of the business to Daramic obviously was the key item there.")). The rationale for not moving forward on the expansion while a potential sale to Microporous was pending was obvious to Mr.

Mr. Heglie from IGP who “had a view that if we weren’t going to get paid by Daramic or get compensation for the capital investments, that we wouldn’t make them, and I believe Daramic understood that.” (PX2300 (Heglie, IH at 206)). He further testified Microporous had an opportunity to do business with East Penn, which occurred around the time of discussions with Daramic, but put off discussions with East Penn “based on the uncertainty with the Daramic transaction.” (PX2300 (Heglie, IH at 188)). According to Mr. Heglie, IGP was unwilling to commit a bunch of capital to it [contracting with East Penn] without knowing if we’re going to be compensated for it.” (PX2300 (Heglie, IH at 188)). Likewise, Mr. Heglie testified that he held the same view about spending capital to gain Exide’s business: “I think similar to East Penn, we would, at least while those [Daramic/Microporous] discussions were moving forward, we would have been reluctant to invest additional capital.” (PX2300 (Heglie, IH at 190)).

i. The Ruse – Management’s Own Agenda

413. Despite concerns growing over the expansion, Microporous management tried to pursue a supply agreement with Exide. (RX00401; Gilchrist, Tr. 446, *in camera*). Some management members had a financial interest in Microporous: they “owned a good chunk of the company and they also owned options in the company which had certain exercise prices. (PX2300 (Heglie, IH at 114)). If the company was sold to Daramic, Microporous would not reap the financial rewards of those options. (PX2300 (Heglie, IH at 114)). Microporous management, therefore, was hesitant about the looming merger with Daramic, and if sold to Daramic, wanted to maximize the value of the company. (PX2300 (Heglie, IH at 114-15); Gilchrist, Tr. 471, *in camera*). The Court finds that these factors lead management to discuss and continue the “ruse” about Microporous’ ability to complete the expansion.

**Response to Finding No. 413:**

This finding’s contention that only Microporous’s management wanted a supply agreement with Exide, is contradicted by the evidence. Mr. Heglie testified that the Microporous Board was supportive of management’s activity with Exide, “[b]ecause it could generate a fair amount of capital, good return on the investment if it worked.” (PX2300 (Heglie, IH at 153)). Mr. Heglie also testified that the Microporous management was working in good faith with

Exide and that at no point was it working in something other than good faith with Exide on potential expansion for PE SLI separators. (PX2301 (Heglie, Dep. at 75-76)).

The remainder of this finding's assertions are gibberish, not supported by the testimony cited, and the testimony cited was admittedly speculation. (PX2300 (Heglie, IH 114-115)). Mr. Heglie did not testify that if the company was sold to Daramic, Microporous would not reap the financial rewards of those options. Rather, he speculated that the management shareholders that held options would want to hold them longer because they thought they could grow the business. (PX2300 (Heglie, IH at 114-115)). Moreover, this finding states a legal conclusion, not a factual assertion.

414. As part of their ruse, Microporous Management became intent on securing a renewal of the expired MOU with Exide. (McDonald, Tr. 3841-42; PX1052; Gilchrist, Tr. 448, *in camera*). Microporous was concerned that Daramic would see through Microporous' "smoke screen," and in a November 27, 2007 email, Trevathan stated "the greatest flaw we have right now in our ruse is that the Exide MOU has expired and we have no evidence of progress on a contract." (RX00402 at 001). [REDACTED] (Gilchrist, Tr. 471-72, 476, *in camera*).

**Response to Finding No. 414:**

This finding's assertion that securing a renewal of the Exide MOU was part of a ruse, is contradicted by the evidence that Microporous management worked in good faith up until the time of the acquisition to become a supplier of SLI battery separators to Exide. (*See generally* CCFOF 604-623). Moreover, notwithstanding the draft mandate, the Microporous Board was supportive of management's activity with Exide, "[b]ecause it could generate a fair amount of capital, good return on the investment if it worked." (PX2300 (Heglie, IH at 153); *see generally* CCFOF 685-691).

Right up to the date of the deal, MPLP had no assurance that the deal would be consummated with Daramic. (Trevathan, Tr. 3753). And had the deal fallen through, MPLP would have continued with its expansion plans including those with Exide. (Trevathan, Tr.

3753-3754). [REDACTED]

[REDACTED] (Gilchrist, Tr. 448-449, *in camera*). Mr. Gilchrist was concerned until the last minute that the acquisition might fall through and carried on developing Microporous's business until the merger agreement was signed. [REDACTED]

[REDACTED] (Gilchrist, Tr. 448-449, *in camera*; RX00403). Mr. Gilchrist testified that he and Mr. Trevathan discussed plans for Microporous should its acquisition by Daramic not occur. (Gilchrist, Tr. 612).

Specifically, he stated: "We'd continue to work on it [the Exide deal] as well as massage the time frames to be able to accommodate customer needs for whatever eventuality. It's just continued planning as you move through managing the business. (Gilchrist, Tr. 612).

415. [REDACTED] (Gilchrist, Tr. 448, 476, *in camera*; RX00403; RX01200 at 001). Aside from signing the non-binding renewal later, which only extended the MOU 45 days. (RX00403). Exide signed the MOU after Microporous told Exide that it would accept "an updated MOU by February 14th," "or redline of the original contract," and a commitment contract ready at the meeting on the 27th" in lieu of a price increase. (RX01033). Exide made no other commitments to Microporous, and delegated negotiations to newcomer, Alberto Perez. (McDonald, Tr. 3836-38, 3845-46; Trevathan, Tr. 3640).

**Response to Finding No. 415:**

The finding's implied assertion that the MOU was only renewed so as to be included in the information that Microporous was to hand over to Daramic is contradicted by the evidence.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Gilchrist, Tr. 448-449, *in camera*). Up until the time of the acquisition, the Microporous management worked in good faith to become a supplier of SLI battery separators to Exide. (See generally CCFOF 604-623). Moreover, notwithstanding

the draft mandate, the Microporous Board was supportive of management's activity with Exide, "[b]ecause it could generate a fair amount of capital, good return on the investment if it worked." (PX2300 (Heglie, IH at 153); *see generally* CCFOF 685-691).

In addition, Respondent's assertion that Exide's reason for signing the MOU extension was because of an impending price increase is contradicted by testimony from Mr. Gillespie that the price increase negotiations and the negotiations over Microporous's planned expansion "were two separate issues." (Gillespie, Tr. 2976-77).

416. Microporous Management became increasingly and appropriately wary of Exide. (RX00285; Gilchrist, Tr. 515. *in camera*). In a February 15, 2008, email (RX00285 at 001), questioning Perez's truthfulness and Exide's sincerity, and in response to Perez's promise of returning the MOU extension and red-line contract draft, McDonald wrote, "that and a \$1.50 will buy you a cup of coffee." (RX00285 at 001). As shown by Exide's internal communications, the MOU was only signed to delay a price increase. (RX00010).

**Response to Finding No. 416:**

The finding's assertion the Microporous's management questioned Exide's sincerity in moving forward to a supply arrangement is contradicted by the evidence. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 443-444, *in*

*camera*). At that point in time of February 2008 MOU renewal, Exide had every intention that

they would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). At the

{ [REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 447, *in camera*). Moreover, because Mr. Gilchrist was the point

person in negotiations with Exide on the expansion (Trevathan, Tr. 3756), Mr. Gilchrist's

testimony should be accorded greater weight on the Exide negotiations than Mr. McDonald's email relaying hearsay.

In addition, Respondent's assertion that Exide's reason for signing the MOU extension was because of an impending price increase, is contradicted by testimony from Mr. Gillespie that the price increase negotiations and the negotiations over Microporous's planned expansion "were two separate issues." (Gillespie, Tr. 2976-2977).

417. Microporous and Exide had two insignificant meetings during early 2008. (McDonald, Tr. 3835-3840, 3844). The first was a brief technical meeting in Paris, France, in January 2008. Steve McDonald, Roger Berger, Rick Wimberly, and George Brilmeyer attended the meeting on behalf of Microporous. (McDonald, Tr. 3840). Despite the significant expense and time commitment to attend the meeting, Exide did not even allow Microporous to finish its prepared presentation. (McDonald, Tr. 3839). This meeting constituted little more than a technical overview for Exide personnel in Europe and a meet and greet for Alberto Perez. (McDonald, Tr. 3837-38). Microporous was disappointed by the meeting. (McDonald, Tr. 3839).

**Response to Finding No. 417:**

Contrary to Respondent's assertion that the Paris meeting was insignificant, Exide made it very clear to Microporous that it intended to use the meeting in Paris to discuss the expansion project as per the MOU. In this context, Mr. Perez informed Microporous that Microporous's attendance at the meeting was vital because Microporous was a "key partner in [Exide's] strategic version and needs to be represented" at the meeting in Paris (PX1018 at 002), that "the futures of our companies are too closely tied to miss this opportunity" (PX1018 at 003), and that Mr. Perez (a new Exide employee) needed to "truly understand, [Microporous'] commitment to growing its business with Exide, and what steps can, are, and/or should be taken to make that happen." (PX1018 at 005).

Furthermore, contrary to Respondent's suggestion that Microporous was disappointed by the length and overall tone of the meeting, Microporous's contemporaneous call report described this meeting as "more productive than we had expected." (PX0512 at 002). In fact, the meeting in Paris was attended by no less than seven Exide employees, representing key Exide

constituencies (procurement, engineering and quality control) from North America and Europe, including Mr. Alberto Perez, the person at Exide who had “global responsibility for separators ‘in the strategic sense.’” (PX0512 at 001). According to Microporous’ call report on the Paris meeting, supply of PE SLI separators was a key component of the meeting, as “[o]ne large segment of the meeting revolved around our capabilities. Exide asked many questions concerning the entire range of their SLI needs.” (PX0512 at 002).

Moreover, because Mr. Gilchrist was the point person in negotiations with Exide on the expansion, Mr. Gilchrist’s testimony should be accorded greater weight than the testimony of either Mr. Trevathan or Mr. McDonald on the Exide negotiations. (Gilchrist, Tr. 400; PX0920 (Gilchrist. IH at 96, *in camera*); Trevathan, Tr. 3756). { [REDACTED]

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 444, *in camera*).

418. A second meeting took place at Exide’s facilities in Alpharetta, Georgia on February 27, 2008, to discuss the intent of Exide going forward. (McDonald, Tr. 3844, Trevathan, Tr. 3844). Mike Gilchrist, Larry Trevathan, Steve McDonald, and Roger Berger attended the meeting on behalf of Microporous. (Trevathan, Tr. 3639). Only Alberto Perez attended on behalf of Exide despite expectations that Douglas Gillespie and Pradeep Menon, two key decision makers, would attend. (McDonald, Tr. 3844-45; Trevathan, Tr. 3640). When Perez met the group from Microporous, he told them that he had actually forgotten all about the meeting and needed to find a room to meet in. (McDonald, Tr. 3846). The parties met in an unheated, back room, and the meeting lasted less than an hour. (Trevathan, Tr. 3640). The parties had little discussion about a future relationship between Microporous and Exide and no contract drafts were exchanged or discussed. (Trevathan, Tr. 3640; McDonald, Tr. 3846-47).

**Response to Finding No. 418:**

This finding’s assertion that the meeting between Exide and Microporous on February 27, 2008 was unproductive with little discussion regarding the future relationship is contradicted by Mr. Gilchrist’s testimony:

[REDACTED]

[REDACTED]

(Gilchrist, Tr. 480-481, *in camera*). Because Mr. Gilchrist was the point person negotiations with Exide on the expansion, his testimony should be accorded greater weight than the testimony of either Mr. Trevathan or Mr. McDonald on the Exide negotiations. (Gilchrist, Tr. 400; PX0920 (Gilchrist. IH at 96, *in camera*); Trevathan, Tr. 3756). [REDACTED]

[REDACTED] } (Gilchrist, Tr. 444, *in camera*).

419. Following the meeting, attendees from Microporous had little confidence in Exide's commitment to Microporous. (McDonald, Tr. 3847). Steve McDonald questioned Exide's sincerity stating, "I had quite a few conversations with Exide, and it seemed like we never got anything accomplished." (McDonald, Tr. 3847). He also questioned whether Exide was actually committed to Microporous or whether a supply agreement would ever be reached between Exide and Microporous. (McDonald, Tr. 3847). Thus, the Court finds, based on the foregoing findings of fact, that it is unlikely that Microporous would have secured a long-term supply agreement with Exide. (RX00283 at 001; Trevathan, Tr. 3760). Accordingly, the Court further finds that Microporous was not in a position to fill out the new lines at Feistritz with production or fill in any capacity at Piney Flats.

**Response to Finding No. 419:**

The assertion in this finding is contradicted by the record evidence. (*See CCRF 418*).

Moreover, the last two sentences are legal conclusions, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 410-419.

420. On February 29, 2008, Daramic acquired Microporous two days after the meeting with Exide. (Trevathan, Tr. 3640-3641).

**Response to Finding No. 420:**

Complaint Counsel has no specific response.

j. Microporous Products Today

421. As the findings below confirm, if Microporous remained a stand alone company today, there are questions as to whether it would be financially viable.

**Response to Finding No. 421:**

Respondent's contention that Microporous's stand-alone viability was questionable is contradicted by the evidence. Prior to the acquisition, Microporous was profitable, growing and it was all upside potential. (Gilchrist, Tr. 403). Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 2; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044).

422. Even prior to this economic downturn, the Microporous' financial viability was in question. (RX00401; RX00244; RX00248). { [REDACTED] } (Riney, Tr. 4961-62, *in camera*). In 2008, the average contribution margin for the ACE-SIL® product was { [REDACTED] }. (Riney, Tr. 4961-62, *in camera*). The average contribution margin for the FLEX-SIL® product was { [REDACTED] } (Riney, Tr. 4962, *in camera*). This compares to an average contribution margin of { [REDACTED] } (Riney, Tr. 4963, *in camera*).

**Response to Finding No. 422:**

The evidence cited does not support the contention that Microporous's financial viability was in question. The documents cited discuss the potential strategies going forward, they do not state that Microporous's is unprofitable or that Microporous's long term financial viability is in question. Prior to the acquisition Microporous was profitable and financially viable. Prior to the acquisition, Microporous was profitable, growing and it was all upside potential. (Gilchrist, Tr. 403). Daramic's own downwardly adjusted financial projections for Microporous revealed { [REDACTED] } (PX0203 at 083, *in camera*). Just 4 days before the acquisition, Polypore reported to its board that the Microporous acquisition would have { [REDACTED] } (PX0824 at 002, *in camera*). A Microporous document prepared two weeks before the merger for an IGP investor conference shows that { [REDACTED] } (PX0078 at 019-020, *in camera*). Microporous's offering memorandum also

shows Microporous to be in healthy financial shape, with significant potential for EBITDA growth from the expansion. (PX0072 at 059, 064, 066).

The contention that { [REDACTED]

[REDACTED] } (Gilchrist Tr. 467, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4522-23,

*in camera*). While Daramic's HD separators were competitive with Flex-Sil in terms of performance, the HD separator's high manufacturing costs meant that Daramic made very little gross margin on the product. (PX0433 at 001). Since its acquisition of Microporous, Daramic embarked on a strategy { [REDACTED]

[REDACTED] }. (PX0617, *in camera*). In

response to a June 12, 2008 email from Pierre Hauswald { [REDACTED]

[REDACTED] } (PX0617-001-002, *in camera*). With regard to the Ace-Sil product, that product is also used as an input into CellForce. (Gilchrist, Tr. 312; Hauswald, Tr. 672; PX0798).

As an input product, its profit margins would most likely be low.

423. Additionally, since the fall of 2008, the economy in United States and the economies throughout the rest of the world have been crippled by a severe economic recession. (Gaugl, Tr. 4569; Riney, Tr. 4969-70, *in camera*; Thuet, Tr. 4328 ).

**Response to Finding No. 423:**

The finding's assertion is not supported by the evidence cited. The witnesses cited are not economists and should not be relied upon for such a bold statement regarding the U.S. and world economies. Not one testified that "the economies throughout the rest of the world have

been crippled by a severe economic recession.” The witnesses spoke generally with regard to their own businesses and spoke of the recession’s impact. However, Dr. Simpson, an economist, assumed that the economy would recover at some point, and noted that when it does, demand will increase and that excess capacity will decrease. (Simpson, Tr. 3195, *in camera*).

424. Even before the economic downturn, { [REDACTED] } (Riney, Tr. 4961, *in camera*). Actual sales in 2008 were { [REDACTED] } (Riney, Tr. 4961, *in camera*). The actual EBITDA for Microporous products was { [REDACTED] } (Riney, Tr. 4961, *in camera*).

**Response to Finding No. 424:**

Respondent’s testimonial-only evidence to support this finding is contradicted by the evidence and fails to recognize that Microporous was controlled by Daramic for 10 months during 2008 and did not have its own actual sales as an independent entity. (See RX01589 at 003 (stating that Microporous was acquired by Daramic on February 29, 2008.) After February 29, 2008, the two firms no longer competed with one another. Respondent also fails to point to any documentary evidence to support its contention that { [REDACTED] } [REDACTED] [REDACTED] }

In addition, this finding is also contradicted by evidence that Daramic plants kept sales volume that, but for the acquisition, would have gone to Microporous’s facilities. In 2008, { [REDACTED] } (PX0203 at 086, *in camera*; PX0294 at 002, 008, 013, *in camera*; Riney Tr., 4986-4987, *in camera*). Mr. Riney testified that the { [REDACTED] } [REDACTED] } (Riney, Tr. 4986-87, *in camera*). The evidence shows that a portion of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Axt, Tr. 2210-11, *in camera*).

425. [REDACTED] (Riney, Tr. 4962-63, *in camera*). Presently, the PE line at Piney Flats is operating at 38 percent of its available capacity. (Trevathan, Tr. 3647; Riney, Tr. 4963, *in camera*). The majority of production is still CellForce, and a small portion of the production is of Daramic's HD product. (Trevathan, Tr. 3647). The Feistritz plant is currently operating at 76 percent of its available capacity today. (Riney, Tr. 4962, *in camera*; Gaugl, Tr. 4569).

[REDACTED] (Riney, Tr. 4962, *in camera*). The remainder of capacity is for SLI products transferred to Feistritz from Daramic's Potenza facility and its other customers. (Riney, Tr. 4963, *in camera*; Gaugl, Tr. 4572-73).

**Response to Finding No. 425:**

This finding is contradicted by the evidence. Moreover, Respondent points to no documentary evidence to support this analysis. A CellForce production line is a polyethylene line capable of running pure PE separators for SLI. (RFOF at 185). At the Feistritz plant facility, Microporous built two production lines both of which could produce CellForce separators or plain polyethylene separators for SLI batteries. (Gilchrist, Tr. 332). Microporous planned to produce polyethylene (PE) separators for automotive batteries on one of the two production lines at its recently built plant in Feistritz, Austria. (Gilchrist, Tr. 331-332). According to Peter Gaugl, the capacity utilization of the Feistritz facility's two lines is 70% today, and 30% of the two lines is being run for CellForce. (Gaugl, Tr. 4569-70). Thus the capacity utilization on one line running only CellForce would be much greater than testified to by Mr. Riney.

Respondent's contention that Piney Flats capacity for CellForce is only 38% is contradicted by evidence that it would be more fully utilized but for the acquisition. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Axt, Tr. 2210-11, *in camera*).

426. [REDACTED] [REDACTED] (Riney, Tr. 4963, 4968-69, *in camera*). Forecasts for 2009 reveal that if Piney Flats were a stand-alone facility its net income would be [REDACTED] [REDACTED] (Riney, Tr. 4969, *in camera*). Forecasts for 2009 also reveal that if Feistritz were a stand-alone facility its net income would be **[\$3.9 million in the negative.]** (Riney, Tr. 4969, *in camera*).

**Response to Finding No. 426:**

Respondent's contention that Microporous's two facilities would have **negative net income in 2009** if Daramic had not acquired Microporous is contradicted by the evidence that prior to the acquisition Microporous was profitable, growing and it was all upside potential. (Gilchrist, Tr. 403). Prior to the acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 2; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). Moreover, after the acquisition, Microporous did not compete with Daramic as an independent entity and did not have the opportunity to acquire the sales volume at these plants that it had expected to gain and Daramic had predicted it would lose to an expanded Microporous. (PX0738 at 004, *in camera* ([REDACTED]

[REDACTED] [REDACTED] [REDACTED])). Any attempt to forecast the net income of the former Microporous facilities on a standalone basis for all of 2009 is pure speculation and does not take into account the independent decisions that an independent Microporous would have made between February 29, 2008 and the December 31, 2009, to fill up its capacity to compete against Daramic.

Additionally, this finding is also contradicted by evidence that Daramic plants kept sales volume that, but for the acquisition, would have gone to Microporous's facilities, which further deprived the Microporous facilities from sales that but for the acquisition it would have had. In 2008, [REDACTED]

[REDACTED] (PX0203 at 086, *in camera*; PX0294 at 002, 008, 013, *in camera*; Riney Tr., 4986-4987, *in camera*). Mr. Riney testified that the [REDACTED] [REDACTED] (Riney, Tr. 4986-87, *in camera*). The evidence shows that a portion of [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (Axt, Tr. 2210-11, *in camera*).

Moreover, the analysis referred to in this finding has never been documented, and the only evidence of its existence is Mr. Riney's statement that he [REDACTED] [REDACTED] as part of his job. (Riney, Tr. 4967-4968, *in camera*.) Additionally, Mr. Riney's testimony and ability to recite without reference to any document the exact amount of net income Feistritz and Piney Flats would have had on a standalone basis had they not acquired Daramic's Potenza and Owensboro capacity is suspect. [REDACTED] [REDACTED] [REDACTED] (Riney Tr. 5041-42, *in camera*).

427. Due to the capital expended to further the expansions thus far, Microporous was capital constrained compared to most businesses under IGP's ownership (PX2300 (Heglie, IHT 72)). As a result, IGP was concerned about the future financial viability of the company. (Trevathan, Tr. 3628-29; PX2300 (Heglie, IHT 72-73); RX00248). As of December 31, 2007, Microporous had outstanding debt of approximately \$46 million, which included debt for the prior Piney Flats expansion and the 2007 Feistritz expansion. (PX0078 at 21; Gilchrist, Tr. 549).

**Response to Finding No. 427:**

The finding's contention that the capital expansion led to Microporous being capital constrained or that IGP was concerned about the Microporous's future financial viability as a company, is not supported by the evidence cited. Mr. Heglie testified that he would have considered buying Daramic's industrial business but Microporous's debt constrained it from

doing so. (PX2300 (Heglie, IHT 72-73)). Mr. Trevathan, testified that the company was not meeting some of its budget projections, but agreed that the company was still profitable.

(Trevathan, Tr. 3652). This is a far cry from Respondent's position that Microporous's future financial viability as a company was in question. In fact, the evidence Respondent points to shows that { [REDACTED] } (PX0078 at 019-020, *in camera*). There is no evidence that Microporous was unprofitable or not able to service its debt. Moreover, total indebtedness is not an indication of firm's financial viability. If it were, than Polypore with \$803.3 million of consolidated indebtedness, is not financially viable. (PX2160 at 018). Notwithstanding this debt, Mr. Toth agreed that he has stated to investors that "we're pleased with our ability to be profitable and to generate cash in a challenging economy." (Toth, Tr. 1646). Likewise, Microporous was profitable before the merger. (Gilchrist, Tr. 403).

428. Microporous' shaky financial viability would also be impacted by the substantial excess capacity both in Europe and in North America. (Weerts, Tr. 4459, *in camera*; Gaugl, Tr. 4569). For example, today { [REDACTED] } (Weerts, Tr. 4459, *in camera*). Daramic, as well, has experienced a drop in orders of almost 40% in Europe. (Gaugl, Tr. 4569).

**Response to Finding No. 428:**

The premise of this finding that Microporous's financial viability was "shaky" is not supported by the evidence cited. (CCRF 427). Microporous was profitable, growing, and had significant upside potential. (Gilchrist, Tr. 403). Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 2; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). Moreover, there is no record evidence that had Microporous not been acquired it would have been affected by substantial excess capacity. This is rank speculation and not supported by evidence. However, the evidence does support the proposition that Daramic sales and profits would have been impacted by Microporous's new capacity expansions had it not acquired the company. As Mr. Hauswald reported to the Polypore Board, the { [REDACTED] }

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT

VOLUME 2

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August 7, 2009

[REDACTED]

[REDACTED] (PX0203 at 088, *in camera*; PX0738 at 010, *in camera*; see generally CCFOF 725-779)).

429. Based on the foregoing findings regarding Microporous, particularly those concerning its management, financial and capital issues, the Court finds that Microporous was in such precarious condition (financial and otherwise) that it was not of competitive significance.

**Response to Finding No. 429**

This finding states a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 421-428.

k. Efficiencies

430. Despite these troubling economic times, [REDACTED] (Riney, Tr. 4971-73, *in camera*). [REDACTED] (Riney, Tr. 4971-73, *in camera*).

**Response to Finding No. 430:**

Dr. Kahwaty, Polypore's economic expert witness, submitted comments to the European Communities in response to the European Communities Green Paper that stated there [REDACTED] [REDACTED] (Kahwaty, Tr. 5252-5254, *in camera*). Dr. Kahwaty and Dr. Simpson both agree that that pecuniary raw material savings that Daramic achieved were [REDACTED] [REDACTED] (Simpson, Tr. 3240, *in camera*).

Moreover, nothing in Mr. Riney's cited testimony discusses neither today's troubling economic times nor [REDACTED] (Riney, Tr. 4971-4973, *in camera*). The [REDACTED] [REDACTED] [REDACTED] (Kahwaty, Tr. 5367,

*in camera*; Riney, Tr. 4963, *in camera*). Additionally, Microporous plants were under-utilized because Microporous was no longer independent and was unable to [REDACTED] [REDACTED] } (Riney, Tr. 4980, *in camera*; PX0294 at 002, *in camera*). [REDACTED] [REDACTED] } (PX0929 (Gilchrist, IH at 47-48, *in camera*). Today, [REDACTED] [REDACTED] } (Gaugl, Tr. 4571; Riney, Tr. 4971-4973, *in camera*).

431. [REDACTED] [REDACTED] } (Riney, Tr. 4972, *in camera*).

**Response to Finding No. 431:**

Dr. Kahwaty, Polypore's Economic expert witness, submitted comments to the European Communities in response to the European Communities Green Paper that stated there {" [REDACTED] [REDACTED] } (Kahwaty, Tr. 5252-5254, *in camera*). Dr. Kahwaty and Dr. Simpson both agree that that pecuniary raw material savings that Daramic achieved were { [REDACTED] [REDACTED] } (Simpson, Tr. 3240, *in camera*; Kahwaty, Tr. 5252-5254, *in camera*).

Pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). [REDACTED] [REDACTED] [REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

To the extent that these efficiencies are merger specific, the operating of two lines at the Feistritz facility would have increased Microporous's total raw material purchases, which could have lead to volume discounts. For example, [REDACTED]

[REDACTED] } it was originally paying for silica from {Rhodia.}

(Riney, Tr. 5021-5022, *in camera*).

432. [REDACTED]

[REDACTED] (Riney, Tr. 4972-73, *in camera*).

[REDACTED] (Riney, Tr. 4972, *in camera*).

[REDACTED] (Riney, Tr.

4973, *in camera*). And finally, [REDACTED]

[REDACTED] (Riney, Tr. 4973, *in camera*).

**Response to Finding No. 432:**

Pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). [REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

433. After the Acquisition, Daramic sought to improve Microporous' existing plants, processes, and equipment. (Hauswald, Tr. 1061). At the Piney Flats facility, Daramic created a task force of engineers from Daramic's Owensboro facility to decrease costs and improve yields on Microporous' existing lines. (Hauswald, Tr. 1062-63). Prior to the Acquisition, the CELL-FORCE line had a yield of approximately 76% which was improved to approximately 90% through the efforts of the Daramic task force. (Hauswald, Tr. 1062). In order to achieve higher efficiency, this team of engineers implemented Daramic's best practices to the lines at Piney Flats which improved safety and environmental standards, as well as reduced costs and improved quality. (Hauswald, Tr. 1063). For example, Daramic changed the oil used in the manufacturing process at Piney Flats to a higher grade to improve the quality of the product. (Hauswald, Tr. 1064). Daramic also improved the solvent recovery system in order to reduce solvent consumption by approximately 25% which reduced costs and waste. (Hauswald, Tr. 1065).

**Response to Finding No. 433:**

First, the proposition in the sixth sentence about oil is contradicted by Mr. Riney's deposition testimony. Mr. Riney, who has a role in determining what efficiencies Daramic could achieve by acquiring Microporous, did not know why using { [REDACTED] } (PX0912 (Riney, Dep. at 43, 104, *in camera*)).

Second, pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). { [REDACTED] } (CCFOF 1054; *see generally* CFOF 1051-1053, 1055-1057).

434. At the Fiestritz facility, Daramic personnel worked to improve costs and efficiency through steps such as changing the solvent as done in Piney Flats. (Hauswald, Tr. 1066). Daramic engineers also improved the capacity of the lines which had glitches in the winding and finishing areas allowing Daramic to fill the second line with pure SLI-type product. (Hauswald, Tr. 1065-66). Additionally, Daramic found ways to reduce the smell of sulfur originating from the product process and plaguing the surrounding Austrian community. (Hauswald, Tr. 1065).

**Response to Finding No. 434:**

First, the proposition in the second sentence that Daramic's improvements allowed for the line to be filled with SLI separators is contradicted by the fact that Microporous was trying to fill the line as early as 2007 with customers SLI separator purchases. (Gaugl, Tr. 4626; *see also* CCFOF 632-632). Tucker Roe considered Microporous to be a competitor in SLI as evidenced by Microporous submitting a quote to Fiam for its SLI separator business. (Roe, Tr. 1307-1308; *see also* CCFOF 692). Additionally, Daramic's improvements to the line were not the reason why the line was filled with SLI separators; it was Daramic's shifting of production from other Daramic plants to the Feistritz line that loaded it with SLI separators. (Riney, Tr. 4963-4964, *in camera*). In fact, Mr. Gaugl stated "[Microporous] had the capability to produce separators for automotive" before Daramic acquired Microporous. (Gaugl, Tr. 4626-4627).

Second, pre-acquisition, Microporous was profitable and was a competitive threat.

(Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). { [REDACTED]

[REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

435. At both former Microporous facilities, Daramic found ways to reduce and recycle scrap materials. (Hauswald, Tr. 1067). Instead of simply tossing this leftover material, Daramic now regrinds and reuses the material to create new product. (Hauswald, Tr. 1067). This not only reduces waste, but also results in cost savings for both plants. (Hauswald, Tr. 1067).

**Response to Finding No. 435:**

Pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 2; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). { [REDACTED]

[REDACTED]

[REDACTED] } (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

436. { [REDACTED] } (Hauswald, Tr. 904, *in camera*). First, { [REDACTED] } (Hauswald, Tr. 904, *in camera*). This resulted in { [REDACTED] } (Hauswald, Tr. 904, *in camera*). { [REDACTED]

[REDACTED] } (Hauswald, Tr. 904, *in camera*).

**Response to Finding No. 436:**

Dr. Kahwaty, Polypore's Economic expert witness, submitted comments to the European Communities in response to the European Communities Green Paper that stated there { [REDACTED]

[REDACTED]

[REDACTED] } (Kahwaty, Tr. 5252-5254, *in*

*camera*). Dr. Kahwaty and Dr. Simpson both agree that that pecuniary raw material savings that

Daramic achieved were { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3240, *in camera*; Kahwaty, Tr. 5252-5254, *in camera*).

First, the proposition in the first sentence about significant raw material savings is contradicted by several pieces of evidence in the record. Daramic has not passed along any raw material savings to { [REDACTED] } (PX0912 (Riney, Dep. at 200-201, *in camera*)). Moreover, the efficiencies that Daramic has achieved by acquiring Microporous is rather trivial, when compared to either the \$76 million Daramic paid to acquire Microporous or the { [REDACTED] } in litigation expenses that Daramic has spent as of January 3, 2009, which does not include the time period where Daramic engaged in an onslaught of extensive discovery and a thirty day trial. (PX0954 at 006, *in camera*; PX2160 at 041).

Second, the proposition in the second sentence is contradicted by the fact that { [REDACTED] }  
[REDACTED]  
{ [REDACTED] } it was originally paying for silica from Rhodia. (Riney, Tr. 5021-5022, *in camera*). Third, the proposition in the third sentence is contradicted by the fact Daramic { [REDACTED] } passed along any of these alleged { [REDACTED] } (PX0912 (Riney, Dep. at 200, *in camera*)). Instead of Daramic passing along the cost savings to its customers, Daramic increased prices in 2009. (PX0371).

Lastly, pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044). { [REDACTED] }  
[REDACTED]

[REDACTED] (CCFOF 1054; *see generally* CCFOF 1051-1053, 1055-1057).

437. Based on the foregoing findings of fact, the Court further finds that the acquisition of Microporous by Polypore has resulted in numerous effective efficiencies of the Piney Flats plant that are based on Daramic's knowledge and skill.

**Response to Finding No. 437:**

Dr. Kahwaty, Polypore's Economic expert witness, submitted comments to the European Communities in response to the European Communities Green Paper that stated there [REDACTED]

[REDACTED]

[REDACTED] (Kahwaty, Tr. 5252-5254, *in camera*). Dr. Kahwaty and Dr. Simpson both agree that that pecuniary raw material savings that Daramic achieved were { [REDACTED]

[REDACTED] } (Simpson, Tr. 3240, *in camera*; Kahwaty, Tr. 5252-5254, *in camera*). Moreover, Dr. Kahwaty { [REDACTED] }.

(Kahwaty, Tr. 5249-5250, *in camera*). Lastly, this bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (*See* CCRF 430-437 and CCFOF 1051-1057).

Additionally, this finding is a legal conclusion, not a factual assertion. Moreover, this finding is based on RFOF 430- 437, which are incorrect and/or invalid, as detailed in CCRF 430-437.

**V. The Customers**

**A. The "Power" Buyers**

**a. Johnson Controls Inc.**

**(a) JCI's Size and Power**

438. Johnson Controls (JCI) is the largest battery manufacturing company in the world, mainly focusing on the production of SLI batteries. (Hall, Tr. 2662-2663; RX00034 at 012). JCI produced more than 120 million lead acid batteries in 2008 with over \$38 billion in sales. (Hall, Tr. 2793; RX00034 at 004; RX01187 at 003). JCI produces these batteries in approximately 60 wholly owned or majority-owned manufacturing plants in 20 countries worldwide. (RX01187 at

004). JCI has 36% of the global market share in the lead-acid automotive battery market. (RX00034 at 013).

**Response to Finding No. 438:**

Complaint Counsel has no specific response.

439. JCI manufactures a small amount of golf cart batteries, which account for only 2 to 3 percent of its production. (Hall, Tr. 2665). [REDACTED]

(Hauswald, Tr. 943, *in camera*).

**Response to Finding No. 439:**

{ [REDACTED]

} (Hall, Tr.

2705, 2874, *in camera*).

440. JCI is headquartered in Milwaukee with plant locations worldwide, including North America, Europe, and China. (PX0965 at 11, *in camera*; Hauswald, Tr. 1086; Hall, Tr. 2665; PX0614). JCI leverages its worldwide business in its relationships with its suppliers. (RX00034 at 008).

**Response to Finding No. 440:**

Respondents cited material in the second sentence does not support the proposition that

JCI leverages its worldwide business in its relationship with its suppliers. Nor was the cited

document used with Mr. Hall at trial.

441. In 2008, Johnson Controls had over \$5.8 billion in sales in their Power Solutions group, which sells batteries. (RX00034 at 012; Hall, Tr. 2793-2794).

**Response to Finding No. 441:**

Complaint Counsel has no specific response.

442. [REDACTED] (RX00040 at 07, *in camera*; Hauswald, Tr. 1086).

**Response to Finding No. 442:**

Complaint Counsel has no specific response.

443. JCI has joint venture or ownership relationships with Enertec (Mexico and Brazil), Amara Raja (India), Varta (Europe), BFR (Asia), and Entek (worldwide). (RX00041 at 005, *in camera*; RX00042, *in camera*; RX01187 at 014; Weerts, Tr. 4479-4480, *in camera*; Hall, Tr. 2819, *in camera*). { [REDACTED]

(Hall, Tr. 2817, *in camera*).

**Response to Finding No. 443:**

Complaint Counsel has no specific response.

(b) JCI's Relationship with Daramic

444. Beginning in 2000, Daramic had a six year supply agreement with JCI Americas. (Hauswald, Tr. 754). This agreement contained a minimum purchase amount. (Hauswald, Tr. 756).

**Response to Finding No. 444:**

Complaint Counsel has no specific response.

445. In 2003 JCI was supplied by both Daramic and Entek. (Hall, Tr. 2666). Around this time JCI began negotiations with both companies for better pricing opportunities because of the growth in market share that JCI had experienced. (Hall, Tr. 2666). [REDACTED]

[REDACTED] (RX00040 at 05-08, *in camera*).

**Response to Finding No. 445:**

A part of JCI's 2004 North America Strategic plan was to [REDACTED]

[REDACTED] (RX00040 at 005, *in camera*).

446. In addition to leveraging their global share to gain better prices from their existing suppliers, JCI was trying to "develop new entrants for competition", including an European based company called Alpha<sup>4</sup>. (RX00041, *in camera*; RX00066 at 002-003, *in camera*; RX00070 at 05-06, *in camera*; Hall, Tr. 2670). [REDACTED]

[REDACTED]. (RX00041, *in camera*; RX00045 at 002, *in camera*, Hall Tr. 2809, *in camera*).

**Response to Finding No. 446:**

The cited material is contradicted by JCI documents and testimony. At the time, JCI felt that the existing supply base of Daramic and Entek were [REDACTED] [REDACTED] (PX1505 at 002, *in camera*). However, JCI was unable to leverage their global share to gain better prices from their existing suppliers, as Daramic successfully thwarted JCI's efforts to use their global share to gain better prices from their existing customers by forcing JCI into a contract that it did not want to sign. (Hall, Tr. 2682).

<sup>4</sup> [REDACTED] (Hall, Tr. 2809, *in camera*).



Daramic did not believe that an agreement was essentially complete at the end of 2003. On December 02, 2003, Mr. Roe informed JCI that the negotiations between the parties appeared to be at an "impasse". (PX1504 at 001). Because of the impasse, Mr. Roe withdrew all previously submitted proposals, and was instructed by the Polypore board to conclude the negotiations before the end of 2003. (PX1504 at 001).

Daramic also understood that its pricing to JCI was not competitive with the offer that it understood JCI had received from Microporous. On December 13, 2003, Mr. Roe indicated that he understood Microporous had quoted JCI pricing of \$0.51 per square meter of 6 mill separator and \$0.52 on 7 mill in the Americas, as compared to Daramic's quote of \$0.53 per square meter on 6 mill and \$0.622 on 7 mill separators. Additionally, Mr. Roe understood that Microporous was offering to hold JCI's prices firm for 18 months and then to reduce prices 2-3% each year, a term that Daramic had "totally rejected" in its contract with JCI. (PX0693).

450. To finalize the agreement, Daramic offered a rebate of one and a half cents per square meter for minimum volumes met in order to earn a contract with JCI. (Roe, Tr. 1244).

**Response to Finding No. 450:**

Complaint Counsel has no specific response.

451. At the beginning of January 2004, JCI abruptly halted contract negotiations and demanded that JCI and Daramic continue to operate under the existing contract covering the Americas and restart from scratch the negotiation for a separate European contract. (Roe, Tr. 1679). Daramic understood this complete change in the course of the negotiations to signify that Daramic was no longer being viewed as a strategic partner by JCI. (Roe, Tr. 1679). When Daramic inquired what it should make of those prior negotiations, JCI curtly instructed Daramic to view them as a "learning experience." (Roe, Tr. 1679).

**Response to Finding No. 451:**

JCI did not halt contract negotiations at the beginning of January 2004. As of early January 2004 the parties had not agreed on a final contract and open issues were still being discussed. (Hall, Tr. 2673-2674). JCI was not satisfied with the contract as it was then drafted with regards to pricing and minimum volume numbers, as well as many other issues that "hadn't been discussed or thoroughly buttoned up as a matter of business." (Hall, Tr. 2674). JCI

informed Daramic that it was not through negotiating the contract and that it wanted to continue to negotiate and to “order separators from [Daramic] as the normal course of business.” (Hall, Tr. 2675).

452. Following those fourteen months of negotiations and near agreement, Daramic was prepared to honor their existing agreement with JCI for the North and South American regions and to supply JCI on a spot price basis for the European region, because no agreement had been reached. (Roe, Tr. 1246-1247).

**Response to Finding No. 452:**

This finding is contradicted by evidence that indicates that Daramic was not prepared to honor the then-existing agreement as is. In December 2003, Daramic informed JCI that if a long term agreement was not reached by the end of 2003, “all purchases for product in Europe will be priced on a spot purchase price that will be significantly higher than those previously quoted.” (PX1504 at 001). { [REDACTED] [REDACTED] [REDACTED] } (Hall, Tr. 2676-2677, 2865-2867, *in camera*; PX1505 at 003, *in camera*). Moreover, Daramic informed JCI that the spot pricing would apply to all separators ordered by JCI above the contractual minimums in North and South America. (PX1504 at 001).

453. JCI’s European operations had been supplied by Daramic without a contract prior to 2004. (Hall, Tr. 2780; Roe, Tr. 1247). During the time prior to the signing of the 2004 supply agreement between JCI and Daramic, Daramic continued to honor the terms and conditions of an agreement with Varta, a company in Europe that JCI had acquired. (Roe, Tr. 1680).

**Response to Finding No. 453:**

Daramic did not honor the terms and conditions of the Varta agreement prior to the signing of the 2004 supply agreement between JCI and Daramic. (See generally, CCFOF 576-593). { [REDACTED] } (Hall, Tr. 2676-2677, 2865-2867, *in camera*; PX1505 at 003, *in camera*; PX1504 at 001).

{ [REDACTED] [REDACTED] } (Hall,

Tr. 2677-2680, 2867-2868, *in camera*; PX1505 at 003, *in camera*). [REDACTED]

[REDACTED] } (PX0757 at 002, *in camera*).

454. After Daramic notified JCI that it would continue to supply Europe on a spot price basis Daramic was contacted by Rodger Hall, JCI's global vice president. (Roe, Tr. 1685; Hall, Tr. 2662).

**Response to Finding No. 454:**

Evidence contradicts this finding. After Daramic notified JCI that it would continue to supply JCI's European facilities on a spot basis with 85% higher prices, it was Daramic's general manager Frank Nasisi who contacted JCI's Rodger Hall. (Hall, Tr. 2676-2677).

455. While there is dispute as to what was said, Hall informed Daramic that JCI would sign the agreement that the two sides had been negotiating for the previous fourteen months. (Roe, Tr. 1682-1683). After that, Daramic added the proposed rebate to JCI to the agreement. (Roe, Tr. 1683).

**Response to Finding No. 455:**

Evidence contradicts this finding. There is no dispute that Daramic threatened to close down its Potenza, Italy manufacturing plant in order to force JCI to sign a contract extension, and that JCI did not want to sign the contract. (*See generally* CCFOF 575-589). Mr. Hall testified that Mr. Nasisi informed him that Daramic would be shutting down the facility in nine days time. (Hall, Tr. 2677-2680, 2867-2868, *in camera*). [REDACTED]

[REDACTED] } (PX0757 at 002, *in camera*). JCI signed the contract under duress with JCI's management "felt we were being forced to sign this contract." (Hall, Tr. 2682). Even Daramic's own executives later admitted to "strong arming" JCI during the 2004 contract negotiations. (PX0750 at 001). After being "forced to sign this contract" there were still other outstanding contractual issues that had not been finalized, including the rebate, and JCI was only able to deal with those issues after it had signed the contract. (Hall, Tr. 2682-2683).

456. JCI then made additional changes to the agreement before signing. (Roe, Tr. 1683-1684). These additions were agreed to by Daramic and were included in an amendment to the contract. (Roe, Tr. 1684; RX001197).

**Response to Finding No. 456:**

The cited material does not support the proposition that JCI made additional changes to the agreement before signing. JCI was given only two or three days to sign the contract. (Hall, Tr. 2682). JCI was only able to deal with the remaining outstanding contractual issues issues that had not been finalized, including the rebate, after it had signed the contract. (Hall, Tr. 2682-2683).

457. A later amendment was requested by JCI to include a consignment program for Europe. (Roe, Tr. 1684). This was agreed to by Daramic and included as an amendment to the contract. (Roe, Tr. 1684).

**Response to Finding No. 457:**

Complaint Counsel has no specific response.

458. The contract negotiations that began in 2002 resulted in a five-year supply agreement between Daramic and JCI effective on January 1, 2004, and ending December 31, 2008. (RX00988; PX2052, *in camera*; Roe, Tr. 1673-1684).

**Response to Finding No. 458:**

Complaint Counsel has no specific response.

459. From January 1, 2004 to December 31, 2008, { [REDACTED] } (RX00988, *in camera*; Hall, Tr. 2748, *in camera*). During this period JCI also purchased PE separators from Entek. (Hall, Tr. 2690). Throughout the course of JCI's contract with Daramic, JCI purchased between 110 and 120 million square meters annually from Entek. (Hall, Tr. 2690). JCI purchased on average 50 million square meters annually from Daramic during the period of 2004 through the end of 2007. (Hall, Tr. 2690).

**Response to Finding No. 459:**

Complaint Counsel has no specific response.

460. { [REDACTED] } (Hauswald, Tr. 909, *in camera*). { [REDACTED] } (Hauswald, Tr. 909, *in camera*). JCI constituted approximately 15 to 16 percent of Daramic's sales. (Hauswald, Tr. 1118).

**Response to Finding No. 460:**

Complaint Counsel has no specific response.

461. Notwithstanding that its contractual relationship with JCI was ending, during the Owensboro strike in September 2008, Daramic had a phone conference with JCI every day to discuss the supply chain. (Hauswald, Tr. 1078). During the strike, JCI received separator material from Daramic's Prachinburi, Thailand facility. (RX01013). JCI had not been supplied

by this facility before and was able to qualify the material in a matter of hours. (Hauswald, Tr. 1082-1083).

**Response to Finding No. 461:**

The findings proposition that Daramic was doing something extraordinary for JCI outside of the contractual relationship is contrary to the evidence. Daramic had an ongoing contractual relationship that it had to abide by. Regardless of whether Daramic's contractual relationship with JCI was ending in 2009, Daramic was obligated under the 2004 supply agreement to { [REDACTED] } (RX00988 at 006, *in camera*). To the extent that Respondent is alleging that JCI received separator material from Thailand for use in North America, the cited material is not supportive. { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0911 (Roe, Dep. at 41-42, *in camera*)). The cited material with respect to the third sentence does not support the proposition that JCI qualified the material in a matter of hours.

(c) The Proposed Renewal of the Relationship

462. [REDACTED] (RX00043 at 02, *in camera*).

**Response to Finding No. 462:**

Complaint counsel has no specific response.

463: Starting in December of 2006, Daramic and JCI entered into contract negotiations for a contract extension to the existing 2004 Daramic/JCI Supply Agreement. (Roe, Tr. 1685). One of the first meetings where an extension was discussed took place in November of 2006 at JCI's headquarters in Milwaukee during a visit by Hauswald and Roe. (Roe, Tr. 1686). The next meeting occurred at Daramic's headquarters in December of 2006. (Roe, Tr. 1686). Hauswald and Roe returned to JCI's Milwaukee office in February 2007 for what they believed to be the finalization of the contract extension. (Roe, Tr. 1686). A conference call at the end of February 2007 set up a March meeting in Milwaukee to have final negotiations on some unresolved minor points. (Roe, Tr. 1686).

**Response to Finding No. 463:**

Evidence at trial contradicts this finding. Mr. Toth testified that meetings with JCI in May 2007 (which took place two months after the alleged conference call for final negotiations)

was largely an "introductory meeting" that also dealt with negotiating an agreement. (Toth, Tr. 1528-1529). In fact, as of early 2007, JCI and Daramic were negotiating { [REDACTED]

[REDACTED] } (PX1510 at 003, *in camera*).

464. JCI, however, cancelled the March 2007 meeting that was to take place in Milwaukee between JCI and Daramic and moved the meeting to a later date. (Roe, Tr. 1687). Daramic was told by JCI that this was to allow JCI to investigate a new opportunity. (Roe, Tr. 1687-1688).

**Response to Finding No. 464:**

Complaint Counsel objects to this finding. Respondent is using statements allegedly made by JCI for the truth of the matter asserted and has failed to state that the admission of this evidence is limited to state of mind.

465. On May 1, 2007, Bob Toth, Polypore's CEO, met with JCI's worldwide battery group president. (Roe, Tr. 1688; Toth, Tr. 1528). JCI informed Daramic that they had entered into a joint venture agreement with a battery manufacturer in China called BFR. (Roe, Tr. 1688). JCI informed Daramic that contract negotiations would resume in the summer 2007. (Roe, Tr. 1688).

**Response to Finding No. 465:**

Complaint Counsel objects to the second and third sentences of this finding. Respondent is using statements allegedly made by JCI for the truth of the matter asserted and has failed to state the admission of this evidence is limited to state of mind.

466. Following the May 1, 2007, visit to JCI, Daramic continued to follow up with JCI regarding contract negotiations, but was not told of JCI's June 4, 2007, agreement with Entek until 2008. (Roe, Tr. 1688; Toth, Tr. 1528-1534.)

**Response to Finding No. 466:**

Complaint Counsel objects to this finding. Respondent is using statements allegedly made by JCI for the truth of the matter asserted and has failed to state that the admission of this evidence is limited to state of mind.

467. During this timeframe, { [REDACTED] } (Weerts, Tr. 4471, *in camera*, RX00130, *in camera*).

**Response to Finding No. 467:**

The cited material does not support the assertion that { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] }  
(RX00130 at 001-002, *in camera*).

468. Toth met with Mr. Molinaroli, of JCI again in October 2007, where Molinaro again indicated that a supply relationship with Daramic was still a possibility. (Toth, Tr. 1530).

**Response to Finding No. 468:**

The statements attributed to Mr. Molinaroli are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Toth, Tr. 1530). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

469. Daramic continued to negotiate a contract with JCI through the rest of 2007 and into 2008. (Toth, Tr. 1532). Representatives from Daramic had periodic contact with representatives from JCI and Daramic believed that they were in negotiations for a supply agreement with JCI until late 2008. (Toth, Tr. 1533).

**Response to Finding No. 469:**

Complaint counsel has no specific response.

470. After a phone call in March 2008, Daramic was under the impression that JCI wanted to negotiate two separate contracts, one for SLI and one for deep cycle. (Roe, Tr. 1689). Daramic believed that this would mean that all contract negotiations would then have to start over. (Roe, Tr. 1689). Daramic agreed to continue negotiations under these new constraints imposed by JCI. (Roe, Tr. 1691).

**Response to Finding No. 470:**

Respondents' assertion in the second sentence is unsupported by the cited material.

471. During this time, Daramic did not know that JCI had been negotiating a global supply agreement with Entek or that, in fact, JCI had signed such an agreement with Entek on June 4, 2007. (Roe, Tr. 1690; Toth, Tr. 1534-35, *in camera*; Hall, Tr. 2747-49, *in camera*; RX00038, *in camera*).

**Response to Finding No. 471:**

This finding is contradicted by documents and testimony on the record. In a September 2007 meeting, { [REDACTED]

[REDACTED]

[REDACTED] } (PX0471, *in camera*; PX0901 (Toth, Dep. at 281-282, 286, *in camera*)).

472. After believing that they were in the process of negotiating a contract with JCI during the period of 2007 through summer 2008, Daramic was finally presented with a "phase-out plan" by JCI in August 2008. (Toth, Tr. 1533-1534; Roe, Tr. 1694-1695). While some possibility continues to be discussed regarding supply by Daramic, in approximately October 2008, JCI finally confirmed it would not be doing any business with Daramic after December 31, 2008, the last day of the 2004 JCI/Daramic Supply Agreement. (Toth, Tr. 1534-1535).

**Response to Finding No. 472:**

Complaint Counsel objects to this finding. Respondent is using statements allegedly made by JCI for the truth of the matter asserted and has failed to state that the admission of this evidence is limited to state of mind.

473. Throughout 2007 and into 2008, JCI kept Daramic in the dark about JCI's intent and actual separator supply decision.

**Response to Finding No. 473:**

Respondent's bare assertion is unsupported by any evidence. Furthermore, the finding is contradicted by documents and testimony on the record. In a September 2007 meeting, { [REDACTED]

[REDACTED]

[REDACTED] } (PX0471, *in camera*;

PX0901 (Toth, Dep. at 281-282, 286, *in camera*)).

(d) JCI's Relationship with Entek

474. On April 30, 2007, { [REDACTED] }  
(RX00073, *in camera*). { [REDACTED]

[REDACTED] } (RX00073 at 002-008, *in camera*).

**Response to Finding No. 474:**

Complaint counsel has no specific response.

475. { [REDACTED] }  
{ [REDACTED] } (RX00072, *in camera*; Hall, Tr. 2747, *in camera*). { [REDACTED]

[REDACTED] } (Hall, Tr. 2747, *in camera*).

**Response to Finding No. 475:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2874, *in camera*;

RX00072, *in camera*).

476. { [REDACTED]  
[REDACTED] } (RX00073, *in camera*; Hall, Tr. 2826-2828, *in camera*).

**Response to Finding No. 476:**

Complaint counsel has no specific response.

477. { [REDACTED]  
[REDACTED] } (Hall, Tr.  
2827, *in camera*, Weerts, Tr. 4458, *in camera*). {  
[REDACTED] } (RX00065 at  
07, *in camera*; Hall, Tr. 2828, *in camera*). {  
[REDACTED] }  
(Hall, Tr. 2829, *in camera*).

**Response to Finding No. 477:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1510 at 006,  
*in camera*; see also Hall, Tr. 2884, *in camera* { [REDACTED]  
[REDACTED] }  
{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2828-2829, *in camera*).  
{ [REDACTED]

[REDACTED] } (Hall, Tr. 2886-  
2887, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Hall, Tr. 2887, *in camera*).

478. { [REDACTED]  
[REDACTED] } (Hall, Tr. 2747, *in camera*). { [REDACTED]  
o [REDACTED]  
[REDACTED] } (Weerts, Tr. 4521, *in camera*).

**Response to Finding No. 478:**

{ [REDACTED]  
[REDACTED] }, (Hall, Tr.  
2747, *in camera*; Weerts, Tr. 4521, *in camera*), { [REDACTED]  
[REDACTED]  
[REDACTED] }

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 008, *in camera*). According to Daramic, { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 004, 007-008, *in camera*).

{ [REDACTED]  
[REDACTED] } (PX0265 at 010, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0265 at 011, *in camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004 ("demonstrate pricing power in the marketplace regardless of movements in material and energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included {" [REDACTED] [REDACTED] }); PX0204 at 002 (Mr. Hauswald's 2006 goals included "Raise Daramic prices where possible to demonstrate pricing power regardless of cost movements").

Daramic's assessment that battery manufacturers lack buying power is confirmed by customer testimony at trial. (*See, e.g.,* Gillespie, Tr. 3002, *in camera* (Exide believes that negotiations with Daramic are [REDACTED] )); Gillespie, Tr. 3066-3068 (Exide has not used its size as leverage in negotiations with Daramic); Gillespie, Tr. 3097 (Exide has not used pressure points to negotiate and get their will); Craig, Tr. 2565 (EnerSys does not consider itself a power buyer, "not at all, not close."); Benjamin Tr. 3525, 3522 (Bulldog Battery received a 10% post-acquisition price increase which Bulldog considered "pretty exorbitant" but "[t]here was no way to try to negotiate a lower price. There was no place to go"); Godber, Tr. 242, *in camera* (Trojan concerned about Daramic's acquisition of Microporous because [REDACTED] [REDACTED] ); Godber Tr. 133, 232-233, 239-242, *in camera* (notwithstanding the fact that Trojan is the world's largest manufacturer of deep cycle batteries, [REDACTED] [REDACTED] } 479. [REDACTED] [REDACTED] .) (Hall, Tr. 2763-2764, *in camera*, 2823-2824, *in camera*).

**Response to Finding No. 479:**

Complaint counsel has no specific response.

480. { [REDACTED] } (Hall, Tr. 2749, *in camera*).  
{ [REDACTED] } (Hall, Tr. 2749, *in camera*, 2825 *in camera*). { [REDACTED] } (Weerts, Tr. 4479-4480, *in camera*; Hall, Tr. 2819-20, *in camera*).

**Response to Finding No. 480:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2749, *in camera*).

481. { [REDACTED] } (Weerts, Tr. 4477, *in camera*).

**Response to Finding No. 481:**

Complaint counsel has no specific response.

482. The loss of JCI's business constituted a drop of \$55 million in revenue and \$20 million in contribution for Daramic. (Toth, Tr. 1535). The loss of the JCI business also required a significant amount of restructuring for Daramic. (Toth, Tr. 1535).

**Response to Finding No. 482:**

Complaint counsel has no specific response.

483. The Owensboro plant had to be restructured and lines had to be shut down after Daramic lost JCI's business to Entek. (Toth, Tr. 1535; Hauswald, Tr. 961). This has resulted in more than 60 workers being let go from that facility. (Toth, Tr. 1535-1536).

**Response to Finding No. 483:**

Complaint counsel has no specific response.

484. The loss of JCI's business also required the complete shut down of Daramic's Potenza, Italy, facility. (RX00184, *in camera*, Toth, Tr. 1535). This put more than 125 people out of work. (Toth, Tr. 1535).

**Response to Finding No. 484:**

Complaint counsel has no specific response.

485. { [REDACTED]  
[REDACTED] } (PX0787, *in camera*; RX00066 at 05, *in camera*; RX00070 at 002, *in camera*).

**Response to Finding No. 485:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1506  
at 005, *in camera*).

(e) JCI's Relationship with Microporous

486. During the 2003-2004 time period, Microporous supplied SLI samples to JCI for testing. (Hall, Tr. 2695-2696). These samples did not qualify for use at JCI. (Hall, Tr. 2696; Gilchrist, Tr. 466, *in camera*). Additionally, JCI had general concerns about the quality of the Microporous product. (RX00071 at 03).

**Response to Finding No. 486:**

The cited material (RX00071) was not introduced at trial with a witness and is contradicted by evidence within the very same document that "[q]ualification moving forward" on Microporous samples. (RX00071 at 01). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2696-2697; PX0672 at 006, *in*

*camera*; see generally CCFOF 594-600).

487. Microporous again solicited JCI in 2005 to supply some of JCI's separator needs, but no agreement was reached. (Hall, Tr. 2694-2695).

**Response to Finding No. 487:**

The material cited by Respondent does not support the statement that no agreement was reached.

488. [REDACTED] (RX00046, *in camera*). [REDACTED] (RX00046 at 002, *in camera*). [REDACTED] (RX00046 at 004, *in camera*). The agreement did not result in a supply agreement. (Hall, Tr. 2694-2695).

**Response to Finding No. 488:**

[REDACTED] } Mr. Hall testified that JCI's intentions with regard to possible purchase of PE SLI separators from Microporous was to "buy them in Europe and we would buy some in the United States." (Hall, Tr. 2695, *see also* RX00046 at 002-003, *in camera* { [REDACTED] } ).

Furthermore, the material cited by Respondent does not support the statement that no agreement was reached. (Hall, Tr. 2694-2695).

489. [REDACTED] (Gilchrist, Tr. 504, *in camera*). JGP did not agree and JCI informed Microporous that the discussions were terminated in June 2007 and those discussions were never resumed. (RX00047; Gilchrist, Tr. 504, *in camera*).

**Response to Finding No. 489:**

Evidence at trial contradicts the assertion that the non-assignment clause was the only reason that JCI and Microporous did not come to a supply agreement. JCI's work with Microporous did not ultimately result in a supply contract because of concerns that JCI had over Daramic's arbitration against Microporous (Hall, Tr. 2699-2700), and because Microporous was unable to give JCI the reassurance that it was looking for that if JCI went forward with a supply

contract with Microporous, Microporous would not eventually be sold to Daramic leaving JCI in the same position that it had been in 2004. (Hall, Tr. 2700-2701).

While discussions about the possible supply of PE SLI separators did not pick up again after June 2007, discussions about Microporous possibly supplying deep cycle separators to JCI for use in JCI's golf cart batteries continued right up until the acquisition of Microporous by Daramic. (Hall, Tr. 2704-2705). Indeed, prior to the acquisition of Microporous, JCI was testing Microporous' CellForce separator for use in JCI's golf cart applications because JCI wanted "to see competition" in its acquisition of golf cart separators. (Hall, Tr. 2704-2707).

490. Microporous never had a contract with JCI for the use of CellForce in automotive batteries. (Gilchrist, Tr. 562). Microporous was not selling CellForce to JCI at the time of the acquisition by Daramic. (Gilchrist, Tr. 562).

**Response to Finding No. 490:**

To the extent that Respondent is asserting that the lack of a contract between JCI and Microporous for the sale of CellForce in automotive applications would have prevented Microporous from attaining sales of CellForce to JCI, that assertion is contrary to evidence presented at trial. A large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller. It is not unusual for Microporous to do business without a contract. (Gilchrist, Tr. 614). Microporous made separator sales to EnerSys for fifty to sixty years without a contract. (Gilchrist, Tr. 614-615). Microporous is not the only separator manufacturer that regularly made sales to non-contract customers. [REDACTED]

[REDACTED] } (RX00116 at 004, *in camera*). JCI also regularly purchases separators without a contract. From 2004-2007, JCI purchased over 100 million square meters of separators from Entek on an annual basis without a contract. (Hall, 2686-2687, 2690).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0419 at 008, in camera). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0419 at 008, in camera).

(f) JCI's Joint Ventures and Efforts at Vertical Integration

491. { [REDACTED] } (RX00050 at 04, in camera). JCI entered into a three-way joint venture agreement with Rising and Fengfan in February 2007. (Hall, Tr. 2715-2716; RX00053, in camera; RX00052, in camera). JCI has a { [REDACTED] } (RX00032, in camera).

**Response to Finding No. 491:**  
Complaint Counsel has no specific response.

492. JCI has { [REDACTED] } (Hall, Tr. 2825, in camera; RX00037-02, in camera).

**Response to Finding No. 492:**  
Complaint Counsel has no specific response.

493. { [REDACTED] } (RX00050 at 11, in camera). JCI envisions expanding BFR's supply market outside of Asia and thus drafted their supply agreement with BFR with global language<sup>5</sup>. (RX00051; RX00055; Hall, Tr. 2860, in camera). { [REDACTED] } (Hall, Tr. 2854, in camera). At the signing of the agreement, it was JCI's intention to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RX00055).

**Response to Finding No. 493:**  
{ [REDACTED] }  
[REDACTED] } (Hall, Tr. 2856, in camera). { [REDACTED]  
[REDACTED]

<sup>5</sup> For example, the contract refers to the need for "global insurance." (RX00051; RX00055).

[REDACTED]  
[REDACTED]  
[REDACTED].} (Hall, Tr. 2746, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED].} (Hall, Tr. 2878, *in camera*;  
PX1509 at 009, *in camera*). { [REDACTED]  
[REDACTED] } (PX0907 (Kung  
Dep. at 186-187, *in camera*)).

494. BFR competes with both Entek and Daramic, as well as other smaller separator manufacturers. (Hauswald, Tr. 1034).

**Response to Finding No. 494:**

BFR competes with Entek and Daramic for sales in Asia, but to the extent that Respondent alleges that BFR competes with Entek and Daramic for sales of separators in North America, testimony at trial from Daramic, { [REDACTED] }. Mr. Roe testified that Daramic had never competed with BFR for business in North America. (Roe, Tr. 1807). Moreover, Daramic has never had to make price concessions to customers in North America due to competition from BFR or any other Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] }.} (See generally, CCFOF 207-246). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] (PX0907 (Kung Dep. at 186-187, *in camera*)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2735, 2745-2747, *in camera*).

495. [REDACTED] (Hall, Tr. 2765, *in camera*, RX32,

*in camera*). { [REDACTED] (RX00037 at 002, *in camera*). {

[REDACTED] (RX00032, *in camera*; Hall, Tr. 2766, *in camera*). {

[REDACTED] (RX00032, *in camera*). { [REDACTED] (RX00032, *in camera*; Hall, Tr. 2770, *in camera*; RX32, *in camera*).

**Response to Finding No. 495:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2765, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2878-2879, *in*

*camera*). { [REDACTED]

[REDACTED] (Hall, Tr. 2771, *in camera*), { [REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2771-2777, *in camera*).

496. In order to secure the agreement, JCI was offered as much of the new line capacity as they wanted. (RX00037 at 002).

**Response to Finding No. 496:**

The cited material (RX00037) was not introduced at trial with a witness.

497. [REDACTED] (RX00032, *in camera*;  
Hall, Tr. 2769, *in camera*). [REDACTED]  
[REDACTED] (RX00032, *in camera*). [REDACTED]  
[REDACTED] (Hall, Tr. 2844, *in camera*). [REDACTED]  
[REDACTED] (Hall, Tr. 2844-2845, *in camera*).

**Response to Finding No. 497:**

[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2769-2770, 2844, *in camera*).

498. Additionally, BFR itself believes that it will become more and more price competitive as time moves on. (RX00056).

**Response to Finding No. 498:**

The material cited (RX00056) asserting that BFR will become more price competitive for sale to customers in North America as time moves on, was not used at trial, mischaracterizes the evidence, and is contradicted by documents and testimony on the record. [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2727-2735, *in camera*; PX1522 at 005, *in camera*; see generally CCFOF 213-229, 234-240, 243-246). [REDACTED]  
[REDACTED] (Hall, Tr. 2735-3736, 2764, *in camera*).

[REDACTED]  
[REDACTED] (CCFOF208-212). [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (PX0907, (Kung Dep. at 172-173, *in camera*)). { [REDACTED]

[REDACTED]

[REDACTED] } (PX0265, at 018, *in camera*).

499. { [REDACTED]  
[REDACTED] } (RX00048, *in camera*; RX00049; RX76, *in camera*; Hall, Tr. 2853-2854, *in camera*).

**Response to Finding No. 499:**

{ [REDACTED]  
[REDACTED]

[REDACTED] } (RX00049, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (PX0672 at 006, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0672 at 006, *in camera*).

500. { [REDACTED]  
[REDACTED] } (Hall, Tr. 2838-2839, *in camera*).

**Response to Finding No. 500:**

{ [REDACTED]  
[REDACTED]

[REDACTED] } (Hall, Tr. 2776-2777, *in camera*; see generally CCFOF 983-986).

501. { [REDACTED]  
[REDACTED] } (RX00062, *in camera*). As a result, { [REDACTED]  
[REDACTED] } (RX00061, *in camera*).

**Response to Finding No. 501:**

[REDACTED]

[REDACTED]

[REDACTED] (See generally CCFOF 947-950, 966-967, 969, 972-974, 983-986). [REDACTED]

[REDACTED] (Hall, Tr. 2881, *in camera*). [REDACTED]

[REDACTED].} (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*) [REDACTED]

[REDACTED].} (Hall, Tr. 2881, *in camera*); [REDACTED]

[REDACTED]

[REDACTED] (PX0907 (Kung, Dep. at 262), *in camera*; Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). [REDACTED]

[REDACTED].} (Hall, Tr. 2881-2882, *in camera*; PX0907 (Kung, Dep. at 291, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2881-2882, *in camera*).

[REDACTED]

[REDACTED].} (Axt, Tr. 2219, *in camera*). [REDACTED]

[REDACTED]"} (Axt, Tr. 2220, *in camera*).

[REDACTED]

[REDACTED].}

(PX0907 (Kung, Dep. at 283, *in camera*)). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2880-2881, *in camera*). Furthermore, neither of the documents cited in this finding were shown to the JCI witness at trial.

502. { [REDACTED] } (Hall, Tr. 2820-2821, *in camera*).

**Response to Finding No. 502:**

{ [REDACTED] }  
(Hall, Tr. 2820-2821, *in camera*).

(g) Today

503. { [REDACTED] } (Hall, Tr. 2834, *in camera*). Moreover, as evidenced by the above findings of fact pertaining to JCI, Entek and BFR, the Court further finds:

**Response to Finding No. 503:**

The acquisition of Microporous by Polypore had an adverse effect on JCI's business.

Prior to the acquisition of Microporous, JCI was testing Microporous' CellForce separator for use in JCI's golf cart applications because JCI wanted "to see competition" in its acquisition of golf cart separators. (Hall, Tr. 2704-2707). { [REDACTED]

{ [REDACTED] } (PX1515 at 002, *in camera*).

Following the acquisition of MPLP, JCI scheduled what it called "red flag" meeting to discuss the impact of the acquisition on JCI's purchases of deep-cycle separators. (Hall, Tr. 2705-2707).

{ [REDACTED] }  
{ [REDACTED] } (PX1514, *in camera*). JCI is not aware of any separator manufacturer other than Daramic that can supply a deep-cycle battery separator that will work in JCI's batteries. (Hall, Tr. 2705).

504. { [REDACTED] } (Weerts, Tr. 4458-4459, *in camera*, 4496, *in camera*).

**Response to Finding No. 504:**

Complaint counsel has no specific response.

505. As the result of { [REDACTED] } (Hall, Tr. 2765, *in camera*; RX00032, *in camera*).

**Response to Finding No. 505:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2727-2735, *in camera*; PX1522 at 005, *in camera*; see generally CCFOF 213-229, 234-240, 243-246). { [REDACTED] }  
[REDACTED] } (Hall, Tr. 2735-3736, 2764, *in camera*).

{ [REDACTED] }  
[REDACTED] } (CCFOF208-212). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907, (Kung Dep, at 172-173, *in camera*)). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0265, at 018, *in camera*). { [REDACTED] }  
[REDACTED] } (PX0907 (Kung Dep. at 186-187, *in camera*)). { [REDACTED] }  
[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*).

506. { [REDACTED] } (Weerts, Tr. 4478, *in camera*; RX00133, *in camera*).

**Response to Finding No. 506:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0471, *in camera*; Toth Tr. 1604-1605, *in camera*). { [REDACTED]

[REDACTED]

(Simpson, Tr. 3390-3391, *in camera*). { [REDACTED]

[REDACTED]. }

(Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED]. } (Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]. } (Simpson, Tr. 3195-3196, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3408, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3442, *in camera*). Dr. Simpson explained: {“ [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3441,

*in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3442, *in camera*; *see also*

Gillespie, Tr. 3024-3025, *in camera*). { [REDACTED]

[REDACTED]. } (Simpson, Tr. 3197, *in camera*). As a matter of economic theory,

most-favored nation clauses tend to make firms less competitive by preventing them from

making selective price cuts. (Simpson, Tr. 3197-3178, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3224, *in camera*, *see generally* 3209-3224, *in camera*).

507. { [REDACTED]  
[REDACTED] } (RX00072, *in camera*; Weerts, Tr. 4479-4480, *in camera*; RX00053, *in camera*; RX00052, *in camera*; RX00032).

**Response to Finding No. 507:**

The assertion that battery manufacturers have buying power is contradicted by evidence

{ [REDACTED]

[REDACTED] } (PX0265 at 008,

*in camera*). According to Daramic, { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 004, 007-008, *in camera*). { [REDACTED] }  
[REDACTED] }  
(PX0265 at 010, *in camera*). { [REDACTED] }  
[REDACTED] } (PX0265 at 011, *in camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004 [REDACTED] [REDACTED] PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included { [REDACTED] [REDACTED] }; PX0204 at 002 (Mr. Hauswald's 2006 goals included "Raise Daramic prices where possible to demonstrate pricing power regardless of cost movements.")) Daramic's assessment that battery manufacturers lack buying power is confirmed by the length's that JCI had to go through simply to prevent being forced into a contract that it did not desire from Daramic.

Despite JCI's size, it took JCI more than five years before it could successfully counteract Daramic's strong supplier power and develop a strategy that met its separator supplier needs. As early as 2002, JCI felt that the current suppliers had "an entitlement attitude" and that in order to get a "competitive price" more competition was needed amongst separator suppliers. (Hall, Tr. 2670-2672). At that time, JCI developed a strategy to develop new entrants for competition. (Hall, Tr. 2670). However, JCI was unable to leverage their global share to gain better prices from their existing suppliers or to develop new suppliers, as Daramic successfully

thwarted JCI's efforts by forcing JCI into a contract that it did not want to sign. (Hall, Tr. 2682). Specifically, JCI was unhappy with the pricing terms, the minimum volumes and the length of the contract, yet felt it had no choice but to sign the contract as it was with Daramic. (Hall, Tr. 2674, 2681-2682, 2684). Daramic's coercion forced JCI to abandon its attempt to develop a new separator supplier entrant at that time. (Hall, 2684-2685). JCI continued to pursue a strategy to meet its separator supply needs and looked to Microporous as a possible future supplier. (Hall, Tr. 2693-2695). JCI's work with Microporous did not ultimately result in a supply contract because of concerns that JCI had over Daramic's arbitration against Microporous (Hall, Tr. 2699-2700), and because Microporous was unable to give JCI the reassurance that it was looking for that if JCI went forward with a supply contract with Microporous, Microporous would not eventually be sold to Daramic leaving JCI in the same position that it had been in 2004. (Hall, Tr. 2700-2701). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2748-2749, *in camera*).

508. The JCI Entek agreement and relationship and the BFR joint venture are likely to constrain prices for battery separators.

**Response to Finding No. 508:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (Hall, Tr. 2727-2735, 2745-2747, *in camera*;  
PX1522 at 005, *in camera*; see generally CCFOF 213-229, 234-240, 243-246). { [REDACTED]

[REDACTED]. }  
(Hall, Tr. 2735-2736, 2764, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (CCFOF208-212). [REDACTED]

[REDACTED] } (PX0907, (Kung Dep, at 172-173, *in camera*)). [REDACTED]

[REDACTED] } (PX0907 (Kung Dep. at 186-187, *in camera*)). [REDACTED]

[REDACTED] } (Roe, Tr. 1807, 1813; Weerts, Tr. 4501, 4512, *in camera*).

JCI's agreement with Entek is unlikely to constrain prices in the future. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0471, *in camera*; Toth Tr. 1604-1605, *in camera*). [REDACTED]

[REDACTED] }

(Simpson, Tr. 3390-3391, *in camera*). [REDACTED]

[REDACTED] }

(Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3195-3196, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3408, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3442, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3441,

*in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3442, *in camera*; *see also*

3024-3025, *in camera*). [REDACTED]

[REDACTED] (Simpson, Tr. 3197, *in camera*). As a matter of economic theory, most-

favored nation clauses tend to make firms less competitive by preventing them from making

selective price cuts. (Simpson, Tr. 3197-3198, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3198-3199, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3221-3224, *in camera*, see generally 3209-3224, *in camera*).

509. Based on the foregoing findings, the Court finds that the acquisition of Microporous by Polypore had no adverse effect on JCI because JCI, a large sophisticated buyer, had previously decided on its own course of action with respect to separator supply, and using that buying power, JCI implemented its own course of action regarding separator supply. As a result of JCI's actions, substantial battery separator manufacturing capacity became more available throughout the world, and particularly in North America.

**Response to Finding No. 509:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 503-508).

510. As noted above, while the events of 2004 concerning the execution of the supply agreement between JCI and Daramic are disputed, whatever occurred is immaterial in this matter, except that those events underscore that a large sophisticated buyer can effectively implement its own course of action to secure its battery separator supply.

**Response to Finding No. 510:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 444-459, 503-508).

b. **Exide Technologies, Inc.**

(a) **Background**

511. Exide Technologies, Inc., is a global battery manufacturer with facilities in North America, Europe and Asia. (Gillespie, Tr. 2957, 3093).

**Response to Finding No. 511:**

Complaint counsel has no specific response.

512. Exide { [REDACTED] } and its { [REDACTED] } (Gillespie, Tr. 2930, *in camera*; Gillespie, Tr. 3052, *in camera*).

**Response to Finding No. 512:**

Complaint Counsel has no specific response.

513. Exide's business is segmented into "Industrial" and "Transportation" units. The transportation unit includes automotive, truck, motorcycles, recreational vehicles, golf cart, and boats, and industrial is subdivided into motive and network batteries. (RX01186 at 006-7; Gillespie, Tr. 2930).

**Response to Finding No. 513:**

Complaint Counsel has no specific response.

514. The separators used by Exide have different base materials, including PE, AGM, rubber and PVC, but otherwise have the same function. Primarily, Exide uses PE separators in its products. (Gillespie, Tr. 2931-32).

**Response to Finding No. 514:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 2981-2982, 3042, *in camera*).

515. There is no difference in formulation between industrial and transportation PE battery separators used by Exide except for dimensions like width, height and ribs. (RX00308). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3118, *in camera*).

**Response to Finding No. 515:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3118, *in camera*).

516. Exide sold almost \$3.7 billion worth of batteries in fiscal 2008 and buys approximately \$70 million of battery separators per year. (RX01186 at 27, 57; Gillespie, Tr. 2929).

**Response to Finding No. 516:**

Complaint Counsel has no specific response.

517. Exide manages 15,000 suppliers globally for various products including separators. (Gillespie Tr. 2995).

**Response to Finding No. 517:**

Complaint Counsel has no specific response.

(b) Exide Battery Separator Buying History

(i) Daramic Purchase of the Corydon Plant

518. Although Exide was a party to certain supply agreements for battery separators prior to 1998 (see below), it also owned and ran its own vertically integrated facility in Corydon Indiana. (RX00899).

**Response to Finding No. 518:**

To the extent that Respondent asserts that Exide has any interest in vertically integrating into the manufacture of battery separators, such assertion is contrary to testimony at trial that Exide got out of that business because it was not a "core competency" for Exide, is not currently interested in vertically integrating into that the separator industry, and has "never had any intention of going back into that business." (Gillespie, Tr. 2983-2984).

519. Seeking a cash infusion, in or about December 1998, Exide offered to sell to Daramic the Corydon facility in which Exide, at that time, made its own PE battery separators for the manufacture of its batteries. (RX00899).

**Response to Finding No. 519:**

The cited material does not support the proposition.

520. On or about April 7, 1999, Exide rejected Daramic's initial offer to purchase the Corydon facility and informed Daramic that it had engaged another company to arrange for "the sale of the plant accompanied by a multi-year contract for the supply of separator material equal to the plant's current capacity." (PX0724, emphasis added).

**Response to Finding No. 520:**

Complaint Counsel has no specific response.

521. By June 1999, Exide had received and was considering three offers for purchase of the plant – all of which included a cash purchase price, pricing per thousand lineal feet of separators from the plant and a proposed term for the accompanying supply agreement for the purchase by Exide of the separators for the plant. (PX0726).

**Response to Finding No. 521:**

Respondent's assertion that Exide considered only three offers for the purchase of the Corydon facility is contradicted by evidence that H&V was also an active bidder for the facility.

(See CCRF 522).

522. The companies bidding on Corydon in June 1999 were Microporous, Daramic and Entek. (PX0726 at 002).

**Response to Finding No. 522:**

Respondent's assertion that Microporous, Daramic and Entek were the only three companies bidding on Exide's Corydon facility is contradicted by evidence that H&V was also bidding on the facility. In June 1999 Exide's representatives contacted H&V invited H&V to submit a proposal to purchase the Corydon assets. (PX1368 at 001). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0917 (Cullen, Dep. 11, *in camera*); PX0925 (Porter, Dep. at 37-38, *in camera*); PX1368 at 001-002; *see also* CCFOF 1171-1177).

523. Microporous offered Exide \$25 - \$29 million in cash and requested a 5 year agreement with prices for separators ranging from \$32-\$33. (PX0726 at 002-3).

**Response to Finding No. 523:**  
Complaint Counsel has no specific response.

524. Daramic submitted a matrix of purchase prices for a supply agreement from which Exide was able to choose the best option for it, based on its cash needs. (PX0726; PX0731; PX0908 at 21, *in camera*). The lowest price for separators offered was \$32 (equal to that offered by Microporous) and the amount of cash offered in that version of the matrix was \$25.6 million with a 10 year supply agreement. (PX0726; PX0731).

**Response to Finding No. 524:**  
{ [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hauswald, Tr. 763 (above market

pricing stemmed from acquisition of Corydon)); Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-3020, *in camera*; *see also* PX1026, *in camera*).

525. Entek offered \$1.5 million in cash, separators at a price of \$31.75 and a 7 year agreement. (PX0726).

**Response to Finding No. 525:**  
Complaint Counsel has no specific response.

526. On or about August 4, 1999, Exide accepted Daramic's offer at the \$32 price level with a cash purchase price of \$25.6 million and assumption of lease obligations of \$21 million. Exide was "delighted" to have reached the agreement at that time. (PX0727 at 002). The agreement reached by Exide and Daramic was of great benefit to Exide in that it provided significant cash with an agreement to buy separators at a reasonable and, at that time, competitive market price. (PX0726; PX0727).

**Response to Finding No. 526:**

The cited material does not support the Respondent's self-serving proposition that the agreement was a great benefit to Exide. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hauswald, Tr. 763 (above market pricing stemmed from acquisition of Corydon));

Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-3020, *in camera*; see also PX1026, *in camera*).

527. None of the current executives at Exide, including each of the two individuals who testified in Complaint Counsel's case, were part of the negotiation or decision making related to the agreement reached between Exide and Daramic in 1999, or the multiple subsequent amendments, all of which include provisions which benefit Exide. (Gillespie Tr. 3065, 3070; PX0835 at 002, *in camera*). { [REDACTED] } (PX0835, *in camera*).

**Response to Finding No. 527:**

Respondent's self-serving assertion that its contracts with Exide are beneficial to Exide is contradicted by testimony at trial. { [REDACTED]

[REDACTED]

[REDACTED] } (Hauswald, Tr. 763 (above market

pricing stemmed from acquisition of Corydon)); Bregman, Tr. 2901, *in camera*; Gillespie, Tr.

3018-3020, *in camera*; see also PX1026, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3001-3002, *in camera*; see generally Gillespie, Tr. 2999, 3074, 3152,

*in camera* { [REDACTED] };  
[REDACTED];

Gillespie, Tr. 3003, 3150-3151, *in camera* { [REDACTED] }; Gillespie, Tr. 3066-3067 (Exide does not feel that it has many negotiating levers when dealing with Daramic); Gillespie, Tr. 3097-3098 (Exide lacks pressure points in negotiations with Daramic and is therefore unable to exert its will on Daramic to get price decreases)). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3000, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3000, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 2978, 3098-3099, 3112-3113, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1050, *in camera*; Bregman, Tr. 2901-2905, *in camera*; see also CCFOF 1060-1065).

(ii) Daramic's Prior Supply Agreement

528. { [REDACTED]  
[REDACTED] } (RX00977, *in camera*).

**Response to Finding No.528:**

Complaint Counsel has no specific response.

529. { [REDACTED]  
[REDACTED] } (RX01517, *in camera*).

**Response to Finding No.529:**

Complaint Counsel has no specific response.

530. Pursuant to {

} (RX00976, *in camera*, PX0728, *in camera*).

**Response to Finding No.530:**

Complaint Counsel has no specific response.

531. {

} (PX0728, *in camera*).

**Response to Finding No.531:**

{

} (PX0724 at 002; RX00976 at 001, *in*

*camera*).

532. On or about September 29, 2000, {

} (RX01517, *in camera*).

**Response to Finding No.532:**

{

} (RX01517, *in camera*).

533. In or about April 2001, {

} (RX01517, *in camera*).

**Response to Finding No.533:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (RX01517 at 001, *in camera*).

534. At the time of the Amendment, { [REDACTED] }  
(RX01517, *in camera*). Daramic agreed in the Amendment to {  
[REDACTED]  
[REDACTED] } (RX01517, *in camera*).

**Response to Finding No.534:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (RX01517 at 002, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Hauswald, Tr. 763 (above market pricing stemmed from acquisition  
of Corydon)); Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-3020, *in camera*; see also  
PX1026, *in camera*).

535. As part of the Amendment in 2001, the parties also agreed to enter into a Golf Cart  
Supply Agreement ("GCSA") whereby Exide was incentivized to purchase golf cart separators  
from Daramic. (Gillespie, Tr. 2937-38). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (RX01517 at 005, *in camera*). { [REDACTED] }  
[REDACTED] } (RX01517, *in camera*).

**Response to Finding No.535:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (CCRF 527). { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED] (PX2051 at 001-002, *in camera*) ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED] Daramic's first deep-cycle separator, DC, was introduced to the market in 2002, however the DC separators did not pass Exide's testing and qualification and therefore [REDACTED] (PX0319 at 003; Gillespie, Tr. 2937).

Daramic then developed the HD separators to replace its DC separators, and provide improved performance over the DC separators. (Roe, Tr. 1196; PX0911 (Roe, Dep. at 69-70)). Daramic HD's first commercial sales took place in 2005. (Roe, Tr. 1209). Exide tested HD for over a year for use in its Salina battery manufacturing facility, and only after testing demonstrated that HD met Exide's performance criteria for deep-cycle batteries could Exide begin to switch from Flex-Sil to HD [REDACTED] (Gillespie, Tr. 2935, 2936-2938). [REDACTED]

[REDACTED] (PX0356, *in camera*). Even after Exide's initial qualification, further work was required by Exide to qualify HD separators use in its Bristol manufacturing facility. This qualification process has taken over a year and was still ongoing at

the time of the acquisition of Microporous. (Gillespie, Tr. 2935). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0222 at 001, *in camera*).

536. { [REDACTED]

[REDACTED] } (RX00968 at 002, *in camera*).

**Response to Finding No.536:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (CCRF

535; *see also* CCFOF 347, 349, 368-370, 375-376, 382, 393-394, 398-405, 897).

537. { [REDACTED]

[REDACTED]

[REDACTED] } (RX01517, *in camera*).

These are benefits to Exide under this contract and are possible by virtue of the long term nature of the agreement. (RX01517, *in camera*; RX01285).

**Response to Finding No.537:**

Respondent's self-serving assertion that its contracts with Exide are beneficial to Exide is

contradicted by testimony at trial. (CCRF 527). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX01517 at 004, *in camera*).

538. The Court finds that { [REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 2999, *in camera*). { [REDACTED]  
[REDACTED] (PX2052 at 005, *in camera*).  
Further, { [REDACTED]  
[REDACTED] (RX00342 at 033, *in camera*).

**Response to Finding No.538:**

{ [REDACTED]  
[REDACTED]

[REDACTED] } (See RX00976 at 005, *in camera* (clause 7.3 of the North American Supply Agreement); PX2052 at 005, *in camera* (clause 7.2 of the Automotive and Supply contract); (PX2051 at 004, *in camera* (clause 6.1 of the Golf Cart Separator Supply Contract).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3003, 3150-3151, *in camera*).

539. The Amendment contained significant terms which brought substantial financial benefit to Exide at a time when it was financially troubled. (RX01517, *in camera*; RX01285).

**Response to Finding No.539:**

Respondent's self-serving assertion that its contracts with Exide are beneficial to Exide is contradicted by testimony at trial. (See CCRF 527, 537).

540. Exide filed for bankruptcy in early 2002, (RX01285), and emerged from bankruptcy in May 2004. (PX0990 at 010).

**Response to Finding No.540:**

Complaint Counsel has no specific response.

541. On or about July 11, 2002, { [REDACTED] } (RX01281, *in camera*). On emerging from bankruptcy, Exide assumed the terms of the various contracts with Daramic.

**Response to Finding No.541:**

{ [REDACTED]

[REDACTED]

[REDACTED] } With respect to the third sentence, this bare assertion is unsupported by any evidence.

542. In March 2005, { [REDACTED] } (RX00979, *in camera*).

**Response to Finding No.542:**

{ [REDACTED]

[REDACTED]

[REDACTED] } (RX00979 at 003, *in camera*). In fact,

Exide has only had a consignment arrangement with Daramic for products in Europe, and such agreement does not cover products purchased in North America. (Gillespie, Tr. 2992).

543. Despite the millions of dollars of revisions and concessions made by Daramic to Exide following the execution of the original asset purchase agreement in 1999, which included by its terms a 10-year supply agreement, Exide routinely and repeatedly breached the terms of its agreements with Daramic by, among other things exceeding, often by millions of dollars, the capital limit approved by the bankruptcy court. (RX01282, RX01283, RX01284, RX01285).

**Response to Finding No.543:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”} (Gillespie, Tr. 3099, *see also* Gillespie, Tr. 3112-3113, *in*

*camera*).

544. Further, despite the significant incentives to purchase golf cart separators from Daramic starting in 2001, Exide did not approve Daramic golf cart separators for use in Exide golf cart

batteries until approximately October 2006, and did not purchase a single golf cart separator from Daramic – and therefore did not obtain the value of the credits and concessions on the price of those separators – until 2006. (RX00314; Gillespie, Tr. 2937-38; RX0119, *in camera*).

**Response to Finding No.544:**

Respondent's implication that Exide dragged its feet from 2001 until 2006 before purchasing a golf cart separator from Daramic is both disingenuous and contrary to the facts and testimony at trial. The assertion is disingenuous because Daramic did not have a deep cycle separator that could be qualified at Exide until 2005. (Gillespie, Tr. 2935, 2936-2938). In fact, Daramic did not even have deep cycle separator that it was selling in 2001, and then when it did develop a deep cycle separator (Daramic DC), the separator failed Exide's testing and could not be qualified by Exide for use in its batteries. (PX0319 at 003; Gillespie, Tr. 2937). After Daramic developed an improved deep cycle separator (HD) to replace its DC separators in 2005, (Roe, Tr. 1196,1209; PX0911 (Roe, Dep. 69-70)) Exide immediately tested HD (a process that <sup>in camera</sup> lasted over a year), and only after testing demonstrated that HD met Exide's performance criteria for deep-cycle batteries could Exide begin to switch from Flex-Sil to HD { [REDACTED] [REDACTED] }. (Gillespie, Tr. 2935, 2936-2938; *see also* CCRF 527).

545. Specifically, the contracts require { [REDACTED] } per year. (RX00976, *in camera*, RX00968, *in camera*, RX01517, *in camera*). If Exide fails to { [REDACTED] } (RX00968, *in camera*; RX01517, *in camera*).

**Response to Finding No.545:**

Complaint Counsel has no specific response.

546. In 2008, the purchase of HD separators (instead of Flex-Sil) generated a credit of about { [REDACTED] } for Exide. This means that the HD separators { [REDACTED] } percent less expensive than the price it paid for Flex-Sil during that time. (RX01119, *in camera*; RX00945, *in camera*).

**Response to Finding No.546:**

The cited materials do not support the propositions made in this finding.

547. Despite this enormous incentive, { [REDACTED] } not purchase any meaningful quantities of HD until 2006 – five years after the incentive was introduced. (RX01119, *in camera*).

**Response to Finding No.547:**

Respondent's implication that Exide dragged its feet from 2001 until 2006 before purchasing a golf cart separator from Daramic is both disingenuous and contrary to the facts and testimony at trial. The assertion is disingenuous because Daramic did not have a deep cycle separator that could be qualified at Exide until 2005. (Gillespie, Tr. 2935, 2936-2938). In fact, Daramic did not even have deep cycle separator that it was selling in 2001, and then when it did develop a deep cycle separator (Daramic DC), the separator failed Exide's testing and could not be qualified by Exide for use in its batteries. (PX0319 at 003; Gillespie, Tr. 2937). After Daramic developed an improved deep cycle separator (HD) to replace its DC separators in 2005, (Roe, Tr. 1196,1209; PX0911 (Roe, Dep. at 69-70)), Exide immediately tested HD (a process that lasted over a year), and only after testing demonstrated that HD met Exide's performance criteria for deep-cycle batteries could Exide begin to switch from Flex-Sil to HD { [REDACTED] } (Gillespie, Tr. 2935, 2936-2938; *see also* CCRF 527).

548. Mr. Gillespie admitted that using HD saves Exide "a lot of money" and, in an analysis of pricing between HD and Flex-Sil, HD was "considerably" lower in cost. (Gillespie, Tr. 2944, 2947, 2996). Furthermore, he admitted that HD is not qualified for OEM use – meaning that no matter what the price, HD cannot be used in those types of batteries. (Gillespie, Tr. 3091; RX1094).

**Response to Finding No.548:**

Respondent's assertion that HD cannot be used in OEM batteries is contradicted by testimony from Exide that it expects to qualify HD for use in all of its deep cycle batteries, including those going into OE applications. (Gillespie, Tr. 3091). Furthermore, HD had already been qualified in certain deep cycle applications by one of Exide's competitors. (Wallace, Tr. 1933-1935). Moreover, approximately 90% of the golf cart batteries that Exide sells are sold into the aftermarket; thus Exide was already prepared to use HD in the overwhelming majority of its deep cycle batteries. (Gillespie, Tr. 2932).

549. Despite the fact that HD is “considerably” lower in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much Flex-Sil as it did HD. (Gillespie, Tr. 3092). { [REDACTED]

(RX00677, *in camera*; PX0949, *in camera*) This difference is considerably more than a SSNIP 5-10% price difference between Flex-Sil and HD.

**Response to Finding No.549:**

It is disingenuous of Respondent to claim that the amount of Flex-Sil that Exide purchased in 2008 is in anyway representative of Exide’s true intentions with regard to its desire to use HD separators given that Exide was forced by Daramic in 2008 to displace HD with Flex-Sil (at a higher price) during Daramic’s Owensboro strike, thus distorting the amounts of Flex-Sil and HD that Exide purchased in 2008. (Roe, Tr. 1223). Because Exide understands that HD is an exact substitute for Flex-Sil, Exide requested HD pricing on the Flex-Sil separators it was forced to purchase during the strike, or alternatively to get the golf cart separator credit applied to its purchases during the strike as contemplated in the GSCA, however Daramic refused on both accounts. (RX01260).

Furthermore, Exide is still in the process of qualifying HD for use in its deep cycle batteries, a process that takes a long period of time. (Gillespie, Tr. 2935-2936 (testing of HD is “ongoing” and the Exide “Bristol facility is still figuring that out.”). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0222 at 001, *in camera*).

Finally, Daramic HD was the closest independently-owned substitute for Flex-Sil. Thus, if the owner of Flex-Sil were to increase price a little more, some of the sales that would be lost would shift to Daramic HD. (Simpson, Tr. 3177-3178). If Flex-Sil and Daramic HD are owned by the same owner, then the joint owner recovers some of the profit on the lost Flex-Sil sales that shift to Daramic HD. (Simpson, Tr. 3178). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3178, PX2251 at 017, *in camera*; Kahwaty, Tr. 5514-5515, *in camera*).

550. Flex-Sil and HD are not economic substitutes for each other under these circumstances. Moreover, the above findings raise questions of credibility concerning Exide's intent in this proceeding, and Gillespie's testimony concerning the effect of HD as a price constraint on FLEX-SIL.

**Response to Finding No.550:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence that HD and Flex-Sil were both functional and economic substitutes. Battery manufacturers viewed HD and Flex-Sil as substitutes for each other (*See, e.g.*, Gillespie, Tr. 2933; *see also* CCFOF 375-384), and HD sales had displaced Flex-Sil in deep cycle batteries. (*See, e.g.*, Gillespie, Tr. 2936-2937; Gilchrist, Tr. 368-370; *see also* CCFOF 385-394). Exide used HD on no less than three occasions to constrain the pricing of Flex-Sil. (*See e.g.*, Gillespie, Tr. 2945-2953; *see also* CCFOF 398-405). [REDACTED]

[REDACTED] } (*See, e.g.*, Gilchrist, Tr. 371-372; Godber, Tr. 190-191, 204-205; 214-215, 258, *in camera*; McDonald, Tr. 3912; *see also* CCFOF 395-421). Moreover, multiple witnesses also testified to the fact that after the acquisition, there is no product that is capable of similarly constraining the price of Flex-Sil. (CCFOF 422-424; 434-460).

Finally, Daramic HD was the closest independently-owned substitute for Flex-Sil. Thus, if the owner of Flex-Sil were to increase price a little more, some of the sales that would be lost would shift to Daramic HD. (Simpson, Tr. 3177-3178). If Flex-Sil and Daramic HD are owned by the same owner, then the joint owner recovers some of the profit on the lost Flex-Sil sales that shift to Daramic HD. (Simpson, Tr. 3178). [REDACTED]

[REDACTED] (Simpson, Tr. 3178, PX2251 at 017, *in camera*;  
Kahwaty, Tr. 5514-5515, *in camera*).

551. { [REDACTED]  
[REDACTED] } (PX0835, *in camera*). { [REDACTED]  
[REDACTED] } (PX0835, *in camera*).

**Response to Finding No.551:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0835, *in camera*).

552. Altogether, { [REDACTED]  
[REDACTED] } (PX0835, *in camera*).

**Response to Finding No.552:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0835, *in camera*;  
CCRF 551). { [REDACTED]  
[REDACTED]  
[REDACTED] } ((Hauswald, Tr. 763 (above market pricing stemmed from acquisition  
of Corydon); Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-3020, *in camera*; see also  
PX1026, *in camera*; PX0835, *in camera*).

553. [REDACTED] (PX0835, *in camera*; Gillespie, Tr. 3102, *in camera*). The contracts and amendments to the contracts that Daramic has agreed to with Exide have contained significant financial and competitive benefit to Exide. (RX01517, *in camera*; RX01285).

**Response to Finding No.553:**

Respondent's self-serving assertion that its contracts with Exide are beneficial to Exide is contradicted by testimony at trial. (CCRF 527). [REDACTED]

[REDACTED] (PX1050, *in camera*; Bregman, Tr. 2901-2905, *in camera*; see also CCFOF 1060-1065).

554. Exide itself admits that Daramic has done things along the way to help Exide. (Gillespie, Tr. 3100). For instance, Mr. Gillespie testified that Exide was "treated very well" during the October 2006 force majeure event (which was clearly real to Exide), and that "it wasn't easy" during that time for Daramic, but that it worked with Exide to ensure it received supplies. (PX1048; Gillespie, Tr. 2985, 3095).

**Response to Finding No.554:**

Respondent's self-serving assertion that its contracts with Exide are beneficial to Exide is contradicted by testimony at trial. (CCRF 527). [REDACTED]

[REDACTED] (PX1050, *in camera*; Bregman, Tr. 2901-2905, *in camera*; see also CCFOF 1060-1065).

555. Mr. Gillespie concedes, in fact, that [REDACTED] (Gillespie, Tr. 3112, *in camera*).

**Response to Finding No.555:**

[REDACTED] (CCRF 527). In fact, while Exide was not pleased with the contractual relationship that it had with Daramic, (Gillespie, Tr. 3065) [REDACTED]

[REDACTED] } (Gillespie, Tr. 3112,  
*in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1050, *in camera*; Bregman, Tr. 2901-2905, *in camera*; *see also*  
CCFOF 1060-1065).

556. { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3073, 3101-3103, *in camera*; RX00537, *in camera*).

**Response to Finding No.556:**

{ [REDACTED] } (*See e.g.*,  
RX00976 at 004, *in camera* { [REDACTED]  
[REDACTED] } { [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3102, *in camera* { [REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3146-3148, *in camera* { [REDACTED]

[REDACTED] };

Gillespie, 3103, *in camera* { [REDACTED] };

PX1900 at 001, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }; PX1063 at 001, *in camera* { [REDACTED]

[REDACTED] }

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3003, 3150-3151, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0261 at 003, *in camera*; Roe, Tr. 1786-1787, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (*See* CCRF 538).

557. In each case, { [REDACTED]  
[REDACTED] } (RX00019, *in camera*; Gillespie, 3101-3104, *in camera*; RX00927 at 5-16, *in camera*). { [REDACTED]  
[REDACTED] } (RX00019, *in camera*; Gillespie, 3101-3104, *in camera*).

**Response to Finding No.557:**

{ [REDACTED]  
[REDACTED] } (*See* CCRF 556).

558. Further, in the first five years of the agreement, from 1999-2004, and in addition to the benefits set out above which were part of the multiple amendments, Daramic did not pass on any raw material costs to Exide, despite the contractual provisions that would have allowed such increases. (Gillespie Tr. 3070).

**Response to Finding No.558:**

The material cited does not support the proposition that Daramic actually experienced any raw material increases from 1999-2004 that would have justified a price increase as per the

contracts, nor is there any evidence anywhere on the record supporting such a notion. (Gillespie, Tr. 3070). { [REDACTED] } (See CCRF 527).

559. Exide has used the fact that it is one of the largest battery manufacturers in the world as negotiating leverage with suppliers, including Daramic. (Gillespie Tr. 3070-71). Even with written supply agreement with fixed pricing, Exide still uses anything "not clearly stated in the contract interpretation as leverage points" against Daramic. This includes technology, volumes and future business. (Gillespie Tr. 3071). These actions show the power and leverage Exide has vis a vis even its contractual suppliers. (Gillespie Tr. 3070-71).

**Response to Finding No.559:**

The material cited does not support the assertion that Exide used its size and buying power in negotiations with Daramic, and is contradicted by testimony by Mr. Gillespie that Exide is able to use its size as leverage in negotiations with Daramic. (Gillespie, Tr. 3070-3071). Nor did Mr. Gillespie testify that Exide uses anything not clearly stated in the contract interpretation as leverage points against Daramic. (Gillespie, Tr. 3070-3071).

Whereas, Exide feels that it does have some buyer power with regards to certain other raw material suppliers, it is crystal clear to Exide that it has no buyer power in its relationship with Daramic. (Gillespie, Tr. 3097-3098 (Exide lacks pressure points in negotiations with Daramic and therefore is unable to exert its will on Daramic to get price decreases as it is able to do with many other suppliers)); *see also* CCFOF 1060-1065 { [REDACTED]

[REDACTED]; CCFOF 1069-1078 { [REDACTED] }

{ [REDACTED] } (See CCRF 478).

560. { [REDACTED] }

[REDACTED]

[REDACTED] (Gillespie, Tr. 3120-21, *in camera*; PX1097, *in camera*; RX00652; RX00263, *in camera*; RX00661, *in camera*).

**Response to Finding No.560:**

{ [REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCFOF 444-445). { [REDACTED]

[REDACTED] (Gillespie, Tr. 3044-3046, 3121, 3132-3134, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX0223 at 004, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX0223 at 004, *in camera*).

561. { [REDACTED]

[REDACTED]  
[REDACTED] (PX1097 at 002, *in camera*).  
[REDACTED]

**Response to Finding No.561:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CCFOF 444-445). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3044-3046, 3121,  
3132-3134, *in camera*).

562. The only option provided to Exide for avoiding the Microporous price increases prior to the Acquisition was to provide to Microporous "An updated MOU by Feb 14!! . . . A redline of the original contract proposal by Feb 14th . . . A commitment (contract) ready at the meeting on the 27 granting Microporous a minimum of 3,000,000 square meters of industrial motive power business in Europe to start no later than April 1, 2008." (RX01033). Without those items, Matt Wilhelm, Microporous CFO, told Exide that those actions "will risk jeopardizing future shipments." (RX01033). [REDACTED]  
[REDACTED] } (Gilchrist, Tr. 481-82, *in camera*)

**Response to Finding No.562:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (CCFOF 444-445). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3044-3046, 3121,  
3132-3134, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (PX0223 at 004, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0223 at 004, *in camera*).

(c) Microporous

563. Exide and Microporous had an over 60-year relationship with respect to the sale of rubber based separator products. (PX1018 at 004). { [REDACTED]

[REDACTED]

} (PX00975 at 001, *in camera*).

**Response to Finding No.563:**

Complaint Counsel has no specific response.

564. On or about November 30, 2001, { [REDACTED]

[REDACTED]

} (PX2190 at 019, *in camera*; RX00974 at 001, *in camera*).

**Response to Finding No.564:**

The cited material does not support the proposition that Exide purchases ACE-SIL for use in golf cart batteries.

565. { [REDACTED]

[REDACTED]

} (RX00974 at 001, *in camera*).

**Response to Finding No.565:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00974 at 008, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 2935, 2936-2938; *see also* CCRF 527).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX2051 at 001-002, *in camera*). Finally, Exide

testimony at trial made it clear that Exide views HD as a complete substitute for Flex-Sil.

(Gillespie, Tr. 2933, 2941-2944; CCFOF 375-376).

566. Furthermore, Exide has also conceded that Flex-Sil is a different type of product, with different consistency, and requiring different machines than Daramic's HD product or Microporous' CellForce product. (Gillespie, Tr. 2935-2936).

**Response to Finding No.566:**

Respondent's assertion that Exide concedes that Flex-Sil requires different machinery on the part of the battery manufacturer is contrary to the testimony of Mr. Gillespie. (Gillespie, Tr. 2935-2936). Mr. Gillespie never said that Exide uses different machinery, but rather that when a battery manufacturer moves from one separator to another it requires tweaking of machinery to make sure it runs properly. This tweaking has an impact on the time it takes for any new separator to get qualified by a battery manufacturer. (Gillespie, Tr. 2935-2936, 2954).

567. Exide also admits that its purchase of FLEX-SIL® separators for its golf cart batteries is not due to price. (Gillespie Tr. 3092).

**Response to Finding No.567:**

To the extent that Respondent's asserts that Exide purchases the higher priced Flex-Sil because Flex-Sil is superior to HD, such assertion is contradicted by testimony at trial. Exide testimony at trial made it clear that Exide views HD as a complete substitute for Flex-Sil.

(Gillespie, Tr. 2933, 2941-2944; CCFOF 375-376).

According to Exide, the reason that Exide continues to purchase Flex-Sil (at higher prices than HD) is because it has not yet had the opportunity to fully qualify Flex-Sil for use in all of its deep-cycle batteries. As Mr. Gillespie testified, Exide started qualifying Flex-Sil for use in its Salina facility and for use with its most popular batteries. (Gillespie, Tr. 2935, 3090-3091).

Subsequently, Exide started the process of qualifying HD in its other facility that manufactures deep-cycle batteries, a process that is ongoing. (Gillespie, Tr. 2935-2936, 2954). In the future, Exide intends on having all of its deep-cycle batteries go through the process of HD qualification. (Gillespie, Tr. 3091).

568. In January 2008, Microporous was supplying Exide with ACE-SIL® products for stationary and submarine applications, and Flex-Sil products for golf cart applications. Sales of those products from Microporous to Exide were approximately \$3 million in 2007. (PX1023 at 098).

**Response to Finding No.568:**

The cited material does not support the proposition that Microporous' sales to Exide were \$3 million in 2007, but rather that sales to Exide exceeded \$3 million in 2007. (PX1023 at 098).

569. { [REDACTED] } (Gillespie Tr. 3127-3128, *in camera*).

**Response to Finding No.569:**

{ [REDACTED] } (Gillespie, Tr. 3127-3128, *in camera*). { [REDACTED] }

{ [REDACTED] } (Gillespie, Tr. 3029, *in camera*). It was partly because of this reputation that Exide was working with Microporous to become a PE SLI separator supplier. (CCFOF 604-623).

570. The relationship between Exide and Microporous was difficult and constrained. (RX00748 at 002). For instance, in 2005, when the parties were negotiating a new agreement and Microporous implemented a price increase, Exide cancelled a meeting to discuss the issues at the last minute after Microporous personnel had traveled to Georgia. Thereafter, Exide began unilaterally deducting the announced price increase and energy surcharges from their invoices and failed to pay certain invoices. Following these actions by Exide, Microporous threatened to cut off shipments if receivables were not brought current. Exide and Microporous were not able to finalize an agreement in 2005. (RX00748 at 002).

**Response to Finding No.570:**

The cited material does not support Respondent's assertion that the relationship between Exide and Microporous was difficult and constrained. (RX00748 at 002). Moreover, it is disingenuous of Respondent to point to specific steps that Exide took to fight a price increase on Flex-Sil as it was getting HD qualified, and then at the same time argue that Exide's testimony about the use of HD as a constraint is not credible. (CCRF 5005; RFOF 550).

571. As of October 12, 2006, Microporous considered Exide to be "severely overleveraged." It had tightened its credit procedures with respect to Exide and purchased "receivables insurance" to protect itself from Exide's possible financial collapse. (PX2110 at 007; Trevathan, Tr. 3610-11).

**Response to Finding No.571:**

Notwithstanding Exide's debt position, Exide paid to Microporous "all amounts due since at least 2001." (PX2110 at 007).

572. At nearly the same time, in March 2006, Exide had determined that the "[p]rices and [t]erms currently offered by Amerace are uncompetitive" and that Microporous had an "arrogant attitude" and "take it or leave it" approach. (RX00314).

**Response to Finding No.572:**

It is disingenuous of Respondent to point to specific steps that Exide took to fight a price increase on Flex-Sil as it was getting HD qualified, and then at the same time argue that Exide's testimony about the use of HD as a constraint is not credible. (CCRF 5005; RFOF 550).

573. [REDACTED]

[REDACTED] (Gillespie, Tr. 3041, *in camera*, 3085-86).

**Response to Finding No.573:**

Respondent's assertion that Microporous' pricing only became competitive because of the partnership with Exide is contradicted by testimony at trial that Microporous became competitive once Exide qualified HD in 2006, at which point Exide finally had a competitive product with which to leverage the pricing that it was receiving on Flex-Sil separators. (Gillespie, Tr. 2949-2950). According to Mr. Gillespie, having HD qualified for use in some of Exide's deep cycle batteries "was the only reason why we were able to negotiate or have leverage" in negotiating with Microporous. (Gillespie, Tr. 2949-2950). Mr. Gillespie was unable to use HD as leverage prior to 2006 because "we don't negotiate from the standpoint of we don't have a viable option, and until we have that viable option. Then we'll negotiate at that point." (Gillespie, Tr. 2950).

574. { [REDACTED] } (PX0910  
(Trevathan Dep., 37-39), *in camera*).

**Response to Finding No.574:**

Notwithstanding Respondent's mischaracterization of Exide's relationship with Microporous, (See CCRF 569-573) Exide and Microporous worked together to enter into a long term supply relationship for the supply of PE SLI separators up until the date of the acquisition. (See CCFOF 604-623).

575. Microporous continued to have concerns with Exide's lack of financial strength, but proceeded to discuss with Exide possible scenarios for an expansion of Microporous' Piney Flats and Feistritz facilities to accommodate Exide production. (PX1018 at 006; Trevathan, Tr. 3609-11; PX2030 (Heglie, IH at 40-41; PX2031 (Heglie Dep. 132-133)).

**Response to Finding No.575:**

To the extent that Respondent asserts that Exide's financial position imperiled Microporous' expansion work with Exide, such assertion is contradicted by testimony to the contrary. Microporous worked with Exide up until the acquisition to become a supplier to Exide. (See CCFOF 604-623). Moreover, because Mr. Trevathan stated that Mr. Gilchrist was

the point person in negotiations with Exide on the expansion, Mr. Gilchrist's testimony should be accorded greater weight on the Exide negotiations. (Trevathan, Tr. 3756). According to Mr. Gilchrist there was ongoing activity between Microporous and Exide up until the time of the acquisition, including Microporous signing an MOU in the Fall of 2007, renewing it in February 2008, making sample materials, which were run at three Exide plants in early 2008, and attending technical meetings between the two firms in Paris and Atlanta. (Gilchrist, Tr. 443-444).

Additionally, Mr. Heglie did not testify about Exide's financial strength or possible scenarios for an expansion at the pages cited from his Investigational Hearing transcript. (PX2300 (Heglie, IH at 40-41)). Furthermore, as to the cited deposition testimony, Mr. Heglie testified that he did not recall how, if at all, Exide's financial position impacted Microporous' work with them. (PX2301 (Heglie, Dep. 132-133)).

576. In order to consider a possible expansion based on Exide, Microporous "required an agreement . . . in the form of a long-term supply agreement that would have included terms for the company to supply a sufficient amount of volume that would have required or occupied a full production line . . . sold at a price that would have been financially attractive to [Microporous]." (Trevathan, Tr. 3613, 3758-59).

**Response to Finding No.576:**

Complaint Counsel has no specific response.

577. In addition, Microporous required funding for any expansion and approval from its board of directors before it could move forward with the expansion. (Trevathan, Tr. 3613).

**Response to Finding No.577:**

To the extent that the assertions in this finding relate to the Phase III expansion for Exide,

Complaint Counsel has no specific response.

578. Microporous could not have supplied SLI separators requested by Exide with its existing separator lines. (PX0909 (McDonald Dep. 9-10)).

**Response to Finding No.578:**

Complaint Counsel has no specific response.

579. [REDACTED]

[REDACTED] (Gillespie Tr. 3053, *in camera*). [REDACTED]

(Gillespie Tr. 3053-54, *in camera*).

**Response to Finding No.579:**

[REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3084).

Furthermore, Exide believed that the MOU would eventually lead to Exide's purchasing of PE

SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). [REDACTED]

[REDACTED] (Gillespie, Tr. 3058-3059, *in camera*).

580. Despite this knowledge, Exide did not take any material steps to exhibit any commitment to Microporous sufficient to allow Microporous to seek funding required for an expansion, seek approval from its board, or move forward with an expansion for Exide in any significant or realistic fashion. Specifically:

a. In Spring 2007, Microporous provided to Exide schedules, quotations, an MOU and a draft of a contract for the supply of SLI separators to Exide. Almost a full year later – on February 14, 2008, only ten days before the Acquisition - the only thing Microporous had received back from Exide was an MOU that was signed after it had already expired by its own terms. (RX00009; RX00399).

b. Following the original expiration of the MOU on August 31, 2007, Exide made no genuine effort to renew the MOU until mid-February 2008. (Gillespie, Tr. 3075-76), when the MOU was renewed, it was for only 45 days. (RX00403). Based on the testimony heard by the Court, there is no reason to believe that the parties could have accomplished in the next 45 days what they had failed to do in the 120+ days prior to the renewal.

c. Exide's reason for signing the MOU extension appears to be primarily because Microporous was insisting on a price increase that it had announced to Exide and had hinted to Exide that shipments from Microporous were "at risk." Alberto Perez of Exide specifically noted to his superior, Pradeep Menon, that "I am trying to do everything I can to keep the increase off the table until we can talk at the end of February and this extension (in my opinion) is [sic] a small concession." (RX00010).

d. Less than two months before the Acquisition, Microporous was "suddenly" asked by Exide to attend a "Separator Supplier Conference" in Paris, which included all of Exide's suppliers, for a limited presentation. (PX1018 at

004). Microporous was allotted only three hours of time out of a three day conference. (PX1018 at 002-3; PX1096; McDonald, Tr. 3838). There were no discussions related to the possible expansion or Exide's commitment to Microporous on the agenda. (PX1018 at 002-3).

e. None of the individuals from Exide or Microporous who were described as those controlling the "spend and buy" - the primary negotiators for a possible supplier relationship between Microporous and Exide - (Gilchrist, Tr. 400, 486-87) attended the conference in Paris. Mr. Gillespie, Mr. Gilchrist and Mr. Ulsh were all absent. (McDonald, Tr. 3836-3837). In fact, the main representative from Exide in Paris was Alberto Perez who had, at the time of the meeting in January, only been on the job for a month or two. (PX0396; McDonald, Tr. 3845).

f. Microporous was greatly disappointed at the length of time Microporous was given to do its presentation, and at the overall tone of the meeting. (McDonald, Tr. 3839).

g. The suggestion by Mr. Gilchrist in his testimony that the meeting in Paris was a progression toward a contract between Microporous and Exide is not credible in light of Mr. McDonald's testimony and the contemporaneous documents related to that meeting. (Gilchrist, Tr. 444-45, *in camera*; PX0512).

h. Exide told Microporous that the rubber pass through Microporous was seeking to implement could have an adverse effect on any plans the companies had to expand together. (PX0396). Microporous responded that if it could not maintain its margins on its Flex-Sil "core business" it would not be able to "do the other things [it] was discussing with Exide. (PX0396). Exide then short paid Microporous. (RX1034).

i. Exide was not privy to Microporous' expansion plans (Gillespie Tr. 3095). In fact, { [REDACTED] } (Gillespie, Tr. 3029, 3034, *in camera* ("Microporous was in North Carolina"); Gillespie Tr. 3064). The Court finds this to be telling of the lack of seriousness with which he and his company took Microporous as part of their long term plans.

j. Exide never made any commitment of money to secure Microporous' expansion plans for it and, in fact, made clear to Microporous that any capital spending had to be shouldered by Microporous for any expansion. (Gillespie, Tr. 3088]

k. Exide did not meet the schedule set out by Microporous. (Gillespie, Tr. 3081]. The schedule provided to Exide by Microporous specified the dates by which Exide would be required to commit in order for Microporous to begin an expansion to supply Exide. Exide missed the required deadlines and thus, as of February 2008, Microporous was not in a position to complete an expansion in time for Exide. (Gillespie, Tr. 3081).

1. Microporous' did not believe that the Exide contract would have become a reality. Mr. Gilchrist testified that while it was his "intent" to complete such a contract, "there were a lot of moving parts to be nailed down." (Gilchrist, Tr. 445) In mid-February 2008, a year after discussions had begun with Exide, Mr. McDonald still did not believe that Exide was committed to having a business relationship with Microporous for the purchase of SLI separators. (McDonald, Tr. 3843, 3846-47).

**Response to Finding No.580:**

Respondent's proposition that Exide did not take any material steps to move forward with Microporous for the future supply of PE SLI separators is directly contradicted by testimony at trial, documents in evidence, and even by the very documents that Respondent cites in support of this finding.

The evidence at trial showed that Microporous and Exide continued to work together to enter into a supply relationship for PE SLI separators right up until the date of the acquisition. (See CCFOF 604-623). After negotiating the MOU, Exide went forward with testing of Microporous' separator samples and developing specific pricing for the separators. (Gillespie, Tr. 2974). Exide personnel also met with MPLP personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. (Gillespie, Tr. 2975). Additionally, Exide was working throughout this period of time to get internal buy-in for the strategy to move forward with MPLP, including working on a red-lined draft of a supply contract. (Gillespie, Tr. 3075, 3077). On February 14, 2008, just two weeks before the acquisition, Exide and MPLP extended their MOU. (Gillespie, Tr. 2976). At that point in time, Exide had every intention that they would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gilchrist, Tr. 446-447, in camera).

Contrary to Respondent's assertion, neither Exide nor Microporous viewed the fact that the original MOU had expired (subpart b) as a reason to stop their work on the expansion project.

{ [REDACTED] } (Gilchrist, Tr. 475, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]

[REDACTED] } (Gilchrist, Tr. 443-444, *in camera*) Mr. Gilchrist's testimony was corroborated by

testimony from Mr. Gillespie as to the steps that the parties were taking in furtherance of the MOU. (Gillespie, Tr. 2974-2976, 3088-3089). Additionally, Exide was working throughout this period of time to get internal buy-in for the strategy to move forward with MPLP, including working on a red-lined draft of a supply contract. (Gillespie, Tr. 3075, 3077).

Respondent's assertion that Exide's reason for signing the MOU extension was because of an impending price increase (subpart c) is contradicted by testimony from Mr. Gillespie that the price increase negotiations and the negotiations over Microporous' planned expansion were two separate issues. (Gillespie, Tr. 2976).

Contrary to Respondent's assertion that no discussion related to Microporous' expansion was on the agenda of the meeting in Paris (subpart d), Exide made it very clear to Microporous that it intended to use the meeting in Paris to discuss the expansion project as per the MOU. In this context, Mr. Perez informed Microporous that Microporous's attendance at the meeting was vital because Microporous was a "key partner in [Exide's] strategic version and needs to be represented" at the meeting in Paris (PX1018 at 002), that "the futures of our companies are too

closely tied to miss this opportunity” (PX1018 at 003), and that Mr. Perez (a new Exide employee) needed to “truly understand, [Microporous’] commitment to growing its business with Exide, and what steps can, are, and/or should be taken to make that happen.” (PX1018 at 005).

That Microporous understood Mr. Perez’s language to be in reference to the potential expansion to supply PE SLI separators is made clear in the presentation that Microporous made to Exide at the meeting in Paris. (PX1023). This presentation is replete with references to Microporous’ intention of supplying PE SLI separators to Exide as well as the ongoing work that the two companies were doing in furtherance of that objective. (*See e.g.*, PX1023 at 003 (Microporous objective for the Paris meeting included “gain your confidence for supply of industrial and SLI separators”); PX1023 at 100 (timeline of ongoing work to test and qualify PE SLI separators at Exide’s Salina and Bristol plants in the U.S.); PX1023 at 101-102 (timeline of ongoing work to test and qualify PE SLI separators at three of Exide’s European battery manufacturing plants).

Furthermore, contrary to Respondent’s suggestion that Microporous was greatly disappointed by the length and overall tone of the meeting (subpart f), Microporous’ contemporaneous call report described this meeting as “more productive than we had expected.” (PX0512 at 002). In fact, the meeting in Paris was attended by no less than seven Exide employees, representing key Exide constituencies (procurement, engineering and quality control) from North America and Europe, including Mr. Alberto Perez, the person at Exide who had “global responsibility for separators ‘in the strategic sense.’” (PX0512 at 001). According to Microporous’ call report on the Paris meeting, supply of PE SLI separators was a key component of the meeting, as “[o]ne large segment of the meeting revolved around our capabilities. Exide asked many questions concerning the entire range of their SLI needs.” (PX0512 at 002).

Moreover, because Mr. Gilchrist was the point person negotiations with Exide on the

expansion, Mr. Gilchrist's testimony should be accorded greater weight than the testimony of either Mr. Trevathan or Mr. McDonald on the Exide negotiations. (Gilchrist, Tr. 400; PX0920 (Gilchrist, IH at 96); Trevathan, Tr. 3756). { [REDACTED]

[REDACTED] }  
(Gilchrist, Tr. 444, *in camera*).

[REDACTED]  
[REDACTED] (subpart i) is not an indication of the seriousness of Exide's work with Microporous, nor is it relevant in any way. This work included, among other things, signing an MOU, testing of Microporous' separator samples and developing specific pricing for the separators, multiple meetings in furtherance of their work together on future supply of PE SLI separators, an extension of the MOU in the middle of February 2008. (Gillespie, Tr. 2974-2976, 3075, 3077). By February 2008, Exide had every intention that they would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gilchrist, Tr. 446-447, *in camera*).

Respondent's assertion that Microporous' expansion would not have gone forward due to Exide's lack of commitment of money to secure an expansion (subpart j) is disingenuous as a commitment was not something that either Exide or Microporous included in the MOU as a component of moving forward in their work together. (Gillespie, Tr. 3088; PX0056).

The testimony cited to in subpart k does not support the proposition that Microporous was not in a position to complete an expansion in time for Exide. (Gillespie, Tr. 3081). On the contrary, Mr. Gillespie testified that he had every intention that Exide would be purchasing PE

SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 446-447, *in camera*). { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 475, *in camera*). { [REDACTED]

[REDACTED] } (Gilchrist, Tr. 445).

581. The Court finds Mr. Gilchrist's testimony that Exide was becoming "energized" in early 2008 as not being credible in light of the above facts. There is no evidence that a long term agreement would have resulted between the two companies based on the findings set forth above. Moreover, as set forth in findings above, Microporous could not have undertaken any sort of expansion on Exide's behalf given the position of its Board of Directors.

**Response to Finding No.581:**

Respondent's assertion that Mr. Gilchrist's testimony is not credible is contradicted by testimony and evidence on the record that Microporous and Exide continued to work together to enter into a supply relationship for PE SLI separators right up until the date of the acquisition. (See CCFOF 604-623; CCRF 580).

Moreover Respondent's assertion that Microporous could not have undertaken any sort of expansion on Exide's behalf given the position of Microporous' Board of Directors is directly contradicted by testimony of Mr. Heglie. Mr. Heglie testified that the draft mandate was not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65)). Nor did the draft mandate mean the Microporous should stop the work that was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66)). There is nothing in the draft mandate that eliminated the possibility of Microporous moving forward in its desire to compete in the automotive separator market. (PX2301 (Heglie, Dep. at 67)). In fact, Mr. Heglie testified that he does not recall the Microporous Board ever communicating that Microporous could not compete in the automotive market. (PX2301 (Heglie, Dep. at 68)). Mr. Heglie further agreed that the draft mandate was not the last word on possible expansion for Microporous.

(PX2301 (Heglie, Dep. at 69); RX00401 at 002; PX2300 (Heglie, IH at 197)). Mr. Heglie also testified that nothing in the mandates would have prevented Microporous management from continuing to work with Exide on possible expansion for the PE SLI separator market. (PX2301 (Heglie, Dep. at 74)). In fact, he testified, that the Microporous Board was supportive of management's activity with Exide, "[b]ecause it could generate a fair amount of capital, good return on the investment if it worked." (PX2300 (Heglie, IH at 153)). Finally, Mr. Heglie testified that the Microporous management was working in good faith with Exide and that at no point was it working in something other than good faith with Exide on potential expansion for PE SLI separators. (PX2301 (Heglie, Dep. at 75-76)).

582. In fact, taking the evidence and testimony related to the Exide/Microporous discussions and juxtaposing them to the discussions Microporous had with JCI in 2006 is telling regarding Exide. Microporous was much further along in its negotiations with JCI - a contract and redlines had been exchanged, testing was almost complete and Microporous management had "reviewed [the opportunity with JCI] in-depth and [was] extremely confident that it will execute successfully." (RX00741; Trevathan, Tr. 3597). As ultimately occurred for Microporous with respect to the JCI opportunity, the Court finds that Microporous' opportunity with Exide was, at best, a "hope" of Microporous as shown by Exide's conduct. Based on the foregoing findings, there is no evidentiary basis from which the Court can reasonably find that any agreement would have resulted between Exide and Microporous, or that Microporous was a genuine competitor for Exide's separator business at the time of the Acquisition.

**Response to Finding No.582:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 563-581. (See also CCFOF 604-623). Moreover, Respondent's attempt to conflate the JCI and Exide situations makes no sense whatsoever given that the two battery manufacturers have different needs, different concerns and were in different supply situations.

(d) Exide and Entek

583. [REDACTED] }  
(Gillespie, Tr. 3021-22, *in camera*, 3122-27, *in camera*).

**Response to Finding No.583:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3128, *in camera*), [REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3124-3125, *in*

*camera*; see also CCRF 964). [REDACTED]

[REDACTED] (Gillespie, Tr. 3040, *in camera*; see

also CCRF 964).

584. [REDACTED]

[REDACTED] (Gillespie Tr. 2695; 3124, *in camera*, 3128, *in camera*)

**Response to Finding No.584:**

[REDACTED]

[REDACTED] (Gillespie

Tr. 2695; 3124, *in camera*, 3128, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3129, *in camera*; PX1902 at 001, *in camera*; see generally CCRF

963-970). [REDACTED]

[REDACTED] (Gillespie, Tr. 3129-3130, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED] (PX1902 at 001,  
*in camera*; Gillespie, Tr. 3129, *in camera*; [REDACTED]  
[REDACTED]); Gillespie, Tr. 3130, 3134-3135, *in camera* { [REDACTED]  
[REDACTED]  
[REDACTED] }; PX1902 at 001, *in camera*;  
Gillespie, Tr. 3040, *in camera* { [REDACTED]  
[REDACTED] }; Gillespie, Tr. 3038-3039, *in camera* { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3040, *in camera*; *see also* CCRF 964).

585. { [REDACTED]  
[REDACTED] } (Gillespie Tr. 3021, *in camera*; 3126, *in camera*; 3129-  
30, *in camera*)

**Response to Finding No.585:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3126, 3129, *in camera*;  
PX1902 at 001, *in camera*). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3040, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3129, *in camera*; PX1902 at 001, *in camera*; see generally CCRF 963-970). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3129-3130, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*).

586. { [REDACTED] } (Gillespie, Tr. 3122, *in camera*).

**Response to Finding No.586:**

{ [REDACTED]

[REDACTED] } (PX1086, *in camera*; Gillespie, Tr. 3021, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3021, 3123, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3037, *in camera*).

587. { [REDACTED] } (Gillespie, Tr. 3123-24, *in camera*; Weerts, Tr. 4486; Weerts, Tr. 4521-23, *in camera*).

**Response to Finding No.587:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3123-24, *in camera*; Weerts, Tr. 4486,  
*in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4521-4523, *in camera*).

[REDACTED]  
[REDACTED]

(PX1515 at 002, *in camera* { [REDACTED] [REDACTED]  
[REDACTED]

[REDACTED] }; Gillespie, Tr. 2953-2954 (Daramic is the only provider of deep-cycle separators  
following the acquisition of Microporous).

588. { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3126-27, *in camera*). Given the size and buying  
power that Exide has, the Court finds that the cost of purchasing tooling is a minor cost,  
particularly given Exide's alleged concerns about having an additional separator source of  
supply.

**Response to Finding No.588:**

Respondent's assertion that the acquisition of industrial tooling would be a "minor cost"  
for Exide is contrary to the evidence. { [REDACTED] [REDACTED]

[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3137-3138, *in*

*camera*). For instance, Microporous had no fewer than ten separate calender rolls (or tools) for  
the manufacture of CellForce separators (Gaugl, Tr. 4618), while Daramic has over 100 different

tolls that it utilizes in the production of separators. (Whear 4778-4779). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3129, in

camera; PX1902 at 001, in camera; see generally CCRF 963-970).

589. { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3122-27, in camera).

**Response to Finding No.589:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX1902 at 001, in camera { [REDACTED]

[REDACTED] }; Weerts, Tr. 4515-

4516, in camera; { [REDACTED] [REDACTED]

[REDACTED] };

PX1806 at 001, in camera { [REDACTED] [REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED]

[REDACTED] } (PX1902 at 001, in camera;

Gillespie, Tr. 3129, in camera; { [REDACTED] [REDACTED]

[REDACTED] }; Gillespie, Tr. 3130, 3134-3135, in camera { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]; PX1902 at 001, *in camera*; Gillespie, Tr. 3040, *in camera* { [REDACTED] };  
Gillespie, Tr. 3038-3039, *in camera* { [REDACTED] }. { [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3040, *in camera*; see also CCRF 964).

{ [REDACTED] }  
[REDACTED] }  
(PX1086, *in camera*; Gillespie, Tr. 3021, *in camera*). { [REDACTED] }  
[REDACTED] }  
(Gillespie, Tr. 3021, 3123, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3037, *in camera*).

(e) Exide's Continuing Action

590. In 2007, Exide issued a Request for Proposal ("RFP") to battery separator manufacturers around the world. (Gillespie Tr. 2962).

**Response to Finding No.590:**  
Complaint Counsel has no specific response.

591. Exide gave the suppliers to whom it issued the RFP the "choice to quote on part or all or whatever they felt comfortable with..." Exide "left it up to [the separator manufacturers] to decide what or any portion they wanted to quote on." (Gillespie Tr. 2965).

**Response to Finding No.591:**  
{ [REDACTED] }  
[REDACTED]  
[REDACTED] }

(PX0922 (Roe, IH at 228, *in camera*)). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1028 at 058-

060, *in camera*; Roe, Tr. 1785-1786, *in camera*; see also Gillespie, Tr. 2966).

592. The RFP called for each separator manufacturer to bid on all PE supplies globally at volumes of 25%, 50%, 75% and 100%; however, Exide did not define in the RFP how the supplier was to bid a lower percentage, whether by plant, product mix or otherwise. (Gillespie, Tr. 2967; Gillespie, Tr. 3015, *in camera*).

**Response to Finding No.592:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0922

(Roe, IH at 228, *in camera*)). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1028 at 058-060, *in camera*;

Roe, Tr. 1785-1786, *in camera*; see also Gillespie, Tr. 2966). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3012, *in camera*).

593. { [REDACTED]  
[REDACTED] } (PX1036, *in camera*).

**Response to finding No.593:**

Complaint Counsel has no specific response.

594. In fact, Mr. Gillespie testified that at the time of the RFP, prior to the Acquisition, Daramic was the only company on the planet that could satisfy all of Exide's needs. (Gillespie, Tr. 2978)

**Response to finding No.594:**

Complaint Counsel has no specific response.

595. At the time of the Acquisition, Exide had not started working with Microporous on testing or approving Microporous' industrial PE material. (Gillespie, Tr. 2974). It is telling that Exide had never even tested Microporous' SLI separators prior to RFP (Gillespie, Tr. 3083).

**Response to finding No.595:**

Respondent's assertion that the fact that Exide had not tested Microporous' SLI separators prior to issuing the RFP is in anyway representative of Exide's seriousness with which it regarded Microporous is contrary to the evidence. To Exide, the signing of the MOU with Microporous was Exide's commitment to move forward. (Gillespie, Tr. 3084). [REDACTED]

[REDACTED] (Gillespie, Tr. 3088, 3127, *in camera*). Moreover, Microporous possessed the qualities that Exide was looking for in a separator manufacturer, including high quality products, the logistical ability to supply Exide's facilities in North America and Europe. (Gillespie, Tr. 2957, 2969). [REDACTED]

[REDACTED] (Gillespie, Tr. 3029-3030, *in camera*). Finally, testing was going very well at the time of Daramic's acquisition of Microporous, and Exide had "full intention that we were going to be buying separators from Microporous in 2010." (Gillespie, Tr. 2975-2976).

To the extent that Respondent alleges that by not testing Microporous' separators prior to the RFP, there would not be sufficient time to qualify the separators, such assertion is contrary to the evidence. At the time Exide issued the RFP, there was still plenty of time for Exide to qualify Microporous' separators prior to any purchases. At the time Exide issued the RFP in the summer of 2007, there were still two and a half years before Exide could begin sourcing separators from any supplier other than Daramic. (PX2050 at 019, *in camera* [REDACTED] [REDACTED]); PX1047 (RFP issued in

May 02, 2007). The time frames for the testing procedures of SLI separators set out in the RFP indicated that SLI testing was expected to take 18-24 months to complete, thus there was more than enough time for Exide to successfully qualify Microporous' PE SLI separators. (Gillespie, Tr. 2973; RX0013 at 009; PX1090).

596. { [REDACTED] } (RX1036, *in camera*). Further, { [REDACTED] } (Gillespie, Tr. 3106-3109, *in camera*; RX1036, *in camera*).

**Response to finding No.596:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (RX1036 at 003, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] }  
(RX1036 at 003, *in camera*; see also Gillespie, Tr. 3142; Roe, Tr. 1363-1364, *in camera*; PX0922 (Roe IH, 239, *in camera*)). { [REDACTED] }  
[REDACTED]  
[REDACTED] }  
(Gillespie, Tr. 3143, *in camera*). { [REDACTED] }  
[REDACTED]

[REDACTED] } (Gillespie, Tr. 3107, 3138, 3141-3142, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3011-3012, *in camera*; PX1028 at 41-46, 58-60, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3140-3142, *in camera*).

{ [REDACTED]  
[REDACTED] }. (Gillespie, Tr. 3016, *in camera*; PX1028 at 058-059, *in camera*). { [REDACTED]

[REDACTED] }. (Gillespie, Tr. 3142, *in camera*).

Dr. Simpson used a hypothetical example to show how Daramic was able to offer these types of market share discount to customers, with an exclusionary effect. (Simpson, Tr. 3256-3261) In the hypothetical example, Daramic offers to sell a customer 100% of its needs at some per-unit price (1P) and offers to sell this customer 75% of its needs at a per-unit price that is 14% higher (1.14P). Assume further that the customer wishes to buy 100 units. If a customer purchases all of its 100 units of supply from Daramic, then it will cost 100P. If it chooses to use multiple suppliers, and purchases only 75 units from Daramic, it will pay Daramic 85.5P for those 75 units. To break even with the prices offered under an exclusive contract, the customer will pay no more than 14.5P for the remaining 25 units, or .58P per unit. A competing supplier

would thus have to offer to sell at a 42% discount compared to Daramic's exclusive contract pricing simply to be price competitive with Daramic for the customer's business. See (Simpson Tr. 3256-3260)

|                                       | Cost for first 75% of supply, or 75 units | Cost for remaining 25% of supply, or 25 units | Total cost of buying 100 units |
|---------------------------------------|---|---|--------------------------------|
| 100% of supply purchased from Daramic | 1P * 75<br>75P                            | 1P * 25<br>25P                                | 75P + 25P = 100P               |
| 75% of supply purchased from Daramic  | 1.14P*75 =<br>85.5P                       | Cannot exceed<br>14.5P<br>(.58P per unit)     | 85.5P + 14.5P = 100P           |

[REDACTED]  
 [REDACTED] } Exide believed that the more competition there was in the marketplace, the better off Exide would be in the long run in obtaining lower costs, better quality and better service. (Gillespie, Tr. 2976-2978). [REDACTED]

[REDACTED] } (PX1063 at 001, *in camera*).

597. In 2007, Exide also began to seek out battery separator manufacturers in Asia to supply product to Exide. (Gillespie Tr. 2962).

**Response to finding No.597:**

Complaint Counsel has no specific response.

598. [REDACTED] } (RX00303 at 002, *in camera*; RX303, *in camera*; RX304; RX305; RX306; RX307). To that end, it began [REDACTED] } (Gillespie Tr. 3022-23, *in camera*).

**Response to finding No.598:**

[REDACTED]  
 [REDACTED]  
 [REDACTED]

[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3116, 3118, *in camera*).

{ [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3025-3026, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] }. (Gillespie, Tr. 3029-3031, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3024-3025, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3025, *in camera*).

{ [REDACTED]  
[REDACTED] } (See e.g., Gillespie, Tr. 3024, 3041, *in camera* { [REDACTED] [REDACTED]

[REDACTED]  
[REDACTED] }; Gillespie, Tr. 3024-3025, *in camera* { [REDACTED] [REDACTED]

[REDACTED] }; Gillespie, Tr. 3024-3025, *in camera* { [REDACTED]  
[REDACTED] }.

{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Gillespie, Tr. 3024-3025, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3028-3030, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] }. (Gillespie, Tr. 3028-3036, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3041, *in camera*).

599. Specifically, { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3023-24, *in camera*).  
{ [REDACTED] } (Gillespie, Tr.  
3034, *in camera*).

**Response to finding No.599:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3023-3024, *in camera*). { [REDACTED]  
[REDACTED] } (See CCRF 598).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3027, *in camera*; RX00306 at 004, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3025-3026, *in camera*).

600. { [REDACTED] } (Gillespie, Tr. 3041, *in camera*).

**Response to finding No.600:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3025, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED] } (See CCRF 598, 995).

601. The Court finds it telling that { [REDACTED] } (Gillespie, Tr. 3026, *in camera*). Mr. Gillespie's credibility is again to be questioned.

**Response to finding No.601:**

The evidence does not support Respondent's proposition that Microporous had only 11 million square meters of capacity at the time of the acquisition. At the time of the acquisition, in addition to the one PE/CellForce line in Piney Flats, Microporous already had in place two more PE/CellForce lines installed and in pre-operational phase in its Austria facility. (Gilchrist, Tr. 334-335). In other words, contrary to Respondent's assertion, Microporous had 33 million square meters of PE/CellForce capacity in 2008, nearly two years before Exide expected to receive any PE SLI separators from Microporous. Additionally, Microporous' infrastructure

included a Flex-Sil manufacturing line as well as an Ace-Sil manufacturing line, meaning that Microporous actually had five manufacturing lines at the time of the acquisition. { [REDACTED]

[REDACTED] } (PX0081 at 018, *in*

*camera*; Gilchrist, Tr. 374-375, *in camera*; PX0920 (Gilchrist IHT at 58-59, *in camera*). It is

simply disingenuous to suggest that Microporous was planning on doubling overnight for Exide and then to use such an inaccurate proposition to try call Mr. Gillespie's credibility into question.

602. [REDACTED]

[REDACTED] (Gillespie, Tr. 3051-52, *in camera*). The Court finds that such testimony was coached, rehearsed and artificial and evidences Exide's intent to influence and use this proceeding for its own benefit.

**Response to finding No.602:**

With respect to the second sentence, this bare assertion is unsupported by any evidence.

603. Based on the foregoing findings, the Court finds that Exide has substantial buying power in the marketplace because of its size and global business. Exide, as evidenced by its ability to resist price increases and defeat energy surcharges (as found above), has the wherewithal and ability to constrain prices, and that Exide has and will continue to use such power against battery separator suppliers, including Daramic.

**Response to finding No.603:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. { [REDACTED]

[REDACTED] }. (PX0265 at 008, *in camera*). According to Daramic, { [REDACTED]

[REDACTED] }. (PX0265 at 004, 007-008, *in camera*).



604. EnerSys is a global manufacturer of industrial batteries, manufacturing and selling batteries for fork lifts, UPS battery backup, specialty battery backup, telecom and utilities. (Axt, Tr. 2097). EnerSys is the world's largest manufacturer of industrial batteries. (Axt, Tr. 2228).

**Response to Finding No. 604:**

Complaint Counsel has no specific response.

605. EnerSys has 20 plants worldwide, including four plants located in the United States, two located in Mexico, three located in China and five or six located in Europe. (Axt, Tr. 2227; RX 1185 at 021). EnerSys manufactures flooded lead acid batteries in North America at its Richmond, Kentucky; Ooltewah, Tennessee; Monterrey, Mexico and Hays, Kansas facilities. (Axt, Tr. 2099).

**Response to Finding No. 605:**

Complaint Counsel has no specific response.

606. EnerSys' total battery sales for the past year were approximately \$2 billion. (Axt, Tr. 2227; RX 1185 at 063). This represents approximately 38-40% of the industrial battery sales in the world. (Axt, Tr. 2227).

**Response to Finding No. 606:**

Complaint Counsel has no specific response.

607. EnerSys' annual spend for battery separators in 2007 was approximately [REDACTED] (Burkert, Tr. 2411, *in camera*). In 2007, EnerSys' annual spend for separators in North America only was [REDACTED] (Burkert, Tr. 2423, *in camera*; RX 220, *in camera*).

**Response to Finding No. 607:**

This Finding is contradicted by Mr. Burkert's testimony who testified that the [REDACTED]

[REDACTED] figures included [REDACTED]

[REDACTED]

[REDACTED] (Burkert, Tr. 2423, *in camera*).

608. EnerSys manufactures batteries outside of the United States for importing into the United States. For example, EnerSys manufactures batteries for fork lifts in Mexico which it ships to the United States. (Axt, Tr. 2228). EnerSys also manufactures AGM batteries in China which it imports into the United States. (Axt, Tr. 2229).

**Response to Finding No. 608:**

EnerSys does not import flooded lead acid batteries into North America. (Craig, Tr.

2551; Axt, Tr. 2228, 2301).

609. EnerSys has acquired over 23 companies and has entered into joint ventures. (Craig, Tr. 2631, *in camera*; RX 229; RX 1185 at 028). EnerSys has also entered into “global distribution and marketing alliances.” (RX230). In 2001, EnerSys purchased Hawker Batteries, a company whose manufacturing operations were principally located in Europe. (Axt, Tr. 2119). EnerSys also acquired the motive power battery business of FIAMM, S.p.A. (“FIAMM”) in 2005. (RX 1185 at 028).

**Response to Finding No. 609:**

Complaint Counsel has no specific response.

- (a) EnerSys Battery Separators Buying History
  - (i) Daramic
    - 1. Daramic’s Sales to EnerSys

610. In May 2004, { [REDACTED] } (RX 964, *in camera*).

**Response to Finding No. 610:**

Complaint Counsel has no specific response.

611. { [REDACTED] } (RX 964 at 002, *in camera*). Daramic’s reserving production capacity in its facilities is a benefit to EnerSys and reflects a risk being borne by Daramic as part of this relationship. (Hauswald Tr. 1039-41; Roe Tr. 1770-72, *in camera*).

**Response to Finding No. 611:**

The second sentence is contradicted by Mr. Hauswald’s testimony that the reservation of production capacity is a benefit to Daramic. (Hauswald, Tr. 1038-1041) (EnerSys not

mentioned). { [REDACTED] } (Roe, Tr. 1770-1772, *in camera* { [REDACTED] } [REDACTED] }.

612. { [REDACTED] } (RX 964 at 002, *in camera*). { [REDACTED] } (RX 964 at 001, *in camera*). { [REDACTED] }

[REDACTED] } (Hauswald, Tr. 823-25, *in camera*).

**Response to Finding No. 612:**

In the fourth sentence, { [REDACTED]

[REDACTED] } (Hauswald, Tr. 823-825, *in camera*).

613. { [REDACTED]

[REDACTED] } (RX 964 at 001, *in camera*). Daramic complied with this term.

**Response to Finding No. 613:**

With respect to the third sentence, this bare assertion is unsupported by any evidence.

614. { [REDACTED]

[REDACTED] } (RX 964 at 001, *in camera*).

**Response to Finding No. 614:**

Complaint Counsel has no specific response.

615. { [REDACTED]

[REDACTED] } (RX00207, *in camera*)

**Response to Finding No. 615:**

This finding is contradicted by the fact that by means of a declaration of force majeure, under the terms of the 2004 contract, Daramic forced EnerSys to sign a new contract in October of 2006, which prevented EnerSys from switching most of its factories to Microporous upon the May 31, 2007 expiration of the 2004 contract. (Craig, Tr. 2562-2563; Axt, Tr. 2128-2129, 2148, 2159, *in camera*; PX1259, *in camera*; see generally CCFOF 1111-1166). { [REDACTED]

[REDACTED] }  
(Axt, Tr. 2148-2150, *in camera*).

616. { [REDACTED]

[REDACTED] } (Roe Tr. 1699; PX1289, *in camera*). Daramic sought a response to that proposal so that it could make a decision and develop a plan for supplying EnerSys and other customers from its facilities. (Roe, Tr. 1700). Despite repeated attempts to obtain a response to Daramic's proposal submitted in February, no response was received.

Daramic was in essence talking to itself as EnerSys was unwilling to engage in meaningful negotiations. (Toth, Tr. 1405-06).

**Response to Finding No. 616:**

In the second sentence, Respondent's cite to Mr. Roe's testimony does not relate to Daramic developing a plan for supplying EnerSys and other customers from its facilities. (Roe, Tr. 1700).

The statement in the third sentence is unsupported by any evidence. The statements in the third and fourth sentences are contradicted by a great deal of record evidence related to the negotiations between EnerSys and Daramic from January to October 2006 culminating in Daramic's declaration of force majeure on October 6, 2006. (CCFOF 1121-1128, 1133-1136).

In February 2006, Mr. Axt compared the competing proposals from Daramic and Microporous, and { [REDACTED] [REDACTED] }. (Axt, Tr. 2166, *in camera*). He then informed Daramic that { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Axt, Tr. 2166, *in camera*). However, EnerSys did not { [REDACTED] }, because { [REDACTED] [REDACTED] } (Axt, Tr. 2166-2167, *in camera*). In the following months, Mr. Axt continued { [REDACTED] [REDACTED] } (Axt, Tr. 2166-2167, *in camera*). Following the meeting, Daramic { [REDACTED] } on August 11, 2006. (PX1204, *in camera*). The { [REDACTED] [REDACTED] } (PX1204 at 001, *in camera*; Axt, Tr. 2258, *in camera*). Daramic again { [REDACTED] }

[REDACTED] } (PX1204 at 001-003, *in camera*; Axt, Tr. 2255-2256, 2257, 2260, *in camera*). Mr. Axt then informed Daramic that { [REDACTED] [REDACTED] } (Axt, Tr. 2146, 2260, *in camera*).

617. At the spring 2006 BCI meeting, Axt had a conversation with Toth. In that conversation, Axt told Toth that the contract between Daramic and EnerSys was not worth the paper it was written on, indicating that it would not be honored by EnerSys, and that Daramic's business was going to zero. (Toth, Tr. at 1512; Axt, Tr. at 2167-68, *in camera*). Toth responded that Daramic remained interested in earning EnerSys' business. (Toth, Tr. 1512).

**Response to Finding No. 617:**

The statements in the second sentences are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Toth, Tr. 1510-1512). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

In addition, these hearsay statements are directly contradicted by the testimony of Mr. Axt who testified that he was discussing the assignability of the FIAMM contract with Mr. Toth and not the existing contract between EnerSys and Daramic. (Axt, Tr. 2168).

618. In July, Roe of Daramic met with Axt of EnerSys regarding Daramic's proposal. At that time, Axt advised Roe that EnerSys had decided to move most of their separator purchases from Daramic to Microporous. (Roe, Tr. 1701 at 02; Axt, Tr. 2169-70, *in camera*). Axt also advised Roe that EnerSys would move to Microporous its separator purchases for its Motecchio Italy plant serving the FIAMM business. (Roe, Tr. 1701-02; PX1240).

**Response to Finding No. 618:**

The statements in the second and third sentences attributed to Mr. Roe are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Roe, Tr. 1700-1702). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

619. { [REDACTED] } (Roe, Tr. 1170-71, *in camera*; PX1240, *in camera*; PX1203, *in camera*). { [REDACTED]

[REDACTED]  
(Roe, Tr. 1170-71, *in camera*; PX1240; PX1203, *in camera*).

**Response to Finding No. 619:**

Respondent cites to Mr. Hauswald's testimony, not Mr. Roe's, the cite does not support the proposition and is improperly marked *in camera*. (Hauswald, Tr. 1170-71 (testimony unrelated to FIAMM)).

620. Following the July meeting between Axt and Roe, Daramic submitted another proposal to EnerSys. (PX1204). In September 2006, { [REDACTED] }  
(Roe, Tr. 1772 *in camera*). At that time, EnerSys had made it clear to Daramic that it no longer viewed Daramic as a long-term strategic partner and instead EnerSys intended to move Daramic's business over to Microporous and that this would happen on a rolling basis as the EnerSys plants began rolling off their contractual commitments with Daramic in January 2008. (Roe, Tr. 1701-02).

**Response to Finding No. 620:**

The second sentence in this finding is contradicted by Mr. Axt's testimony, who testified that he called Mr. Roe and told him EnerSys's decision, but nothing about dinner. (Axt, Tr. 2283).

621. In October 2006, { [REDACTED] } (PX1224, *in camera*). { [REDACTED] }  
{ [REDACTED] } (PX1224 at 003, *in camera*; RX964, *in camera*).  
{ [REDACTED] }  
{ [REDACTED] } (Burkert, Tr. 2426-27, *in camera*).

**Response to Finding No. 621:**

The statement in the third sentence is unsupported.

The statement in the fourth sentence is contradicted by Mr. Burkert's testimony that

{ [REDACTED] }  
{ [REDACTED] } (Burkert, Tr. 2426, *in camera*).

This finding does not explain why EnerSys signed a contract with Daramic in October for less advantageous terms after informing Daramic in September that it was switching to Microporous. (*compare* RFOF 620 and RFOF 621).

622. [REDACTED] } (RX1121, *in camera*; RX01119, *in camera*). [REDACTED] } (RX1121, *in camera*; Burkert Tr. 2396). [REDACTED] } (RX1121, *in camera*).

**Response to Finding No. 622:**

The first sentence is not supported by the evidence. The document cited, RX01119, does not support this statement [REDACTED]

[REDACTED] The second document cited, RX01121 does not support the first sentence, either, as [REDACTED]

2. EnerSys' Leverage in Pricing Negotiations

623. [REDACTED] (Seibert, Tr. 4194, *in camera*, 4213-17, *in camera*).

**Response to Finding No. 623:**

[REDACTED] } (Axt, Tr. 2146, 2260, *in camera*). On October 6, 2006, Daramic notified EnerSys by letter that evening (a Friday) "[E]ffective immediately EnerSys will receive most likely 10 to 20%, if possible up to 50% of [its] normal material requirements for the next six to eight weeks." (PX1207). Mr. Toth threatened that Daramic was "going to stop shipping product to you [EnerSys] within two weeks if you don't sign a long-term contract. Correction. 10 to 20 percent

in the next two weeks.” (Craig, Tr. 2556-2557). After a short period of negotiations, EnerSys and Daramic { [REDACTED] } (Axt, Tr. 2193, in camera; PX1211, in camera; PX1224, in camera). [REDACTED]

624. EnerSys, as the largest manufacturer of industrial batteries in the world, with annual sales in 2007 of \$2 billion, approximately half of which was for industrial separators, had great leverage over its suppliers over issues of price and terms. (Craig, Tr. 2557, 2561; Burkert, Tr. 2421-23, in camera).

**Response to Finding No. 624:**

This finding is contradicted by the facts and is not supported by the testimony cited.

EnerSys is not a power buyer. (Craig, Tr. 2565). [REDACTED] } (Craig, Tr. 2566-2567, in camera). [REDACTED] } (Craig, Tr. 2566-2567, in camera).

The assertion that battery manufacturers have buying power is contradicted by evidence

[REDACTED] } (PX0265 at 008, in camera).

According to Daramic, [REDACTED] } (PX0265 at 004, 007-008, in camera). [REDACTED]

[REDACTED]

(PX0265 at 010, in camera). [REDACTED]

[REDACTED] } (PX0265 at 011, in

camera). Because it is the separator suppliers that have the power in the industry, Daramic’s leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004

(“demonstrating pricing power in the marketplace regardless of movements in material and energy costs.”); PX0468 at 001, *in camera* (Mr. Toth’s goals for 2008 included { [REDACTED] } [REDACTED] [REDACTED] ); PX0204 at 002 (Mr. Hauswald’s 2006 goals included “[r]aise Daramic prices again where possible to demonstrate pricing power regardless of cost movements .”)

The testimony cited by respondent does not support this finding. Mr. Craig testified that Daramic { [REDACTED] } [REDACTED] } (Craig, Tr. 2557, 2561).

Similarly, { [REDACTED] } [REDACTED] } (Burkert, Tr. 2421-2423, *in camera*)

625. { [REDACTED] } [REDACTED] } (Axt, Tr. 2230-2231, 2244, *in camera*).

**Response to Finding No. 625:**

{ [REDACTED] } (Axt, Tr. 2244, *in camera*). { [REDACTED] }

626. In 2005, Daramic sought to pass on an energy surcharge to EnerSys for both Europe and the U.S. (RX608). { [REDACTED] } [REDACTED] } (RX582 *in camera*; Axt, Tr. 2242-43, *in camera*). The negotiations between Daramic and EnerSys as to this surcharge are telling as to EnerSys’ strength in negotiating the price of separators. Even though EnerSys had objected only to an increase over 3% for Europe, and obtained a concession on this point from Daramic (RX582, *in camera*; RX209), EnerSys later sought to use this concession to argue for a price concession for the US as well. (RX584 at 001). (“Why do you continue to try for an additional 3% in the US, it is not validated and will never be confirmed.”). (RX584 at 001).

**Response to Finding No. 626:**

The fourth sentence of this finding is contradicted by the documents cited by respondent, which demonstrate that Daramic specifically requested that there be further discussions on the week of December 20, 2005, about a 3 percent price increase for the U.S. on January 1, 2006

(RX00597 at 005). (Please note to reduce possible confusion that RX00597 is a single email chain containing each of the emails cited by respondent as (RX00209, RX00582, RX00583, and RX00608)).

The third sentence of this finding is contradicted by EnerSys's lack of market power.

(See CCRF 624).

627. { [REDACTED] }  
(RX596, *in camera*; Axt, Tr. 2249, *in camera*). It is apparent that EnerSys, even in 2005, was a tough negotiator. (RX00595).

**Response to Finding No. 627:**

Complaint Counsel has no specific response.

628. In 2006, Daramic announced a price increase to its customers effective January 1, 2007 due to its increasing cost of production. (RX831; RX773; RX606; RX1549; RX590; RX768 *in camera*). { [REDACTED] } (RX768, *in camera*). Yet, { [REDACTED] } (Burkert, Tr. 2436, *in camera*) { [REDACTED] } (RX768, *in camera*; RX1032; Burkert, Tr. 2438, *in camera*).

**Response to Finding No. 628:**

The second sentence of respondent's finding is { [REDACTED] }

{ [REDACTED] }  
(RX00768 at 001, *in camera*).

629. In 2008, Daramic announced to its customers a price increase for 2009. (PX1550; PX372, *in camera*; RX536, *in camera*; Seibert, Tr. 4191-93, 4194-95. *in camera*; RX542).

**Response to Finding No. 629:**

Complaint Counsel has no specific response.

630. { [REDACTED] } (Seibert, Tr. 4189-91, *in camera*). { [REDACTED] } (Seibert, Tr. 4191, *in camera*). { [REDACTED] } (Seibert, Tr. 4195, 4215-16, *in camera*; Axt, Tr. 2215-16, *in camera*).

**Response to Finding No. 630:**

This finding is contradicted by a number of facts in evidence. First, { [REDACTED]

[REDACTED] } (PX0852 at 001-002, *in camera*).

Second, the dates given are inconsistent with the timing of Daramic's notices of price increases.

{ [REDACTED] } (PX0950 at 014, *in camera*).

{ [REDACTED]

[REDACTED] } (Axt, Tr. 2215-2216, *in camera*). Moreover, { [REDACTED]

[REDACTED]

[REDACTED] }

(PX0882 at 004; PX0950 at 005-013, *in camera*; Burkert, Tr. 2433, *in camera*; Seibert, Tr. 4193, *in camera*).

[REDACTED]

[REDACTED] For example, { [REDACTED]

[REDACTED] } (Seibert, Tr. 4298-4299, *in camera*; PX0950 at

004-013). { [REDACTED]

[REDACTED] } (PX0950 at 004-013, *in camera*; Riney, Tr. 4949, *in camera*, 4951, *in camera*).

{ [REDACTED]

[REDACTED] } (PX0950 at 013, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED] } (PX0950 at 014, *in camera*;

PX0371). The proposed price increases by customer range from [REDACTED] }

(PX0950 at 014-015, *in camera*).

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]  
[REDACTED] (PX0025 at 001, *in camera*; RX00086). In February 2006, Daramic { [REDACTED]  
[REDACTED] } (Roe, Tr. 1699;  
PX1289, *in camera*). { [REDACTED]  
[REDACTED] }  
(Axt, Tr. 2175-2176, *in camera*; PX1204, *in camera*). Similarly, Daramic announced a price  
increase to C&D in April 2006. (RX00805).

The statement in the third sentence is not supported by Mr. Axt's testimony. Mr. Axt  
testified only that [REDACTED] { [REDACTED] } [REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2215-2216, *in camera*).

631. { [REDACTED] } (Burkert, Tr. 2433, *in camera*;  
Seibert, Tr. 4193, *in camera*). { [REDACTED]  
[REDACTED] } (Seibert, Tr. 4214-15, *in camera*). { [REDACTED]  
[REDACTED] } (Seibert, Tr. 4216, *in camera*; RX00927 at 5-13,  
*in camera*).

**Response to Finding No. 631:**

The second sentence is contradicted by Mr. Burkert's testimony that he called Mr.  
McDonald at Daramic and { [REDACTED] } [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Burkert, Tr.  
2346, *in camera*).

632. In October 2008, Daramic announced that due to extraordinary cost increases, including  
unprecedented energy cost increases, Daramic was increasing its pricing effective January 1,  
2009. (RX00564). { [REDACTED] } (Berkert, Tr. 2434, *in  
camera*).

**Response to Finding No. 632:**

Respondent attempts to support the first sentence of this finding with a document not used at trial.

633. { [REDACTED] } (Axt, Tr. 2465, *in camera*). { [REDACTED] } (Seibert, Tr. 4193-94, *in camera*). { [REDACTED] } (Seibert, Tr. 4193-94, *in camera*).

**Response to Finding No. 633:**

This finding is contradicted by a number of facts in evidence. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Burkert, Tr. 2464-2466, *in camera*; Burkert, Tr. 2467).

634. { [REDACTED] } (Burkert, Tr. 2434, 2464-65, *in camera*; Seibert Tr. 4216-17, *in camera*; PX2264, *in camera*; RX00927 at 14-16, *in camera*). { [REDACTED] } (Seibert, Tr. 4217, *in camera*). Based on the foregoing finding, the Court finds { [REDACTED] } [REDACTED] }

**Response to Finding No. 634:**

{ [REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2215-2216, *in camera*).

Respondent attempts to support this finding with documents that were not used at trial that are contradicted by EnerSys witness testimony. Further, respondent's statement in the first sentence that { [REDACTED]

[REDACTED] } is not supported by Mr. Burkert's testimony. (Burkert, Tr. 2434, 2464-2465, *in*

camera [REDACTED]  
[REDACTED]

The third sentence of this finding is unsupported by logic or evidence. EnerSys is not a power buyer. (Craig, Tr. 2565). [REDACTED]

[REDACTED] (Craig, Tr. 2566-2567, *in camera*). [REDACTED]  
[REDACTED] (Craig, Tr. 2566-2567, *in camera*).

The assertion that battery manufacturers have buying power is contradicted by evidence from [REDACTED]  
[REDACTED] (PX0265 at 008, *in camera*).

According to Daramic, [REDACTED]  
[REDACTED]  
[REDACTED] (PX0265 at 004, 007-008, *in camera*). [REDACTED]  
[REDACTED]  
(PX0265 at 010, *in camera*). [REDACTED]  
[REDACTED] (PX0265 at 011, *in camera*). Because it is the separator suppliers that have the power in the industry, Daramic's leaders are regularly called upon to demonstrate pricing power. (PX0832 at 004 ("demonstrating pricing power in the marketplace regardless of movements in material and energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included [REDACTED]  
[REDACTED]); PX0204 at 002 (Mr. Hauswald's 2006 goals included "[r]aise Daramic prices again where possible to demonstrate pricing power regardless of cost movements."))

The FTC's investigation and the current administrative action are better explanations for Daramic's { [REDACTED] }

635. EnerSys has itself announced price increases, including a 6% increase effective January 1, 2006 and another increase of 5% to 10% in 2006. (RX00231; RX00232). In reporting on its price increases in 2006, and in its subsequent Form 10-K filing for Fiscal Year 2008, EnerSys has noted cost increases for lead, copper, plastics and utilities. (RX232; RX1185 at 016, 034, 044). No mention is made of polyethylene separators in these documents. In any event, EnerSys makes "strong efforts . . . to pass through sales price increases in all regions" [REDACTED] (RX1185 at 044; Craig, Tr. 2553, *in camera*). And EnerSys attempts to "control [its] raw materials costs through strategic purchasing decisions" including hedging arrangements. (RX 1185 at 034; RX1185 at 011).

**Response to Finding No. 635:**

Two of the three documents with which respondent attempts to support this finding were not used at trial, and all are contradicted by the testimony of Mr. Craig who testified that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Craig, Tr. 2552-2554, *in camera*).

3. Force Majeure Event

636. Complaint Counsel and EnerSys have both claimed in this hearing that Daramic's force majeure, declared in October 2006, was fake. The evidence presented at trial adequately demonstrates that the force majeure event was not only real, but posed substantial difficulty to Daramic in the operation of its business. (Hauswald, Tr. 1101).

**Response to Finding No. 636:**

Respondent's use of the phrase "force majeure event" is ambiguous and misleading. Respondent seeks to blur the distinction between three different declarations of force majeure in the polyethylene supply chain: (1) Shell Germany declared force majeure (no specific date was ever established) allegedly as a result of problems with an ethylene cracker; (2) Ticona's Oberhausen PE facility then declared force majeure on September 18, 2006; and (3) Daramic then declared force majeure on October 6, 2006. (RX01054 at 003; RX01598 at 001; PX1207). As detailed in Complaint Counsel's Reply Findings below, there is no solid evidence in the

record of a singular "event" to justify Daramic's declaration of force majeure supply conditions to its PE customers during the September/October 2006 timeframe. (See, e.g., CCRF 639-645, 648-649, 654, 656).

In addition, the proposed finding relies solely on the testimony of Mr. Hauswald. In response to questioning from the Court and from Complaint Counsel, he admitted that [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (Hauswald, Tr. 887-888, 1135, *in camera*).

Furthermore, the proposed finding is contradicted by the substantial volume of evidence cited in CCRF 637-659. This evidence reveals that Daramic took advantage of a short-term shortfall in Europe, and hyped it as a worldwide PE supply crisis of Category 5 proportions. To the extent Respondent's proposed finding contains legal conclusions about the sufficiency of the evidence presented at trial, Complaint Counsel objects.

637. { [REDACTED] } (Hauswald, Tr. 884-85, *in camera*). In 2006, { [REDACTED] } (Hauswald, Tr. 885-86, *in camera*).

**Response to Finding No. 637:**

This proposed finding is contradicted by other testimony from Mr. Hauswald, who admitted that { [REDACTED] } (Hauswald, Tr. 946, 1137-1138, *in camera*; RX00698 at 005, *in camera*; PX0473 at 006, *in camera*). Mr. Hauswald's assertion that { [REDACTED] } is unsupported by any independent evidence.

(Hauswald, Tr. 884, *in camera*).

638. UHMWPE is the primary raw material used by Daramic. Daramic's purchases of UHMWPE are approximately 10 times greater than those of Microporous. (Trevathan, Tr. 3646).

**Response to Finding No. 638:**

Silica is the primary raw material used in the PE separator manufacturing process, as Daramic's own witness explained. (Hauswald, Tr. 997 (raw material formulation for making PE is "60 percent silica, 20 percent polymer, and 20 percent oil.")). Oil and solvent are important raw materials also. (Hauswald, Tr. 1020-1021; Hall, Tr. 2726, *in camera*; Gilchrist, Tr. 601).

639. In September 2006, Ticona notified Daramic that it was experiencing a force majeure and Ticona anticipated that it would not be able to supply more than 50% of Daramic's demand for several months. (RX1077, *in camera*; Hauswald Tr. 885, *in camera*; RX1598; Toth, Tr. 1404-05).

**Response to Finding No. 639:**

This proposed finding is not supported by the evidence cited. The notice letter from Ticona's European headquarters to Daramic's head of manufacturing in France establishes that the Ticona force majeure only affected production at its Oberhausen, Germany plant. (RX01598 at 001). Mr. Hauswald explained { [REDACTED] } (Hauswald, Tr. 885, *in camera*). This proposition is further contradicted by Daramic's internal documents, as explained below. (See CCRF 641).

The other evidence cited by Respondent is not probative. Mr. Toth's testimony is non-responsive and speaks only to the issue of whether Daramic notified EnerSys and other customers that it was declaring its own force majeure. And the chart reflected in RX01077 – an exhibit not used at trial – [REDACTED]

[REDACTED]

640. { [REDACTED] } (Hauswald, Tr. 884, 890-91, *in camera*).

**Response to Finding No. 640:**

This proposed finding is contradicted by logic and evidence. The Ticona force majeure event occurred in Oberhausen, Germany. (Trevathan, Tr. 3645; Gilchrist, Tr. 625; Hauswald, Tr. 1135-1137, *in camera*; PX0473 at 006, *in camera*; RX01598 at 001). { [REDACTED] }

[REDACTED] } (Hauswald, Tr. 1100, 1148, *in camera*;  
RX01598 at 001). [REDACTED]

[REDACTED]  
(PX0473 at 006, *in camera*; see also RX01598 at 001 (“[S]upplies in North America from  
[Ticona’s] Bishop facility in Texas are not impacted.”); Hauswald, Tr. 1136-1138, *in camera*)).

[REDACTED]  
[REDACTED] (Hauswald, Tr. 884, *in camera*).

Mr. Hauswald testified that { [REDACTED]

[REDACTED]  
[REDACTED] } (Hauswald, Tr. 1136-1138, *in camera*; PX0473 at 006, *in camera* { [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED].) He also stated that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hauswald, Tr. 891, *in camera*). Respondent offered no contemporaneous  
evidence to support the proposition that its North American inventories or supplies of UHMWPE  
were “impacted adversely” by any force majeure events in 2005 or 2006.

641. { [REDACTED]  
[REDACTED] } (Hauswald,  
Tr. 886, *in camera*).

**Response to Finding No. 641:**

The proposed finding is misleading. On September 15, 2006, when Daramic first learned  
that Ticona was about to declare force majeure in Germany, it roughly estimated “a capacity loss  
of 10 million sqm.” (RX01054 at 004). Only four days later, however, Daramic was optimistic

that it could “bridge this PE shortage without missed orders,” and maintain “full capacity operation” at its three affected plants in Italy, France and Thailand throughout the force majeure period. (RX01054 at 002). In fact, Daramic believed its plan to obtain UHMWPE from an alternative supplier (Braskem) and reallocate inventories and shipments among all its plants gave it a “very realistic” chance of continuing full operation worldwide as of September 19, 2006. (RX01054 at 002). The only potential affect on its PE separator output or “[i]mpact on customers” that Daramic anticipated was a “slight cosmetic compromise” in the appearance of some products due to “white streaks that have no effect on quality or [the] battery.” (RX01054 at 002 (also noting any cosmetically blemished products would still have Daramic’s “full specification guarantee.”))).

642. Following Ticona’s announcement of the Force Majeure, Daramic attempted to find alternative supply of UHMWPE. (Hauswald, Tr. 887, *in camera*; Roe, Tr. 1707). Representatives of Daramic worked long hours, traveling around the world trying to locate alternate supply of UHMWPE and to move some of its existing supply of UHMWPE from Daramic’s facilities in North America to Asia and Europe. (Hauswald, Tr. 891-92, *in camera*; RX1054).

**Response to Finding No. 642:**

Complaint Counsel has no specific response, other than to note these efforts succeeded in quickly mitigating the effect on Daramic of any PE shortfall from Oberhausen. (*See, e.g.*, CCRF 641, 648, 658).

643. { [REDACTED] } (Hauswald, Tr. 887-88, *in camera*; RX698 at 005, *in camera*).

**Response to Finding No. 643:**

Mr. Hauswald admitted that { [REDACTED] } (Hauswald, Tr. 887-888, 1135, *in camera*). { [REDACTED] } (RX00806 at 035, *in camera*). Ironically, { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

(Hauswald, Tr. 886-888, *in camera*; RX00707 at 005, *in camera*).

644. Daramic declared a force majeure event as a result of the reduction of supply by Ticona and advised EnerSys, among other customers. (Hauswald, Tr. 889, *in camera*; RX698 at 005, *in camera*; RX1052; PX1048; Roe, Tr. 1708-09). [REDACTED] } (Hauswald, Tr. 889, *in camera*; RX698 at 005, *in camera*).

**Response to Finding No. 644:**

This proposed finding is contradicted by the fact that Daramic declared a force majeure event with respect to EnerSys in bad faith. (PX0480; *see also* CCRF 645, 648, 658; CCFOF 1139-1141, 1143-1149). It is further contradicted by evidence showing that, in the months and days leading up to Daramic's force majeure announcement on October 6, 2006, the company planned all along to present EnerSys with an ultimatum (agree to an undesired contract extension, or separator supply will stop) as a means to maintain the customer's volumes and hinder its rival, MPLP. (CCRF 645-659; *see also* CCFOF 1087, 1089, 1101-1102, 1117, 1121-1122, 1129, 1138-1141, 1145-1147, 1161-1165).

645. [REDACTED] } (Hauswald, Tr. 890, *in camera*; Hauswald Tr. at 1143-46). Daramic advised its customers that it would need to allocate its separator production among its customers during this period of time. (Hauswald, Tr. 889-90, *in camera*; RX698 at 005; PX1048("[O]ur current estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.")).

**Response to Finding No. 645:**

This proposed finding is misleading because it fails to account for Daramic's actions to obtain alternative sources of UHMWPE, allocate its existing inventory and production, and maintain its output. (*See* CCRF 640-642). Daramic's initial estimate of the impact from the Ticona force majeure on its PE production capacity was far more dire than what actually

transpired. (See CCRF 641, 648, 658 (detailing how Daramic was able to maintain production and mitigate any impact of the Ticona supply situation)).

Furthermore, the cited testimony of Mr. Hauswald does not support any finding that Daramic allocated its separator production among its customers in a fair and balanced fashion. Rather, Mr. Hauswald made a remarkably candid admission:

{ [REDACTED] }

(Hauswald, Tr. 890, *in camera*). [REDACTED] { [REDACTED] }  
[REDACTED] }

(CCFOF 1139-1141, 1145-1146, 1161-1162). And so it did just that. (CCFOF 1151-1154).

646. [REDACTED]  
[REDACTED]

[REDACTED]

(RX964 at 002-03 (emphasis added), *in camera*).

**Response to Finding No. 646:**

This proposed finding is a legal conclusion, not a factual assertion. To the extent that Daramic once asserted its rights under this contract in litigation with EnerSys, and then voluntarily withdrew or dismissed those claims, it is barred from reasserting them in this proceeding. (Craig, Tr. 2559-2560, 2564). Moreover, the truncated contractual language that Respondent references is highly misleading and self-serving. The full provision states:

{ [REDACTED] }

[REDACTED]

(RX000964 at 002-003, *in camera*). Respondent's proposed finding omits key language:

[REDACTED]

(RX000964 at 002, *in camera*). Daramic tries to have it both ways: it claims no legal responsibility for withholding supply from EnerSys under this proposed finding, but then tries to take credit for *post hoc* efforts to mitigate the situation. (*See* CCRF 656, 657, 659). These inconsistent positions illuminate Daramic's true intent with respect to customers over which it exerted a high degree of market power. A further irony is, as noted above (*see* CCRF 643),

[REDACTED]

647. While Complaint Counsel has repeatedly attempted to portray Daramic as telling EnerSys that it would receive only 10% of its PE supply, a full review of the evidence demonstrates amply that this simply was not the case at all. (Roe, Tr. 1707-09). Daramic actually advised in its letter to EnerSys that EnerSys would "receive most likely 10 to 20%, if possible up to 50%, of your normal material requirements for the next six to eight weeks. Based on the timing communicated to us by our vendor, our current best estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November." (PX1207). The Court finds Complaint Counsel's assertion to this Court that it would receive only 10% to be, at best, overstated.

**Response to Finding No. 647:**

This proposed finding is contradicted by the words of Daramic's own witnesses.

[REDACTED] (Hauswald,

Tr. 950, *in camera*). Mr. Roe took charge of communicating this decision to EnerSys and handling "[a]ll discussions of supply" with the customer. (PX0487 ("For EnerSys, the allocation is 10%."); *see also* CCFOF 1141, 1144, 1147). In light of this evidence, Respondent's attempt to

parse the plain language of Mr. Roe's letter to Mr. Axt for exculpatory material is pointless.

(PX1207).

648. [REDACTED] (RX707 at 005, *in camera*; RX698 at 005, *in camera*; RX806 at 035, *in camera*)

[REDACTED]  
(RX1054).

**Response to Finding No. 648:**

This proposed finding is contradicted by the cited evidence and numerous other facts in the trial record. The Ticona force majeure had no material impact on Daramic's PE production or sales. (See CCRF 641, 658). { [REDACTED]

[REDACTED]  
[REDACTED] } (RX00707 at 005, *in camera* [REDACTED]  
[REDACTED] ); RX00698 at 009,  
*in camera*; { [REDACTED] }; RX00806 at 035, *in camera*

[REDACTED]  
[REDACTED] } ).

649. EnerSys admits that it confirmed with Microporous that Ticona had suffered a production disruption. (Axt, Tr. 2284-85; PX1209). { [REDACTED]

[REDACTED] } (RX235, *in camera*; Craig, Tr. 2617-18, *in camera*). Kubis was one of several EnerSys employees (including Craig) that Axt alerted about Daramic's force majeure on October 7, 2006. (PX2104). Craig also admits that Toth explained that Daramic was declaring the force majeure due to a problem that it was having with a supplier. (Craig, Tr. 2577).

**Response to Finding No. 649:**

This proposed finding is not supported by the cited evidence. Mr. Axt confirmed with Microporous that any "production disruption" involving Ticona was (a) limited to Europe ("U.S. supply positions are whole."); (b) did not involve any "fire" at Ticona's ethylene supplier,

contrary to what Daramic had represented; and (c) supply would be restored "by month-end."

(PX1209). The other evidence cited by Respondent is consistent with these facts.

As for Entek and EnerSys, the contemporaneous evidence shows that Daramic disclosed to Entek immediately after the force majeure that it had used its leverage over EnerSys in that situation intentionally to disadvantage MPLP. (PX1808).

650. Daramic did not tell EnerSys' employees that if EnerSys signed a contract the force majeure would go away. (Toth, Tr. 1579; Roe, Tr. 1713, 1724). Not one single contemporaneous document has been provided by the FTC to support EnerSys' bald assertion that Toth told Craig that if EnerSys signed a contract the force majeure would go away. (Craig, Tr. 2571; Axt, Tr. 2294, 2296).

**Response to Finding No. 650:**

This proposed finding is contradicted by the evidence. (See CCRF 654).

651. {

[REDACTED]

} (Axt, Tr. 2172, *in camera*).

Axt testified that with spot pricing, there would be no stability of price, no stock of inventory and no guaranteed availability of supply. (Axt, Tr. 2116). {

[REDACTED] (Axt, Tr. 2172, *in camera*).

Yet, Axt also testified that EnerSys prefers not to have written contracts and would rather purchase product from its suppliers on a purchase order basis only. (Axt, Tr. 2110-11). ("We are a handshake type of company, we make agreements and we issue purchase orders for our material requirements for all of our factories around the world.").

Q Now, do you have any preference – at EnerSys would you prefer – how would you prefer to purchase your separators?

A. We have a couple of hundred suppliers. We do not have contracts as a norm. The only commodity we have contracts on is lead that we utilize in our plants.

Q. When do you – I mean, with respect to the contract you have with Daramic, would it be your preference to purchase from Daramic by contract or on a purchase order basis?

\* \* \*

A. I would like to place purchase orders like I do with 90 percent of our other suppliers.

(Axt, Tr. 2115-16).

**Response to Finding No. 651:**

This proposed finding mischaracterizes the cited testimony, and is contradicted by the weight of the evidence. (See CCRF 652). Respondent conflates form and substance by making the incorrect assumption that only a contract – but not a purchase order – can bring a customer “certainty of supply” and “stability of price.” As Mr. Axt testified, EnerSys normally uses purchase orders to obtain reliable supplies and pricing, as well as the benefits of competition

(Axt, Tr. 2116-2117).

652. Such purchasing would of course be subject to availability of supply and pricing would vary. EnerSys’ testimony is at best contradictory. EnerSys’ assertions in this hearing that it was forced to sign a contract in October 2006 or else face spot pricing and availability, which its Vice President, Global Procurement testified he preferred anyway, are not credible.

**Response to Finding No. 652:**

This proposed finding is conclusory, argumentative and unsupported by evidence in the record. It directly contradicts – or worse, deliberately mischaracterizes – the testimony cited by Respondent immediately above. (See CCRF 651). The proposed finding is contradicted by the testimony of Mr. Axt, who stated that he considers purchase orders to be contracts with other separator suppliers (Amer-Sil, H&V, Dumas and Alpha Beta). (Axt, Tr. 2113). {

[REDACTED]

[REDACTED]

[REDACTED]

(Axt, Tr. 2171-2173, *in camera*).

653.

[REDACTED] (PX1211, *in camera*; PX1212; PX1224, *in camera*; Axt, Tr. 2265-67, *in camera*; Axt, Tr.2291, 2293).

**Response to Finding No. 653:**

This proposed finding is contradicted by the evidence that { [REDACTED]

[REDACTED] } (CCFOF 1123, 1136).

654. Complaint Counsel's and EnerSys' assertion that the force majeure was fake is also not borne out by any contemporaneous documentation submitted as evidence in this case. Both Craig and Axt admit they have no written email or memorandum reporting on the conversation that Craig claims to have had with Toth. (Craig, Tr. 2571, 2574-76, 2659-60; Axt, Tr. 2296). The only document that Craig could point to and only after prompting by Complaint Counsel on re-direct (after testifying first in his deposition and then again at the hearing that he was not aware of any documentation of his purported conversation with Toth) was the Complaint filed by EnerSys against Daramic in October 2006. (RX243; Craig, Tr. 2658-59). Yet, as Craig admits, Toth is nowhere referenced in the Complaint. (Craig, Tr. 2658-59).

**Response to Finding No. 654:**

This proposed finding is contradicted by several contemporaneous documents, in addition to the testimony at trial. For example, Daramic itself was skeptical of the basis for Ticona's force majeure claim from the beginning. (RX01054 at 003 (noting "there is a lot of smoke around this" force majeure declaration, and "[t]he key issue actually is not the Shell Quaker (sic) failure, but the very tight ethylene supply situation in Europe.")). And as Respondent admits,

{ [REDACTED]

[REDACTED] } (See CCRF 636, 643). { [REDACTED]

[REDACTED]

[REDACTED] } (RX0698 at 005, *in camera*; Hauswald, Tr. 944-945, *in camera*).

The complaint EnerSys filed on October 11, 2006 specifically alleges that Daramic told EnerSys its "supply problems will 'go away' if EnerSys agrees to enter into a new long term contract between the parties at terms unilaterally dictated by Daramic . . ." (RX00243 at 009).

Daramic { [REDACTED]

[REDACTED]"} }

(PX1211, *in camera*). That contemporaneous document { [REDACTED]

[REDACTED]

[REDACTED] } (PX1211 at 002, *in camera*; see also

(PX1224 at 004, *in camera* { [REDACTED] }  
[REDACTED] ); CCFOF 1153-1154).

655. Significantly, EnerSys' Complaint seeks temporary and preliminary injunctive relief (RX243 at 002), yet no evidence exists that EnerSys took any additional steps to obtain such relief from any court, including holding a hearing, submitting any motions, briefs or affidavits, or obtained such relief. { [REDACTED]

[REDACTED] } (RX1601, *in camera*; PX1224 *in camera*). As is clear, EnerSys was represented by counsel throughout this timeframe. No evidence has been presented to this Court that EnerSys ever sought to have its contract with Daramic nullified for supposedly signing it under duress and no evidence has even been presented to this Court that EnerSys ever made that assertion prior to the institution of this matter.

**Response to Finding No. 655:**

This proposed finding is argumentative, improper and factually unsupported. EnerSys sought injunctive relief because Daramic's conduct threatened the company with "immediate and irreparable harm arising from the shutdown of one or more of the EnerSys Plants." (RX00243 at 003; *see also* CCFOF 1087, 1147, 1151-1154). [REDACTED]

[REDACTED] (*See* CCFOF 1152-1154). Respondent's unfounded speculation about alternative legal strategies EnerSys may or may not have considered is not probative. Moreover, Respondent never explored these issues at trial. Such information is likely to be protected by one or more legal privileges, in any event.

656. Daramic was proactive in its dealing with EnerSys on this force majeure event. Tucker Roe attempted to reach EnerSys over the telephone before sending the letter notifying EnerSys of the force majeure situation. (Roe, Tr. 1707-1711). Bob Toth on at least two occasions sent emails to John Craig assuring EnerSys that Daramic was doing what it could to handle the situation fairly with it and apprising of the status of deliveries. (PX1287; PX1288; Craig, Tr. 2577-82). Roe developed a plan with Axt whereby they would talk daily about the supply situation during this force majeure period. (Roe, Tr. 1711). Toth told every customer with whom he spoke, including Craig, that Daramic was doing everything that it could to get separators to them and that Daramic did not want to shut any of the customer's plants down. (Toth, Tr. 1406).

**Response to Finding No. 656:**

This proposed finding is contradicted by evidence { [REDACTED]  
[REDACTED] } (Hauswald, Tr. 950, *in camera*). *See also*

(CCRF 647). [REDACTED]

[REDACTED] (See, e.g., PX0694 at

001; PX0852 at 001, *in camera*; PX0986 at 001; PX1211 at 002, *in camera*; see generally

CCFOF 1114, 1117, 1121-1122, 1139-1146). After-the-fact, self-serving testimony of Daramic

executives trying to justify their anticompetitive actions carries no weight.

657. Daramic employees worked 12 hour days during this force majeure period trying to manage the situation, juggling schedules and verifying inventories all in an effort to meet the customer requirements. (Roe, Tr. 1704-05).

**Response to Finding No. 657:**

Complaint Counsel has no specific response, other than to note that the beneficial activities described in the cited testimony did not apply to Daramic's conduct with respect to EnerSys until after the companies had agreed to the contract extension. (See CCRF 644, 654, 656, 659).

658. {

[REDACTED] } (Hauswald, Tr. 893-894, *in camera*).

**Response to Finding No. 658:**

This proposed finding misstates the cited testimony. Mr. Hauswald stated that { [REDACTED] } (Hauswald, Tr. 894, *in camera*). He further admitted that, { [REDACTED] } (Hauswald, Tr. 947-949, *in camera*; RX00698 at 009, *in camera*). This admission is consistent with several contemporaneous Daramic documents. (See CCRF 648 (detailing how Daramic was able to maintain production and mitigate any impact of the Ticona supply situation)).

659. {

[REDACTED] } (Axt, Tr. 2207, *in camera*).

**Response to Finding No. 659:**

This proposed finding is not supported by the evidence. Mr. Axt testified that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2207, in camera; see also CCFOF 1154).

(ii) Microporous

660. EnerSys purchased ACE-SIL® and CellForce battery separators from Microporous. (Burkert, Tr. 2377; RX1120, in camera). { [REDACTED] } (RX1120, in camera). EnerSys admits that no other separator can be used in batteries using Ace-Sil separators except Ace-Sil separators. (Axt, Tr. 2235).

**Response to Finding No. 660:**

Complaint Counsel has no specific response.

661. From 1996 up until the merger between Daramic and Microporous, EnerSys purchased separators from Microporous' Piney Flats, Tennessee facility and shipped those separators to EnerSys' plants located in Europe and China. (Burkert, Tr. 2377, 2379). And from there, EnerSys used the Microporous battery separators in EnerSys batteries which it then sold to its customers. (Burkert, Tr. 2382-83).

**Response to Finding No. 661:**

The first sentence of this finding is contradicted by Mr. Burkert's clarifying testimony that it was Microporous, itself, that shipped separators to EnerSys in Europe. (Burkert, Tr. 2383). EnerSys then used those separators at its plants in Europe to make batteries for its European customers. (Burkert, Tr. 2383).

662. Prior to the merger of Microporous and Daramic, less than 10% of the separators purchased by EnerSys from Microporous remained in the United States. (Burkert, Tr. 2380, 2381).

**Response to Finding No. 662:**

This finding is contradicted by Mr. Burkert's testimony who testified only with respect to the amount of CellForce that was purchased by EnerSys, and did not testify as to the amount of Ace-Sil (rubber) consumed by EnerSys in North America. (Burkert, Tr. 2379-2380). The

exclusionary contract that Daramic forced EnerSys to sign required that EnerSys purchase 90 percent of its motive separators from Daramic. (Burkert, Tr. 2380-2381).

663. { [REDACTED] } (Axt, Tr. 2145, *in camera*). { [REDACTED] } (Burkert, Tr. 2407-08, 2458, *in camera*; Axt, Tr. at 2145, *in camera*).

**Response to Finding No. 663:**

This finding is contradicted by the testimony of Mr. McDonald who testified that with respect to { [REDACTED] } (PX0921

(McDonald, IH at 202-204, *in camera*). { [REDACTED] } { [REDACTED] }

This finding is not supported by Mr. Axt's testimony that *as of February 2006* the { [REDACTED]

{ [REDACTED] } (Axt, Tr. 2145, *in camera*) { [REDACTED]

{ [REDACTED] } Nor is it supported by Mr. Burkert who testified only that { [REDACTED] } { [REDACTED] } (Burkert, Tr. 2407-2408, 2458, *in camera*) (no testimony on development).

664. At the time of the merger of Microporous and Daramic, the Feistritz plant was not in commercial operation, and EnerSys, to the extent it needed separators from Microporous for its worldwide operations, would buy them from Microporous' Piney Flats, Tennessee facility. (Burkert, Tr. 2384-85; Axt, Tr. 2239).

**Response to Finding No. 664:**

The Feistritz plant would have been operational in mid-March, two weeks after Microporous was acquired. (Gilchrist, Tr. 309). Feistritz was already making production line samples for its customers prior to the acquisition. (Burkert, Tr. 2467).

665. EnerSys does not believe it is necessary for its business for its separator suppliers to be physically located in both North America and Europe. (Burkert, Tr. 2385; RX224).

**Response to Finding No. 665:**

EnerSys prefers to have its separator suppliers to be located close to its plants, not necessarily next door, but "within a 50-mile radius." (Axt, Tr. 2108). EnerSys prefers to have

local suppliers to reduce shipping costs, inventory carrying costs, freight forward fees, logistics, lead times, timeliness of supply, and duties. (Axt, Tr. 2109, 2130). This is particularly true in Europe and North America where EnerSys does a lot of business. (Axt, Tr. 2108). Even for its low-volume motive business in China, EnerSys is concerned about logistics. (Axt, Tr. 2240-2241). However there is [REDACTED] (Axt, Tr. 2220, *in camera*).

[REDACTED]  
[REDACTED] (Axt, Tr. 2141-2142, *in camera*). However, this raised concerns for EnerSys because [REDACTED]  
[REDACTED] (Axt, Tr. 2142, *in camera*; PX1200 at 002, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2142, *in camera*).

MPLP and EnerSys [REDACTED] (PX1200 at 001, *in camera*). [REDACTED]  
[REDACTED] (Axt, Tr. 2141, *in camera*). [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

(PX1200 at 002-003, *in camera*).

666. EnerSys had for years purchased battery separators from North America and shipped them to its plants located in Europe and China. (Burkert, Tr. 2377-79; RX206 at 003, *in camera*).

**Response to Finding No. 666:**

Respondent attempts to support this finding with a document not used at trial that is contradicted by Mr. Burkert's testimony that EnerSys was not happy with the situation of having Microporous supply its European plants from North America, which is why it asked Microporous to build a plant in Austria. (Burkert, Tr. 2466-2467).

1. EnerSys Enters Into Contract with Microporous

667. { [REDACTED] } (RX00953, *in camera*).

**Response to Finding No. 667:**

This finding is contradicted by the testimony of Mr. Craig who testified that he had not made a decision not to do business with Daramic. (Craig, Tr. 2595). "My objective is I want multiple sources. I want a competitive environment. And if we were to switch over to one other source and not do business with Daramic, that would put us right back where we are today." (Craig, Tr. 2505). Mr. Craig concluded that, despite the force majeure actions by Daramic, "business is business" and he hoped that EnerSys and Daramic would be able to do business together in the future. (Craig, Tr. 2596).

Mr. Burkert testified that even if EnerSys went 100% with Microporous, it would still have Daramic as a second source. (Burkert, Tr. 2424-2425, 2459-2460).

668. { [REDACTED] } (RX206 at 005, *in camera*). { [REDACTED] } (RX206 at 004, *in camera*).

**Response to Finding No. 668:**

Complaint Counsel has no specific response.

669. { [REDACTED] } (RX206 at 003 at 03, *in camera*).

**Response to Finding No. 669:**

EnerSys's plant in China would receive product from Piney Flats, Tennessee. (Axt, Tr. 2240-2241).

670. No credible evidence is in the record that the Feistritz facility was intended to provide separators to EnerSys for its North America operations.

**Response to Finding No. 670:**

This finding is contradicted by credible evidence that { [REDACTED] }  
[REDACTED] }

This meant that EnerSys would { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2144, *in camera*). Initially EnerSys committed every plant except Richmond, Kentucky, which was not included because EnerSys wished to keep two suppliers and because CellForce could not be sleeved at that time. (Axt, Tr. 2131).

671. { [REDACTED] } (Axt, Tr. 2256, *in camera*; RX207 at 009, *in camera*)

**Response to Finding No. 671:**

Complaint Counsel has no specific response.

672. { [REDACTED] } (RX207, *in camera*). { [REDACTED] }  
{ [REDACTED] } (RX207 at 001-002 *in camera*). { [REDACTED] }  
{ [REDACTED] } (RX207 at 10, *in camera*).

**Response to Finding No. 672:**

Complaint Counsel has no specific response.

673. EnerSys did not enter into the contract with Microporous until January 2007 due to the fact that the Microporous board of directors, and the owners of Microporous, IGP Partners, did not provide its support to the project until that time. (Axt, Tr. 2256, 2153, *in camera*; PX2300; PX2301).

**Response to Finding No. 673:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Axt, Tr. 2303-2304, *in camera*).

2. EnerSys Intended to Move 100% of its Purchases from Daramic to Microporous

674. [REDACTED]

[REDACTED] (Burkert, Tr. 2424, *in camera*; RX241). {

[REDACTED] } (Craig, Tr. 2637-38, *in camera*). {

[REDACTED] } RX220 at 008, *in camera*; Burkert, Tr. 2428, *in camera*).

**Response to Finding No. 674:**

This finding is contradicted by the testimony of Mr. Craig who testified that he had not made a decision not to do business with Daramic. (Craig, Tr. 2595). "My objective is I want multiple sources. I want a competitive environment. And if we were to switch over to one other source and not do business with Daramic, that would put us right back where we are today." (Craig, Tr. 2595). Mr. Craig concluded that, despite the force majeure actions by Daramic, "business is business" and he hoped that EnerSys and Daramic would be able to do business together in the future. (Craig, Tr. 2596).

The contract between Microporous and Daramic applied to [REDACTED]

[REDACTED] } (RX00953 at 001-002, *in camera*). [REDACTED]

[REDACTED] (RX00953 at 001-002, *in camera*). The contract commits

EnerSys to purchase { [REDACTED] }

(compare RX00953 at 002, *in camera* and PX1259 at 003, *in camera*) { [REDACTED]

675. { [REDACTED]

[REDACTED] } (Burkert, Tr. 2429, 2431, *in camera*; RX221, *in camera*).

**Response to Finding No. 675:**

[REDACTED]

[REDACTED] } (CCRF 674, *in camera*).

676. [REDACTED]  
[REDACTED] } (RX1349 at 002 *in camera*).

**Response to Finding No. 676:**

[REDACTED]

[REDACTED]

[REDACTED] } (CCRF 674, *in camera*).

677. Finally, in its contract entered into with Microporous in January 2007, [REDACTED]  
[REDACTED] } (RX953 at 001, 005, *in camera*). [REDACTED]  
[REDACTED] } (RX953 at 003, *in camera*). The Court finds that Daramic was not and would not be a competitive factor as related to EnerSys until at least July 2013.

**Response to Finding No. 677:**

[REDACTED]

(RX00953 at 001-002, *in camera*). The contract commits EnerSys to purchase [REDACTED]

[REDACTED] } (*compare* RX00953 at 002, *in*

*camera* and PX1259 at 003, *in camera*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } [REDACTED] { [REDACTED]

[REDACTED] } (RX00953 at 002, *in*

*camera*). Moreover, the contract applied to [REDACTED]

(RX00953 at 001-002, *in camera*). [REDACTED] { [REDACTED]

(Axt, Tr. 2214, *in camera*; RX00953, *in camera*). Without a competitor, customers have no way of knowing if the price increases being sought by Daramic are legitimate. (Benjamin, Tr. 3524-3525).

In previous negotiations, [REDACTED]

[REDACTED]

[REDACTED] For example, on November 7, 2007,

Tucker Roe wrote an email to Larry Burkert in which he informed Mr. Burkert that { [REDACTED]

[REDACTED] } (RX00768 at 001, *in*

*camera*). Mr. Roe added, however, that Daramic would { [REDACTED]

[REDACTED] } (RX00768 at 001, *in camera*). [REDACTED]

[REDACTED] { [REDACTED] } [REDACTED]

[REDACTED] { [REDACTED] } (CCFOF 1114-1115, 1121, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (PX1224 at 007, *in camera*).

3. EnerSys Refused Microporous Price Increases and Surcharges

678. { [REDACTED] } (RX210; Axt, Tr. 2245-46, *in camera*). { [REDACTED]

[REDACTED] } (Axt, Tr. 2246, *in camera*; RX210).

**Response to Finding No. 678:**

This finding is contradicted by the testimony of Mr. Burkert who testified that EnerSys accepted the rubber pass through with respect to Ace-Sil. (Burkert, Tr. 2313). Mr. Burkert further testified that EnerSys was able to avoid this preacquisition price increase in CellForce only by virtue of the then existing competition between Daramic and Microporous. (Burkert, Tr. 2314-2315).

With respect to the first sentence, this bare assertion is unsupported by any evidence and is contradicted by Mr. Craig's testimony that EnerSys does not { [REDACTED]

[REDACTED]

[REDACTED] (Craig, Tr. 2566-2567, *in camera*).

The assertion that battery manufacturers have buying power is contradicted by evidence

[REDACTED] { [REDACTED]

[REDACTED] } (PX0265 at 008, *in camera*).

According to Daramic, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0265 at 004, 007-008, *in camera*). { [REDACTED]

[REDACTED] }

(PX0265 at 010, *in camera*). { [REDACTED]

[REDACTED] } (PX0265 at 011, *in*

*camera*). Because it is the separator suppliers that have the power in the industry, Daramic's

leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004

("demonstrating pricing power in the marketplace regardless of movements in material and

energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included { [REDACTED]

[REDACTED]

[REDACTED] }; PX0204 at 002 (Mr. Hauswald's 2006 goals included "[r]aise Daramic prices

again where possible to demonstrate pricing power regardless of cost movements.")

679. Again, in 2007, { [REDACTED]

[REDACTED] } (RX228, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX228 at 002-03, *in camera*). { [REDACTED]

[REDACTED] } (Berkert,

Tr. 2434-37, *in camera*; RX228 at 001 *in camera*). This further evidences EnerSys' strength to use its buying power.

**Response to Finding No. 679:**

{ [REDACTED] }  
[REDACTED] } (Burkert, Tr. 2458-2459, *in camera*). { [REDACTED] }  
[REDACTED] } (Burkert, Tr. 2460, *in camera*).

The assertion that battery manufacturers have buying power is contradicted by evidence [REDACTED] { [REDACTED] } (PX0265 at 008, *in camera*).

According to Daramic, { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 004, 007-008, *in camera*). { [REDACTED] }  
[REDACTED] }  
(PX0265 at 010, *in camera*). { [REDACTED] }  
[REDACTED] } (PX0265 at 011, *in camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004 ("demonstrating pricing power in the marketplace regardless of movements in material and energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included { [REDACTED] }  
[REDACTED]

[REDACTED] }; PX0204 at 002 (Mr. Hauswald's 2006 goals included "[r]aise Daramic prices again where possible to demonstrate pricing power regardless of cost movements."))

(b) Today

(i) Other Sources of Supply Are Available

680. EnerSys has available to it potential suppliers of battery separators for its industrial batteries and, in fact, has been in discussion with three potential suppliers since the merger of Daramic and Microporous was announced.

**Response to Finding No. 680:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. Simply put, EnerSys has no suppliers of battery separators for its industrial batteries today. (Axt, Tr. 2101). Any potential suppliers to EnerSys are at least three years away from providing industrial (motive) separators if they are successful at developing a motive separator and 40 months for UPS, again if they are successful in developing such a separator. (Gagge, Tr. 2491-2492). [REDACTED]

[REDACTED] (Axt, Tr. 2217-2219, *in camera*; PX1248 at 001, *in camera*).

1. Entek

681. Entek, which had been a supplier of PE separators for industrial application in the 1990s, has at least twice expressed an interest to EnerSys to supply it with battery separators. (Burkert, Tr. 23111; Burkert, Tr. 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*). During Daramic's force majeure in 2006, Entek also expressed a willingness to provide samples to EnerSys. (RX201).

**Response to Finding No. 681:**

This finding is contradicted by the fact that Mr. Burkert specifically testified [REDACTED]

[REDACTED] [REDACTED] (Burkert, Tr. 2447, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] (Burkert, Tr. 2351-2352, *in camera*). [REDACTED]

[REDACTED] (Burkert, Tr. 2352, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Burkert, Tr. 2353, *in camera*).

Mr. Burkert felt that [REDACTED]

[REDACTED] (Burkert, Tr. 2353, *in camera*; see also Gagge, Tr. 2521, *in camera*).

As a result of these conversations, { [REDACTED] }

(Burkert, Tr. 2357, *in camera*).

{ [REDACTED] }

[REDACTED]

{ [REDACTED] } (Burkert, Tr. 2447, *in camera*). Mr. Burkert testified that { [REDACTED] }

[REDACTED]

{ [REDACTED] } (Burkert, Tr. 2447, *in camera*).

If EnerSys received { [REDACTED] }

{ [REDACTED] } (Gagge, Tr. 2522, *in camera*). { [REDACTED] }

[REDACTED]

{ [REDACTED] } (Gagge, Tr. 2522, *in camera*).

The statement in the second sentence of this finding is supported only by a document not used at trial that is contradicted by the simple fact that { [REDACTED] }

{ [REDACTED] } (Axt, Tr. 2189-2190,

*in camera*).

682. { [REDACTED] }

{ [REDACTED] } (Burkert, Tr. 2448, *in camera*).

**Response to Finding No. 682:**

Mr. Burkert testified that { [REDACTED] }

[REDACTED]

{ [REDACTED] } (Burkert,

Tr. 2355, *in camera*) (emphasis added).

[REDACTED]

{ [REDACTED] }, { [REDACTED] }

{ [REDACTED] } (Burkert, Tr. 2447, *in camera*). Mr. Burkert testified that { [REDACTED] }

[REDACTED]

(Burkert, Tr. 2447, *in camera*). [REDACTED]

[REDACTED] (Burkert, Tr. 2447-2448, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Gagge, Tr. 2522, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Gagge, Tr. 2522, *in camera*).

683. [REDACTED]

(Burkert, Tr. 2448, *in camera*).

**Response to Finding No. 683:**

Polypore hopes to exploit an ambiguous statement in this finding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (compare Burkert, Tr. 2354, *in camera*

and Burkert, Tr. 2446-2448, *in camera*).

684. [REDACTED]

[REDACTED] (Gagge, Tr. 2514, *in camera*).

**Response to Finding No. 684:**

[REDACTED]

[REDACTED]

(Gagge, Tr. 2514, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Gagge, Tr. 2522, *in camera*). { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] } (Gagge, Tr. 2522, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

2. Asian Producers

685. { [REDACTED] [REDACTED] } (RX239, *in camera*; RX193; RX203, *in camera*). { [REDACTED] [REDACTED] } (RX1203, *in camera*). EnerSys also gave consideration to PT Separindo located in India (RX194) and Epoch located in China (RX195).

**Response to Finding No. 685:**

With the exception of RX00239, none of the documents cited by respondent in this finding were used at trial, and all are contradicted by the evidence, which shows that { [REDACTED] [REDACTED] } (Burkert, Tr. 2355-2360, *in camera*). EnerSys has no approved suppliers of battery separators for its motive or UPS batteries today. (Axt, Tr. 2101, 2103-2104).

[REDACTED] { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] } (PX0916 (Dauwe, Dep. at 115), *in camera*; PX0916 (Dauwe, Dep. at 117)).

{ [REDACTED] } According to Amer-Sil's Managing Director, { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] } (PX0916 (Dauwe, Dep. at 94-95), *in camera*). [REDACTED]

[REDACTED] { [REDACTED] [REDACTED]

[REDACTED] } (PX0916 (Dauwe, Dep. at 94, *in camera*)).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gagge, Tr. 2497-2499, *in camera*).  
[REDACTED] { [REDACTED] } (Gagge, Tr. 2499-  
2500, *in camera*).

[REDACTED]  
[REDACTED] } (Axt, Tr.  
2217-2219, *in camera*). { [REDACTED]  
[REDACTED] } (PX1248 at 001, *in camera*).

3. BFR

686. { [REDACTED]  
[REDACTED] } (Hall Tr. 2849-52, *in camera*; RX23 at 002, *in camera*). { [REDACTED]  
[REDACTED] } (RX25  
*in camera*); { [REDACTED] }  
[REDACTED] }; (RX1206 *in camera*). { [REDACTED]  
[REDACTED] } (Axt, Tr. 2267-68, *in camera*).

**Response to Finding No. 686:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (See generally CCFOF 947-950, 966-  
967, 969, 972-974, 983-986). { [REDACTED]  
[REDACTED] } (Hall, Tr. 2881, *in camera*). { [REDACTED]  
[REDACTED] } (Axt, Tr. 2218, *in*  
*camera*; see also Gagge, Tr. 2499, *in camera*) { [REDACTED]  
[REDACTED] } (Hall, Tr.

2881, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 262), *in camera*; Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*).

{ [REDACTED] }  
[REDACTED] } (Hall, Tr. 2881-2882, *in camera*; PX0907 (Kung, Dep. at 291, *in camera*)). { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2217-2219, *in camera*). Mr. Hall has communicated to { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2881-2882, *in camera*).

Respondent did not use any of the documents cited in this finding at trial.

687. BFR, which produces battery separators for JCI, the world's largest manufacturer of automotive batteries, has advised EnerSys that it is capable of producing industrial PE separators for EnerSys. (RX225). BFR has also stated that it prefers establishing long term contracts with its key customers. (RX225).

**Response to Finding No. 687:**

This finding is contradicted by EnerSys testimony that it { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*).

688. EnerSys agreed to support the financial cost of a new profile roll for BFR, at an approximate cost of \$5,000. (RX237).

**Response to Finding No. 688:**

Respondent attempts to support this finding with a document not used at trial that is contradicted by the trial testimony of Mr. Burkert who testified that { [REDACTED] }  
[REDACTED] } (Burkert, Tr. 2448-2449, *in camera*). In addition, { [REDACTED] }

[REDACTED]

[REDACTED] (Axt, Tr. 2219, *in camera*). [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] (Axt, Tr. 2271, *in camera*).

689. [REDACTED] (RX204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*). [REDACTED] (RX238; Axt, Tr. 2270, *in camera*). [REDACTED] (RX238; Axt, Tr. 2270, *in camera*).

**Response to Finding No. 689:**

The document cited by respondent in support of this finding, (RX00238), was not used at trial and is contradicted by clear testimony that EnerSys received [REDACTED]

[REDACTED] (Gagge, Tr. 2497, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Gagge, Tr. 2497-2499, *in camera*).

4. Anpei

690. [REDACTED] (Axt, Tr. 2272, *in camera*).

**Response to Finding No. 690:**

Complaint Counsel has no specific response.

691. [REDACTED] (RX222, *in camera*).

**Response to Finding No. 691:**

Respondent attempts to support this finding with a document it did not use at trial that is contradicted by the trial testimony of Mr. Gagge who testified that [REDACTED]

[REDACTED] (Gagge, Tr. 2515). [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]  
[REDACTED] } (RX00222 at 001, *in camera*). This document does, however, demonstrate that even without { [REDACTED] } (RX00222 at 001, *in camera*).

692. { [REDACTED] } (RX197, *in camera*).

**Response to Finding No. 692:**

Respondent attempts to support this finding with a document it did not use at trial that is contradicted by the trial testimony of Mr. Gagge who testified that { [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*). { [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*). [REDACTED] { [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*). [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*).

693. [REDACTED] (Burkert, Tr. 2445, *in camera*).

**Response to Finding No. 693:**

This finding is contradicted by Mr. Gagge's testimony that { [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*).

Moreover, this finding is not supported by Mr. Burkert's testimony who merely stated that { [REDACTED] } (Burkert, Tr. 2445, *in camera*). Mr. Axt testified that [REDACTED] } (Axt, Tr. 2272-2273, *in camera*).

694. { [REDACTED] } (Axt, Tr. 2273, *in camera*; Berkert, Tr. 2445, *in camera*).

**Response to Finding No. 694:**

Prior to the acquisition of Microporous by Daramic, { [REDACTED] } (Axt, Tr. 2273, *in camera*).

After the acquisition, { [REDACTED] } (Axt, Tr. 2273, *in camera*). Thus, it was not until EnerSys learned that { [REDACTED] }

In any event, EnerSys has been working with { [REDACTED] } (Gagge, Tr. 2507, *in camera*).

5. Alpha Beta

695. { [REDACTED] } (Berkert, Tr. 2449-51, *in camera*). { [REDACTED] } (RX199 *in camera*; Axt, Tr. 2277, *in camera*; Berkert, Tr. 2456, *in camera*).

**Response to Finding No. 695:**

The document cited for this proposition, which was not used at trial, actually says

{ [REDACTED] } (RX00199 at 001).

696. { [REDACTED] } (RX223, *in camera*; Burkert, Tr. 2450, *in camera*).

**Response to Finding No. 696:**

Complaint Counsel has no specific response except to note that respondent did not use RX00223 at trial.

697. { [REDACTED] } (Axt, Tr. 2278, *in camera*).

**Response to Finding No. 697:**



[REDACTED]  
[REDACTED] }  
(PX0916 (Dauwe, Dep. at 94-95), *in camera*). [REDACTED] { [REDACTED]

[REDACTED] } (PX0916 (Dauwe, Dep. at 94), *in camera*).

Mr. Burkert who { [REDACTED]

[REDACTED]  
[REDACTED] }  
(Burkert, Tr. 2355-2356, *in camera*). { [REDACTED]

[REDACTED] } (Burkert, Tr. 2357, *in camera*).

Respondent did not use PX1262 at trial, and it does not support the proposition. First, [REDACTED] } Second, the document cited concludes with a September 2008 email from Mr. Gagge in which he writes "At this point, I would say thanks but no thanks on the PE replacement strategy. Make it known that we discussed at BCI and have yet to hear a plan from them. A sloth moves faster." (PX1262 at 001).

700. { [REDACTED] } (Gagge, Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280). EnerSys has considered using Amer-Sil PVC separators. (PX1283).

**Response to Finding No. 700:**

Respondent attempts to support this finding with documents it did not use at trial that are contradicted by the testimony of Messrs Axt, Gagge, Gilchrist, Dauwe, and by Daramic's own documents:

When EnerSys used Amer-Sil PVC separators in Europe during Daramic's declared force majeure in 2006, they were 20 percent more expensive than the PE that EnerSys was buying from Daramic. (Axt, Tr. 2102). { [REDACTED]

[REDACTED] (Axt, Tr. 2307, *in camera*). [REDACTED]  
{ [REDACTED] } [REDACTED] (Burkert, Tr. 2357, *in camera*). { [REDACTED]  
[REDACTED] } (Gagge, Tr. 2521, *in camera*). { [REDACTED]  
[REDACTED] } (Gagge, Tr. 2512, *in camera*).  
{ [REDACTED]  
[REDACTED] } (Gagge, Tr. 2520, *in camera*). { [REDACTED]  
[REDACTED] } (Gagge, Tr. 2520, *in camera*).  
[REDACTED] { [REDACTED] } [REDACTED]  
[REDACTED] (Gagge, Tr. 2521, *in camera*).  
{ [REDACTED]  
[REDACTED] } (Gagge, Tr. 2520, *in camera*).  
[REDACTED] { [REDACTED]  
[REDACTED] } (PX0916 (Dauwe, Dep. at 122), *in camera*) { [REDACTED]  
[REDACTED] } (PX0916 (Dauwe,  
Dep. at 88), *in camera*) { [REDACTED]  
[REDACTED] } (PX0916 (Dauwe, Dep. at 158), *in  
camera*).

Daramic's own documents detail these problems with PVC, stating that "In North America and Western Europe, sintered PVC separators are never used in motive power applications. Batteries with sintered PVC separators will not meet the demanding performance and cycle life applications (the battery is required to achieve a minimum life of 4 years under arduous deep-cycle duty)." (PX1790 at 002).

The documents cited by respondent were not used at trial and do not support the proposition. One document cited by respondent, PX1280, relates only to Daramic's own product, Darak, and does not relate in any way to PVC or Amer-Sil. The other document, PX1283, relates to the potential use of PVC in light duty batteries in Eastern Europe during Daramic's Owensboro strike when EnerSys was unable to get sufficient supply of quality separators from Daramic to keep its lines running. (Hauswald, Tr. 1071-1073) (55 day strike in Fall of 2008 at Owensboro affected all production there). The document highlights the problems with using PVC because it must be used in leaf form and is brittle. (PX1283 at 002).

701. [REDACTED] (RX199, *in camera*; RX239, *in camera*; Berkert, Tr. 2456, *in camera*) [REDACTED] (Burkert, Tr. 2356, *in camera*).

**Response to Finding No. 701:**

This finding is contradicted by the testimony of Mr. Dauwe of Amer-Sil, who testified that "[t]he only thing that EnerSys did was ask if we would be interested to make PE separators. The joint venture is an incorrect – factually incorrect." (PX0916 (Dauwe, Dep. at 90)). Amer-Sil has [REDACTED]

[REDACTED].}

(PX0916 (Dauwe, Dep. at 115), *in camera*; PX0916 (Dauwe, Dep. at 117)). [REDACTED]

[REDACTED] } According to Amer-Sil's Managing Director, [REDACTED]

[REDACTED]

[REDACTED] }

(PX0916 (Dauwe, Dep. at 94-95), *in camera*). [REDACTED] [REDACTED]

[REDACTED] } (PX0916 (Dauwe, Dep. at 94), *in camera*).

EnerSys has considered vertical integration into separator manufacture, { [REDACTED]

[REDACTED]

[REDACTED] } (Burkert, Tr. 2366, *in camera*). EnerSys concluded that it { [REDACTED]

[REDACTED]

[REDACTED] } (Craig, Tr. 2644, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00199 at 001, *in camera*). { [REDACTED]

[REDACTED] } (RX00239, *in*

*camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Burkert, Tr. 2456, *in camera*).

702. { [REDACTED]

[REDACTED] } (RX215, *in camera*). EnerSys also

used Amer-sil for increased production during the fall 2006 *force majeure*. (Axt 2287-88).

**Response to Finding No. 702:**

This finding is contradicted by the testimony of Messrs Burkert, Gagge, and the document cited by respondent in support of the finding:

Mr. Burkert testified that while EnerSys has considered vertical integration into separator manufacture, { [REDACTED]

[REDACTED] } (Burkert, Tr. 2366, *in camera*). With respect

to Amer-Sil, Mr. Burkert only { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Burkert, Tr. 2355-2356, in camera). [REDACTED]

[REDACTED] } (Burkert, Tr. 2357, in camera).

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

(Gagge, Tr. 2534-2535, in camera; RX00215, in camera { [REDACTED] });

RX00216-001 ([t]hat's the argument that will be presented by Daramic"). EnerSys concluded

that [REDACTED]

[REDACTED]

[REDACTED] } (Gagge, Tr. 2535-

2536, in camera; RX00216 at 001, in camera).

When EnerSys used Amer-Sil PVC separators in Europe during Daramic's declared force majeure in 2006, they were 20 percent more expensive than the PE that EnerSys was buying from Daramic. (Axt, Tr. 2102). [REDACTED]

[REDACTED] }

[REDACTED] (Axt, Tr. 2307, in camera). [REDACTED]

{ [REDACTED] Burkert, Tr. 2357, in camera). [REDACTED]

[REDACTED] } (Gagge, Tr. 2521, in camera). [REDACTED]

[REDACTED] } (Gagge, Tr. 2512, in camera).

#### 7. Other Sources

703. [REDACTED] } (Berkert, Tr. 2453-56, in camera; RX199, in camera).

#### **Response to Finding No. 703:**

This finding, which is supported by a document not used at trial, is contradicted by the testimony of [REDACTED] (Burkert, Tr.

2454, *in camera*). { [REDACTED] } and [REDACTED] [REDACTED] (Burkert, Tr. 2463, *in camera*). EnerSys has considered vertical integration into separator manufacture, { [REDACTED] [REDACTED] } (Burkert, Tr. 2366, *in camera*). EnerSys concluded that it { [REDACTED] [REDACTED] } (Craig, Tr. 2644, *in camera*).

704. { [REDACTED] [REDACTED] } (Gagge, Tr. 2510, *in camera*).

**Response to Finding No. 704:**

With respect to the first two sentences of this finding, these bare assertions are unsupported by any evidence and are contradicted by a great deal of evidence. { [REDACTED] [REDACTED] } (Axt, Tr. 2273, *in camera*; Gagge, Tr. 2507, *in camera*). { [REDACTED] [REDACTED] } (Axt, Tr. 2273-2274, *in camera*). { [REDACTED] [REDACTED] } (Craig, Tr. 2628-2629, *in camera*). [REDACTED] { [REDACTED] } that are detailed in respondent's findings above give the lie to this unsupported assertion. (RFOF 680-703). [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Gagge, Tr. 2528-2529, *in camera*).

705. [REDACTED]

(Craig, Tr. 2629-30, *in camera*, 2631-32, *in camera*).

**Response to Finding No. 705:**

[REDACTED]

[REDACTED] (Craig, Tr. 2632). [REDACTED]

[REDACTED] [REDACTED] (Burkert, Tr.

2447, *in camera*). [REDACTED] [REDACTED]

[REDACTED] (Burkert, Tr. 2355-

2360).

[REDACTED] [REDACTED]

[REDACTED] (Gagge, Tr. 2498-2500, *in camera*). O [REDACTED]

[REDACTED] [REDACTED] by commencing testing on

production samples. Any potential suppliers to EnerSys are at least three years away from

providing industrial (motive) separators if they are successful at developing a motive separator

and 40 months for UPS, again if they are successful in developing such a separator. (Gagge, Tr.

2491-2492). [REDACTED] [REDACTED]

[REDACTED] (Axt, Tr. 2217-2219, *in camera*; PX1248 at 001, *in camera*).

[REDACTED] (RFOF 680-703, *in camera*), [REDACTED]

[REDACTED]

[REDACTED]

706. For example, { [REDACTED] } (Axt, Tr. 2272-2274, *in camera*).

**Response to Finding No. 706:**

This finding is contradicted by Mr. Axt's testimony that the { [REDACTED] } (Axt, Tr. 2272, *in camera*). It is further contradicted by Mr.

Axt's testimony that

{ [REDACTED] }

(Axt, Tr. 2272-2273, *in camera*).

Respondent's cite to Mr. Axt's testimony does not support this finding. (Axt, Tr. 2272-2274, *in camera*) { [REDACTED] }

707. { [REDACTED] } (Craig, Tr. 2631, *in camera*).

**Response to Finding No. 707:**

This unsupported finding is contradicted by the testimony of Mr. Dauwe, Mr. Burkert, Mr. Axt, and Mr. Craig.

Mr. Dauwe of Amer-Sil testified that "[t]he only thing that EnerSys did was ask if we would be interested to make PE separators. The joint venture is an incorrect – factually incorrect." (PX0916 (Dauwe, Dep. at 90), *see also* CCRF 701, *in camera* { [REDACTED] }

EnerSys has considered vertical integration into separator manufacture, { [REDACTED] }

[REDACTED] (Burkert, Tr. 2366, *in camera*). EnerSys concluded that it [REDACTED]  
[REDACTED]  
[REDACTED] (Craig, Tr. 2644, *in camera*). [REDACTED]  
[REDACTED] (Craig, Tr. 2632, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] (Craig, Tr. 2631, *in camera*) [REDACTED]  
708. [REDACTED] (Axt, Tr. 2273, *in camera*; Berkert, Tr. 2445, *in camera*).

**Response to Finding No. 708:**

Prior to the acquisition of Microporous by Daramic, [REDACTED]  
[REDACTED] (Axt, Tr. 2273, *in camera*). After the acquisition, [REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2273, *in camera*). Thus, it was not until EnerSys learned that [REDACTED]  
[REDACTED]  
[REDACTED] (Gagge, Tr. 2507, *in camera*).

709. [REDACTED]  
[REDACTED] (Craig, Tr. 2632-33, 2635, *in camera*). [REDACTED]  
(Gagge, Tr. 2518-19, *in camera*).

**Response to Finding No. 709:**

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Burkert, Tr. 2351-2352, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2271, *in camera*).

Respondent's cite to Mr. Gagge's testimony does not support this finding. (no mention of Mr. Craig's knowledge). Even if it did, it would be unreliable and objectionable speculation.

710. The above findings demonstrate a lack of any serious effort on EnerSys' part to find a supplier of PE separators despite ample opportunities to do so.

**Response to Finding No. 710:**

This unsupported finding is contradicted by fact, logic, and basic economics. That EnerSys would not move forward expeditiously in finding a second source while Daramic is demanding unprecedented price increases as their contract comes to an end is simply not credible.

711. { [REDACTED]  
[REDACTED] } (Craig, Tr. 2625, *in camera*). { [REDACTED]  
[REDACTED] } (Craig, Tr. 2626, *in camera*).

**Response to Finding No. 711:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Craig, Tr. 2643-2644, *in camera*). { [REDACTED]  
[REDACTED] } (Craig, Tr. 2644-  
2645, *in camera*).

712. { [REDACTED]  
[REDACTED] }  
(Axt, Tr. 2238-39, 2250, *in camera*). This Court does not credit Axt's testimony.

**Response to Finding No. 712:**

Microporous was not just a potential supplier to EnerSys, it was an actual supplier.

(PX1259). EnerSys had been doing business with Microporous for more than 40 years.

(PX0072 at 044).

(c) EnerSys Testing of Battery Separators

713. { [REDACTED] } (Gagge, Tr. 2508, *in camera*). For example, during the strike at Daramic's Owensboro facility, EnerSys accepted battery separators manufactured at the Feistritz location for use in EnerSys' facility in Monterrey, Mexico, after, at most, five months of testing. (Burkert Tr. 2400-01).

**Response to Finding No. 713:**

{ [REDACTED] }  
[REDACTED] }

(Gagge, Tr. 2508-2509, *in camera*). The testimony cited by respondent does not support the assertion. { [REDACTED] }

{ [REDACTED] } (Gagge, Tr. 2508, *in camera*) (no testimony that it { [REDACTED] })

Respondent's claim that EnerSys accepted separators from Feistritz with less than 5 months of testing is also deceiving. EnerSys "started looking at CellForce in 2002. It was approved around 2007. It went through five years of testing." (Burkert, Tr. 2401). Moreover, Microporous sent EnerSys production samples from Feistritz *prior* to the acquisition by Daramic in February, 2008. (Burkert, Tr. 2467).

714. { [REDACTED] } (PX2188 at 002, *in camera*). { [REDACTED] }  
{ [REDACTED] }

**Response to Finding No. 714:**

This finding is supported by a document not used at trial that is contradicted by Mr. Burkert's testimony that CellForce "went through five years of testing." (Burkert, Tr. 2401; Gilchrist, Tr. 618 (based on Microporous's experience in CellForce the internal customer process

can take four to five years)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX2188 at 002, *in camera*).

715. { [REDACTED] } (RX717, *in camera*).

**Response to Finding No. 715:**

EnerSys "started looking at CellForce in 2002. It was approved around 2007. It went through five years of testing." (Burkert, Tr. 2401). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00717 at 001, *in camera*).

716. { [REDACTED] } (Burkert, Tr. 2441, *in camera*; RX204).

**Response to Finding No. 716:**

EnerSys received { [REDACTED] } (Gagge, Tr. 2497, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gagge, Tr. 2497-2499, *in camera*).

{ [REDACTED] } (Gagge, Tr. 2499-2500, *in camera*). { [REDACTED] } (Gagge, Tr.

2499-2500, *in camera*). Just in terms of testing, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gagge, Tr. 2499-2500, *in camera*).

717. In a complaint filed by EnerSys against Daramic in state court in Pennsylvania in October 2006, which was verified by Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year:

Moreover, even if EnerSys was able to purchase replacement battery separators from other vendors, such products could not immediately be used by EnerSys *and satisfy industry standards for battery performance and life testing*. Rather, significant engineering, testing, and manufacturing hurdles would be encountered to ensure that the replacement battery separators *would satisfy these specifications. These engineering, testing and manufacturing hurdles can take as long as one year to overcome.*

(RX243 at 007 emphasis added).

**Response to Finding No. 717:**

Respondent attempts to support this finding with a document on which it did not bother to question Mr. Axt. This complaint, hastily filed by EnerSys within days of Daramic's declaration of force majeure in 2006, is contradicted by the testimony of Mr. Gagge, the engineer in charge of testing at EnerSys, who testified that motive battery separators undergo cycle testing for a period of 2.5 years at EnerSys. (Gagge, Tr. 2490). From beginning to end the testing process takes "upwards of three years, a six-month development cycle for production tooling, et cetera, and then the two and a half years of testing would follow." (Gagge, Tr. 2492). "It takes a long time to try and develop a supplier." (Axt, Tr. 2127).

[REDACTED]

[REDACTED] } (Whear, Tr. 4798; PX0568; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*). Testing for motive power and stationary is a very long-term process that takes about two years to complete. (Whear, Tr. 4801, (PX0842 "Testing industrial cells is a very long term process (~2 years). . .")). When C&D began testing HD for use in motive batteries, Daramic understood that it would take two years to qualify the separator at C&D. (PX0806 at 003).

718. { [REDACTED] } (RX953 at 009, *in camera*).  
{ [REDACTED] } (RX953 at 001, *in camera*). Accordingly, EnerSys agreed with Microporous that EnerSys would be in a position to purchase, and Microporous would be in a position to sell, separators within 18 months of the execution of the contract.

**Response to Finding No. 718:**

EnerSys "started looking at CellForce in 2002. It was approved around 2007. It went through five years of testing." (Burkert, Tr. 2401). { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (RX00717 at 001, *in camera*).

719. In addition, { [REDACTED] } (Axt, Tr. 2256, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Axt, Tr. 2151-53, *in camera*, 2166-67, *in camera*).

**Response to Finding No. 719:**

Complaint Counsel has no specific response.

(d) EnerSys' Business Today

720. { [REDACTED] } (Craig, Tr. 2639 *in camera*).

**Response to Finding No. 720:**

{ [REDACTED] } (Simpson, Tr. 3195, *in camera*).

721. { [REDACTED] } (Craig, Tr. 2642 *in camera*). { [REDACTED] }  
{ [REDACTED] } (Axt, Tr. 2254, *in camera*).

**Response to Finding No. 721:**

{ [REDACTED] } (Simpson, Tr. 3195, *in camera*).

(e) The Microporous Acquisition Did Not Result In A Loss Of Technological Innovation

722. { [REDACTED] }

[REDACTED] } (Burkert, Tr. 2407, in camera; RX1208, in camera). { [REDACTED] } (Burkert, Tr. 2407 at 08, in camera). { [REDACTED] } (Burkert, Tr. 2408, in camera). Daramic also considers the white PE project as being active, and awaits further information from EnerSys regarding this sample testing. (Hauswald, Tr. 1099).

**Response to Finding No. 722:**

[REDACTED] } (Brilmyer, Tr. 1924-1925; PX0665 at 002, in camera). Moreover, as far as EnerSys could tell, Daramic had no intention of spending an additional man hour working on the solution to its black scum problem embarked upon by MPLP. (PX0579 at 003, in camera [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] } { [REDACTED] [REDACTED] } (PX0913 (Whear, Dep. at 197, in camera); Whear, Tr. 4825, in camera). [REDACTED] [REDACTED] (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200, in camera)).

723. While EnerSys witnesses testified that Microporous' white PE product in development was the answer to the Black Scum problem, the evidence demonstrates that, at best, this assertion is incorrect. (Whear, Tr. 4731-32, in camera; RX01298).

a. First, so-called Black Scum is a problem encountered with any PE product and is the result of oils found in the separator oxidizing. (Hauswald Tr. 1097-99; Whear Tr. at 4710-11; Burkert, Tr. 2316-17, 2468).

b. Second, Daramic studied the Black Scum problem in the 1990s and determined that the problem was the result of oils used in the separators and developed a process using so-called clean oil to reduce the Black Scum problem. (Whear, Tr. 4710-11). Daramic has a patent on this clean oil. (Whear, Tr. 4711).

c. Third, while Gilchrist testified at this hearing that Black Scum was the result of use of carbon black in PE separators and that Microporous' white PE was an example of Microporous' "innovation," the Court finds that Gilchrist is misinformed. Black

Scum is not caused by carbon black but rather by oil from the separator, and that the white PE product (also known as LENO) is not in fact the dramatic technological improvement that Gilchrist made it out to be. (Gilchrist, Tr. 353-355; Hauswald, Tr. 1098; Whear, Tr. 4710-11; Whear, Tr. 4731-32, *in camera*; PX0662, *in camera* [REDACTED])

**Response to Finding No. 723:**

While Black scum is a common problem for PE separators MPLP was committed to finding an innovative solution. MPLP assembled a team of engineers, salespeople, and finance professionals to ensure that a solution would be found, there would be customers interested in it and that ultimately the product would be profitable for the company. (Brilmyer, Tr. 1837-1838). MPLP's solution to remove the calcium stearate had already proven effective in the EnerSys batteries used in rail application from two of its European facilities. (PX0564 at 001 ("[EnerSys] had one black scum incidence each in Poland and Hagen, but no incidences anymore after MP reduced the calcium stearate content.")). In contrast, { [REDACTED] } (PX0913 (Whear, Dep. at 197, *in camera*); Whear, Tr. 4825, *in camera*). { [REDACTED] } (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200, *in camera*)).

724. EnerSys complained to Daramic that it was experiencing a Black Scum problem at its Hays, Kansas plant. (Whear, Tr. 4714). Daramic studied the problem extensively and determined that cutting fluids used by EnerSys was causing this particular Black Scum problem. (Whear, Tr. 4719-21). Daramic met with representatives of EnerSys and recommended that EnerSys change its cutting fluid to reduce the frequency of the Black Scum incidents. (Whear, Tr. 4721-22; PX1253; Berkert, Tr. 2397-98).

**Response to Finding No. 724:**

{ [REDACTED] } (PX0913 (Whear, Dep. at 197, *in camera*); Whear, Tr. 4718, 4825, *in camera*).

(f) EnerSys' Witnesses Are Not Credible

725. This Court has heard the live testimony of Mr. Larry Axt, Mr. Larry Burkert, Mr. John Gagge and Mr. John Craig. Having viewed these witnesses and heard their testimony, the Court

does not credit their testimony as being credible. The EnerSys witnesses were heavily coached by FTC lawyers. (Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192-01-02).

**Response to Finding No. 725:**

The bare assertion in this finding that EnerSys witnesses are not credible is unsupported and refuted by the EnerSys witnesses' testimony and demeanors. Mr. Burkert testified that he did not go over his testimony with Mr. Dahm of the FTC when they met prior to Mr. Burkert's testimony. (Burkert, Tr. 2376-2377). Mr. Burkert also denied telling any of the other EnerSys witnesses what they should say. (Burkert, Tr. 2376).

The assertion that EnerSys witnesses were heavily coached is unsupported by the record which reflects no more than a competent investigation and normal trial preparation by Complaint Counsel. (Axt, Tr. 2230 (talked to FTC and EnerSys attorney about his deposition); Burkert, Tr. 2369-2376 (one October 2008 interview with FTC, conference calls, and meeting prior to testimony); Gagge, Tr. 2543-2547 (interview in May, 2008, October, 2008, and shown a document by Mr. Dahm on May 12, 2009); RX00192 at 001 and 002 (email related to October meeting with Messrs. Dahm and Robertson of the FTC).

726. Led by Mr. John Craig, EnerSys has been a vocal opponent to the Daramic-Microporous merger. Craig, having been described as being on the "warpath" about the announced merger (RX211; Gagge, Tr. 2544-46), [REDACTED] (Craig, Tr. 2619, *in camera*), [REDACTED] (RX233, *in camera*; Craig, Tr. 2619-21, *in camera*). Craig then instructed EnerSys employees to cooperate fully with the FTC lawyers (Gagge, Tr. 2547), which included voluntarily providing documents, dummy batteries and other information – some of which was not even requested by the FTC (Burkert, Tr. 2372-74; Burkert, Tr. 2404-10, *in camera*; RX192; RX1017, *in camera*; RX221 *in camera*; RX1012; RX1208 *in camera*). Craig also provided the contact information for its outside counsel, Stevens & Lee, to EnerSys' competitors to contact the FTC regarding the Daramic merger with Microporous. (Craig, Tr. 2623, *in camera*; Godber, Tr. 280-282).

**Response to Finding No. 726:**

[REDACTED] (Craig, Tr. 2621, *in camera*;  
RX00233, *in camera*). However, only one was inaccurate. [REDACTED]

[REDACTED] } (Craig, Tr. 2621, *in camera*). In fact, Entek had exited the industrial business without selling it to anyone. (Burkert, Tr. 2311).

[REDACTED] } (Craig, Tr. 2619-2620, *in camera*). [REDACTED]  
[REDACTED] } (Hauswald, Tr. 869-870, *in camera*; Toth, Tr. 1396).

That Mr. Craig is an opponent of the merger and that he asked EnerSys personnel to cooperate with the FTC *enhances* his and their credibility.

727. In addition to the clear bias of EnerSys in this matter, the Court finds the testimony of EnerSys' witnesses as inconsistent with each other, certain exhibits and prior deposition testimony. For example, Mr. Craig repeatedly feigned a lack of recollection of his deposition testimony but yet was able to recall, unsolicited, a particular page of his deposition transcript. (Craig, Tr. 2574-81, Craig, Tr. 2619-20, *in camera*; RX243; PX1288; PX1287).

**Response to Finding No. 727:**

Respondent's unsupported allegation that Mr. Craig "feigned" a lack of recollection of his deposition is unconscionable and should not be tolerated by this court. Respondent's counsel asked Mr. Craig to remember whether he had read an entire document at his deposition or portions of it, and whether any part of what he had read contained the phrase "putting a gun to EnerSys' head" and Mr. Craig was unable to perform this miraculous feat at trial. (Craig, Tr. 2574). Rather than simply refresh Mr. Craig's recollection with the document, respondent chooses to levy an unfounded accusation that Mr. Craig "feigned a lack of recollection." The finding is unfounded, unsupported, ridiculous, and should be stricken.

728. Craig testified that he could not recall the content of the complaint filed by EnerSys against Daramic, even though he was questioned about it at his deposition and admitted at that time that the complaint did not allege that Daramic threatened to shut EnerSys down. (Craig, Tr. 2575-76). Yet Craig was able to recall the content when asked questions about it by the FTC on re-direct, contradicting his prior sworn and unchanged testimony. (Craig, Tr. 2652-53).

**Response to Finding No. 728:**

This finding is inaccurate and extraordinarily misleading. Mr. Craig was asked at his deposition where in the Complaint it was written that “Mr. Toth or Daramic threatened to shut EnerSys down.” (Craig, Tr. 2575). Mr. Craig answered, truthfully, “I submit it doesn't.”

In fact, what the Complaint actually says is

[s]imilarly, Daramic has specifically advised EnerSys that EnerSys's battery separator supply problems will “go away” if EnerSys agrees to enter into a long term contract between the parties at terms unilaterally dictated by Daramic including EnerSys's worldwide battery separator requirements.

(RX00243 at 009). While this paragraph refers to the threats made by Mr. Toth, it does not specifically attribute the threat to him and does not say that “Daramic threatened to shut EnerSys down.” Mr. Craig testified that while he does not recall reading this statement in the Complaint, it accurately reflects his recollection of what Mr. Toth told him, though not in the exact same words. (Craig, Tr. 2653-2654). Respondent's assertion that Mr. Craig recalled the content of the Complaint during Complaint Counsel's questioning is inaccurate and is not supported by the record.

Mr. Craig's accurate and truthful testimony reflects well on his credibility and his testimony should be credited by the court.

729. Craig also admitted that he read the testimony after the deposition, which included his prior testimony regarding the complaint, made no changes to it and signed the transcript under oath. (Craig, Tr. 2589-90, 2591-92; Craig, Tr. 2620-21, *in camera*).

**Response to Finding No. 729:**

Complaint Counsel has no specific response.

730. Axt and Craig both testified regarding a purported conversation that they claim occurred with Mr. Toth regarding Daramic's declaration of a force majeure in October 2006. Yet, both Craig and Axt admitted that despite the supposed critical importance of Daramic separators to its business and supposed potential impact on its business of the force majeure, no one at EnerSys sent a single email or wrote a single memorandum documenting the purported conversation. (Craig, Tr. 2593, 2659-60; Axt, Tr. 2293-96). [REDACTED] (Axt, Tr. 2191, *in camera*), yet Craig testified that he alone was on the call with Toth and that he briefed Axt after the call. (Craig, Tr. 2592, 2571).

**Response to Finding No. 730:**

This finding is contradicted by Paragraph 37 of the Complaint filed against Daramic by EnerSys in the Berks County, Pennsylvania Court of Common Pleas on October 11, 2006, which states

[s]imilarly, Daramic has specifically advised EnerSys that EnerSys's battery separator supply problems will "go away" if EnerSys agrees to enter into a long term contract between the parties at terms unilaterally dictated by Daramic including EnerSys's worldwide battery separator requirements.

(RX00243 at 009). This document reflects the conversation between Toth and Craig. (Craig, Tr. 2653-2654).

[REDACTED]  
[REDACTED] } (Axt, Tr. 2191, *in camera*). [REDACTED]  
[REDACTED] } (Axt, Tr. 2191-2192, *in camera*). Mr. Axt's testimony that he did not speak with Mr. Toth personally, but was present when Mr. Craig spoke to Mr. Toth is consistent with Mr. Craig's testimony that only he and Toth were on the call. (Craig, Tr. 2592). When Mr. Craig was asked when he briefed Mr. Axt, he responded "Sir, I don't recall. It's three years ago. I really don't recall." (Craig, Tr. 2592-2593). None of these statements are inconsistent.

731. [REDACTED] } (Craig Tr. 2617-18, *in camera*; RX235, *in camera*). [REDACTED] } (Craig, Tr. 2258, *in camera*), and did not even bother to search the Internet for "force majeure and Ticona" to see what information he could learn. (Craig Tr. 2587). Had he contacted Exide's purchasing manager, Gillespie, he would have learned that Exide also received notification of the force majeure from Daramic. (RX1048). [REDACTED] } (RX207 at 005 *in camera*).

**Response to Finding No. 731:**

The force majeure was a fake with respect to North America. EnerSys investigated Daramic's force majeure claim, and determined that the asserted force majeure was a sham. (i)

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2206, *in camera*; see also Hauswald, Tr. 1136, *in camera*). (ii)

EnerSys contacted its second PE supplier, Microporous to investigate. On October 9, 2006, Microporous reported that in the United States no allocation was planned and that "U.S. supply positions are whole." (PX1209). (iii) Mr. Craig contacted the CEOs of several other battery manufacturers, including East Penn, Trojan, and Exide. Each executive reported that his company had not been informed that there was a product shortage; further, these companies had not been informed that there would be a curtailment of supply. (Craig, Tr. 2558). Microporous was "never affected by the same [limited PE supply] conditions" as Daramic claimed to be during October 2006, even though both companies obtained their PE stock for making separators from Ticona. (Gilchrist, Tr. 414-415; Trevathan, Tr. 3655).

The CEO of EnerSys, John Craig, called the CEO of Daramic, Bob Toth, shortly after the force majeure announcement. (Craig, Tr. 2556). Their conversation confirmed that the prospective curtailment was a ploy aimed at forcing EnerSys to enter into a new long term contract for the majority of its requirements. Specifically, Mr. Toth threatened that Daramic was "going to stop shipping product to you [EnerSys] within two weeks if you don't sign a long-term contract. Correction. 10 to 20 percent in the next two weeks." (Craig, Tr. 2556-2559). [REDACTED]

[REDACTED] { [REDACTED] } (Craig, Tr. 2562-2563, 2570, *in camera*).

When it informed Exide, a competitor of EnerSys, of the force majeure event on October 6, 2006, Daramic pledged to continue supplying Exide with “80% to 90%, and if possible up to 100%” of its normal requirements in the following weeks. (PX1048). During the force majeure period, Daramic “treated Exide very well,” and “did a very good job” of supplying the separators Exide needed at that time. (Gillespie, Tr. 2985, 3095-3096.) Nobody from Daramic told Exide that their supply would be cut off or that Daramic would not sell to them during the force majeure. (Gillespie, Tr. 2985, 3155; PX1048).

After the acquisition of Microporous, Mr. Hauswald and Mr. Roe of Daramic told [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (Gilchrist, Tr. 414; Gilchrist, Tr. 621, *in camera*).

When EnerSys attempted to alter the language it had negotiated with Microporous as a result of its force majeure experience with Daramic, Mr. Gilchrist was understandably upset, writing that he did “not understand why the ‘policy’ changes at EnerSys relative to agreements in light of the Daramic coercion and why that has to affect our dealings. Especially since we have never – and will never – conduct our business like Daramic does.” (PX1215). Because of the additional delay that negotiating new contract language would introduce, Mr. Gilchrist agreed to accept the insurance provisions and the minor wording, but refused the majority of the other inclusions that would “bog us down.” (PX1215). Thus the inclusion of a force majeure provision in the contract between EnerSys and Microporous is hardly “curious.”

732. Axt claims that EnerSys is “a company of our word” and “we make agreements and we stick to them.” (Axt, Tr. 2116). [REDACTED]

[REDACTED] (Axt, Tr. 2148, *in camera*; RX206, *in camera*).

[REDACTED] (Axt, Tr. 2251, *in camera*;  
PX1201, *in camera*). [REDACTED]

[REDACTED] } (Axt, Tr. 2263-64, *in camera*; PX1205). Axt's past conduct further undermines his credibility in this hearing.

Response to Finding No. 732:

[REDACTED]  
[REDACTED]  
[REDACTED] }  
(Axt, Tr. 2251, 2263-64, *in camera*; PX1215). As Mr. Craig pointed out, "they held a gun to our head, that sign the contract or we'll shut you down." (Craig, Tr. 2562). Even Microporous understood that Mr. Axt could not keep his agreement with them under those circumstances. (PX1215; Axt, Tr. 2297).

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1289 at 001-003, *in camera*; Axt, Tr. 2160-2161, *in camera*). [REDACTED]  
[REDACTED] } (Axt, Tr. 2260, *in camera*). EnerSys did not get sufficient assurance of Microporous's commitment until September 22, 2006. (PX1206). [REDACTED]

[REDACTED] (Axt, Tr. 2126, 2166-2167; Axt, Tr. 2260, *in camera*). [REDACTED]  
[REDACTED] } (Axt, Tr. 2260, *in camera*). Moreover, the MOU between Microporous and EnerSys expired by its terms on May 1, 2006. (PX1200 at 004).

Mr. Axt met personally with Messrs Roe and Hauswald on July 6, 2006, to inform them that EnerSys was switching to Microporous. (Axt, Tr. 2252-2253). [REDACTED]  
in camera  
[REDACTED]

[REDACTED] (PX1204, *in camera*). [REDACTED]  
[REDACTED]

(Axt, Tr. 2260, *in camera*).

733. Thus, as set forth in the above findings, the Court finds that EnerSys has participated in this proceeding for purposes of obtaining advantages for EnerSys and that EnerSys' employees offered their testimony in effect to achieve those purposes. Accordingly, the Court cannot credit any of the EnerSys witnesses.

**Response to Finding No. 733:**

This bare assertion is not supported by any evidence and is contradicted by a great deal of evidence. Daramic cites no advantage that EnerSys might gain from being a witness in this matter. The only thing EnerSys has to gain is the return of a competitor to Daramic. On the other hand, EnerSys faces the danger of retaliation in terms of supply disruptions and pricing from an angry Daramic. The EnerSys witnesses are brave and credible people.

d. Trojan

734. Trojan Battery Company ("Trojan") is a global manufacturer of industrial batteries, manufacturing and selling batteries primarily for golf carts, but also for marine, floor scrubber and aerial work platform applications. (Godber, Tr. 133-134, 142-143). Trojan products are sold in what Trojan terms a "niche market." (Godber, Tr. 133).

**Response to finding No.734:**

Complaint Counsel has no specific response.

735. Trojan is the largest manufacturer of golf cart batteries in the world. (Godber, Tr. 274). [REDACTED] (Godber, Tr. 253, *in camera*). In 2007, [REDACTED] (Godber, Tr. 252-253, *in camera*).

**Response to finding No.735:**

Complaint Counsel has no specific response.

736. Trojan sells approximately 40% of its batteries to original equipment manufacturers and sellers of new equipment and 60% to the after-market, where batteries are sold for use in used equipment). (Godber, Tr. 144.) Trojan's OE sales are mostly domestic (which Trojan defines as North America) with only 4% being sold internationally. In after-market sales, 35-38% of Trojan's sales are domestic with the remainder being international. (Godber, Tr. 144.)

**Response to finding No.736:**

Complaint Counsel has no specific response.

(a) Trojan's Products

737. Trojan believes the composition of its golf cart batteries is unique and it refers to the material in its batteries, including separators, as "our Coke formula" to which Trojan attributes its success. (Godber, Tr. 138.)

**Response to finding No.737:**

The cited material does not support Respondent's assertion that Trojan believes that its separators are part of what it refers to as "our Coke formula". In actuality, Mr. Godber testified that it is the active material that Trojan puts into the actual positive plates of its deep-cycle batteries that is referred to as their "Coke formula". (Godber, Tr. 138). The active material of the plate does not include the separator.

738. Trojan acquires AGM battery separators from China and uses those separators primarily in its marine line. (Godber, Tr. 148.) Trojan's product sales and purchases of component parts indicate that it is involved in activity throughout the global marketplace.

**Response to finding No.738:**

With respect to the second sentence, this bare assertion is unsupported by any evidence. Moreover, it is disingenuous of Respondent to assert that Respondent that Trojan's acquisition of AGM separators is indicative of a global marketplace, given that Trojan's sales of AGM batteries constitute only one percent of Trojan's total sales. (Godber, Tr. 148).

739. Trojan competes with US Battery, Exide, Crown Battery, East Penn Battery, Surette, a Canadian company, Johnson Controls, Global and Yuasa for customers. (Godber, Tr. 145.) Global and Yuasa are Asian battery manufacturers. (Godber, Tr. 145; Thuet, Tr. 4369-70).

**Response to finding No.739:**

To the extent that Respondent asserts that Trojan competes with Global and Yuasa for sales of deep-cycle batteries in North America, such assertion is contradicted by testimony from Mr. Godber that Trojan "probably" competes with Global and Yuasa overseas. (Godber, Tr. 145).

740. Trojan considers Flex-Sil to be a unique battery separator. Because of Flex-Sil's uniqueness, Trojan has invested substantial time and effort in marketing Flex-Sil to its customers. (Godber, Tr. 277.)

**Response to finding No.740:**

To the extent that Respondent asserts that because Trojan considers Flex-Sil to be a unique product, there was no separator that competed for Trojan separator purchases, such assertion is contradicted by testimony at trial. (See CCRF748; CCFOF 406-421).

741. Trojan had never tried to qualify CellForce for use in OEM applications until late 2008. (Godber, Tr. 277-278.)

**Response to finding No.741:**

To the extent that Respondent asserts that Trojan was not interested in qualifying CellForce for use in OEM applications prior to late 2008, such assertion is contradicted by testimony from Mr. Godber that Trojan was unable to attempt to qualify CellForce in OEM applications until such time as Trojan was able to gain access to CellForce for the particular sized battery it was trying to qualify. (Godber, Tr. 277-278). In fact, Mr. Godber testified he understood that CellForce production had been capacity constrained prior to 2008. (Godber, Tr. 193-195, 198). Despite Microporous' capacity constraints, Trojan continued to seek to get access to more CellForce from Microporous, and expected to be able to purchase 38 million more pieces of CellForce due to the Austrian expansion. (Godber, Tr. 192-193, 225-228). However, following Daramic's acquisition of Microporous, the delivery of increased amounts of CellForce was delayed due to the strike in Owensboro, costing Trojan about \$140,000. (Godber, Tr. 177, 227-229).

(b) Trojan's Relationship with Microporous

742. Trojan began purchasing battery separators from Microporous in the mid-1980's and signed its first agreement with Microporous in 1987. (Godber, Tr. 155.) Until the acquisition of Microporous by Polypore in 2008, Microporous was Trojan's exclusive battery separator supplier. (Godber, Tr. 153). Trojan believes that it was Microporous' largest customer. (Godber, Tr. 157).

**Response to finding No.742:**

Complaint Counsel has no specific response.

743. Trojan first began purchasing Flex-Sil from Microporous in the mid-1980's and in approximately 1999, began purchasing CellForce from Microporous. (Godber, Tr. 155-156, 166).

**Response to finding No.743:**

Respondent's assertion that Trojan began purchasing CellForce from Microporous in 1999 is contradicted by testimony from Mr. Godber that Trojan's purchases of CellForce did not begin until 2001. (Godber, Tr. 165-167; *see also* Gilchrist, Tr. 325 (Trojan began purchasing CellForce for commercial use in 2002)).

744. [REDACTED]

|            |            |            |            |            |            |
|------------|------------|------------|------------|------------|------------|
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

|            |            |            |            |            |            |
|------------|------------|------------|------------|------------|------------|
|            |            |            |            |            | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

}

**Response to finding No.744:**

To the extent that Respondent asserts that Trojan's actual purchases of CellForce are reflective of the amount of CellForce that Trojan's in fact desired to purchase, such assertion is contradicted by evidence that Trojan wanted access to more CellForce but was unable to purchase more due to capacity constraints at Microporous. Mr. Godber testified he understood that CellForce production had been capacity constrained prior to 2008. (Godber, Tr. 193-195, 198). In fact, due to the capacity constraint, Microporous offered to sell Flex-Sil to Microporous at CellForce pricing in 2006. (Godber, Tr. 198; PX1659). Trojan agreed to this arrangement and thus purchased less CellForce than it otherwise would have in order to give Microporous the ability to service a different customer. (Godber, Tr. 198).

Despite Microporous' capacity constraints, Trojan continued to seek to get access to more CellForce from Microporous, and expected to be able to purchase 38 million more pieces of CellForce due to the Austrian expansion. (Godber, Tr. 192-193, 225-228). However, following Daramic's acquisition of Microporous, the delivery of increased amounts of CellForce was delayed due to the strike in Owensboro, costing Trojan about \$140,000. (Godber, Tr. 177, 227-229).

(c) Trojan and Daramic

745. Trojan first heard of Daramic's HD battery separator in the February-April 2005 timeframe. (Godber, Tr. 178-179). Trojan obtained samples of the HD product and began testing it. Testing took approximately 9 months and resulted in Trojan qualifying the HD product for its Pacer battery line in March 2006, a low-end golf cart battery line sold in the after market. (Godber, Tr. 170-171, 273). The Pacer battery is not colored the same as other Trojan batteries and it would take a sophisticated buyer to determine that the Pacer battery is in fact a Trojan battery. (Godber, Tr. 271-272). Pacer is the only battery product for which Trojan qualified Daramic's HD product. (Godber, Tr. 271).

**Response to finding No.745:**

To the extent that Respondent asserts that because Trojan has only qualified HD in its Pacer line of batteries, HD did not serve as a competitive constraint on Trojan's purchases of Flex-Sil, such assertion is contradicted by testimony at trial as well as by contemporaneous documents. (See CCRF748; see also CCFOF 406-421)

746. Since March 2006, Trojan had not initiated any additional testing whatsoever with respect to HD until 2009. (Godber, Tr. 273-274). Trojan has never purchased any HD separators from Daramic and it has no contract presently to purchase any HD product. (Godber, Tr. 270-271). Trojan has never made any attempt to qualify Daramic's HD product for an OEM application. (Godber, Tr. 271).

**Response to finding No.746:**

To the extent that Respondent asserts that because Trojan has only qualified HD in its Pacer line of batteries, HD did not serve as a competitive constraint on Trojan's purchases of Flex-Sil, such assertion is contradicted by testimony at trial as well as by contemporaneous documents. (See CCRF748; see also CCFOF 406-421).

747. Trojan's testing of Daramic's HD product revealed that CellForce performed better than HD by 10-15% and that Flex-Sil performed better than CellForce by 15-20%. (Godber, Tr. 271). Accordingly, Flex-Sil, based on Trojan's testing, has a significantly better performance than Daramic's HD.

**Response to finding No.747:**

To the extent that Respondent asserts that because HD did not perform as well in testing, it could not serve as a competitive constraint on Trojan's purchases of Flex-Sil, such assertion is contradicted by testimony at trial as well as contemporaneous documents. (See CCRF748; see

also CCFOF 406-421). Moreover, Mr. Godber testified that HD performed well enough to be substituted into any of the 25% of Trojan's batteries that either currently use CellForce, or could potentially use CellForce. (Godber, Tr. 172-173).

748. Complaint Counsel contends and Trojan claims, through the testimony of its Chief Executive Officer, Rick Godber, that Daramic's HD constituted economic "leverage" for Trojan to use in negotiations with Microporous concerning price increases. The facts do not support such contention and claim:

a. Trojan and Microporous were in a long-term contract or relationship at the time Trojan's CEO alleges such "leveraging" discussions took place.

b. The only evidence adduced through Trojan's CEO concerning savings consisted of \$200,000-300,000 in savings attributable to redesign and reengineering by Microporous – not price concessions. (Godber, Tr. 282-283).

**Response to finding No.748:**

Respondent's proposition that HD did not constitute economic leverage for Trojan to use in negotiations is contradicted by multiple pieces of evidence and testimony at trial. Moreover, Respondent's contention that the only evidence adduced at trial of Trojan's use of HD as leverage concerned \$200,000-300,000 in cost savings simply ignores testimony from Mr. Godber and Mr. Gilchrist concerning the numerous occasions when HD was successfully used by Trojan as leverage in negotiations with Microporous. In fact, trial testimony as well as contemporaneous documentary evidence prove that Trojan successfully used HD as leverage in negotiations with Microporous on multiple occasions.

The first instance when Trojan successfully used HD as economic leverage came soon after Trojan learned of HD. At that time, Trojan informed Microporous that it needed cost reductions because it had another potential source of separators and Trojan was "using this as leverage in terms of trying to get some concessions out of Mike [Gilchrist] of capacity and of price." (Godber, Tr. 184). Subsequently, Trojan received pricing from Daramic on HD which was 10-28% lower than Microporous' Flex-Sil pricing. (Godber, Tr. 188). Soon thereafter,



The third time that Trojan successfully used HD as leverage in negotiations with Microporous came in early 2006 when Microporous attempted to increase the prices it charged Trojan by around 6.5 percent for Flex-Sil and by 4.5 percent for CellForce. (Godber, Tr. 202). Trojan did not accept the price increases. (Godber, Tr. 202). Mr. Godber testified that in his negotiations with Microporous, Trojan used the only ammunition it had -- the threat of switching to HD separators -- to reduce the amount of the price increase down to 4.5 percent across the board for all Microporous separators. (Godber, Tr. 202). The fact that Trojan threatened to move product to HD is corroborated by contemporaneous communications between Mr. Godber and Mr. Gilchrist wherein Mr. Gilchrist stated: "We must put the specter of Daramic's [HD] product totally behind us." (PX1660 at 004; Godber, Tr. 203-204).

The fourth time that Trojan successfully used HD as leverage in negotiations with Microporous **came in 2007 when Microporous attempted to impose a base price increase of 6 percent on all of Trojan's Flex-Sil separators, and 4% on all of Trojan's CellForce separators.** (Godber, Tr. 293-295; PX1664; PX0428 at 001, 003, *in camera*). The price increases covered all of the separators that went into Trojan's OE and aftermarket golf batteries. (Godber, Tr. 293-295). { [REDACTED]

[REDACTED] } (Godber, Tr. 204-205; *see also* PX0428 at 001, *in camera* { [REDACTED]

[REDACTED] }. A Trojan internal email exchange confirms that at this time, Trojan was contemplating HD as an alternative on some of its product lines and was also contemplating giving up the exclusive separator design that Microporous provided Trojan in return for its sole source commitment. (Godber, Tr. 206-207; PX1663).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Godber, Tr. 214-215; Gilchrist, Tr. 408-410, 526, *in camera*; PX1664, [REDACTED]).

[REDACTED]

[REDACTED] } (Gilchrist, Tr. 410, 526, *in camera*).

Mr. Godber's testimony and documentary evidence is further corroborated by testimony from Mr. Gilchrist who testified that Trojan used HD as leverage in pricing negotiations with Microporous, and indicated that Trojan would bring up HD "every time there was us instigating the need for a price increase." (Gilchrist, Tr. 371-372, 406).

749. After having been in conversation with Complaint Counsel concerning Polypore's acquisition of Microporous, in August 2008, Trojan's CEO emailed the FTC that:

[REDACTED]

[REDACTED] } (RX00167, *in camera*) (Godber, Tr. 255-256, *in camera*). (Emphasis added.)

**Response to finding No.749:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Godber, Tr. 257-258, *in camera*). Moreover, Mr., Godber's testimony at trial was corroborated by testimony from Mr.

Gilchrist that Trojan used HD as leverage in every negotiation over a price increase. (Gilchrist, tr. 371-372, 406).

750. { [REDACTED] } (RX00171, *in camera*) - { [REDACTED] }

If, however, such “leveraging” discussions had been as prominent as Trojan’s CEO testified, his memory would have been clearer 9 months ago, and he would not have sent this email stating that he could not swear to any “leveraging” in August 2008. Instead, Trojan’s CEO’s memory appears to have been the product of coaching rather than true, sincere recollection – raising questions about his truthfulness.

**Response to finding No.750:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (See CCRF 748). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Godber, Tr. 257-258, *in camera*; Gilchrist, Tr. 371-372, 406). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (See CCRF 748).

With respect to the fourth and fifth sentences, these bare assertions are unsupported by any evidence.

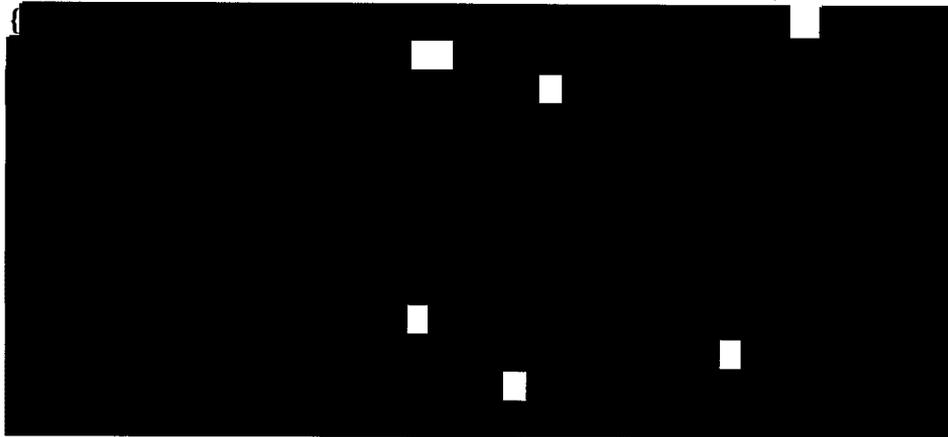
751. As shown in finding of fact 744, above, in the 5 years preceding the merger, Trojan’s purchases of CellForce constituted less than 6% of its total purchases from Microporous. The annual average of dollars spent on CellForce was \$907,000, compared to \$14,133,000 spent on

Flex-Sil. CellForce was only approved for after market products. Accordingly, given the low percentage of purchases of CellForce, it is not credible that Trojan could have used the replacement of CellForce with HD as "negotiating leverage" against Microporous. Even if Trojan had threatened to convert all of its CellForce purchases to HD, the amount was not significant enough to have the negotiating impact claimed by Trojan.

**Response to finding No.751:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. First, Respondent's assertion that Trojan's history of CellForce purchases implies that Trojan could not have used HD as leverage in negotiations with Microporous is contradicted by testimony and contemporaneous documents that clearly prove that Trojan successfully used HD as leverage in negotiations with Microporous on numerous occasions. (See CCRF 748). Second, Trojan's history of CellForce purchases is not indicative of the amount of CellForce that Trojan wished to purchase from Microporous. (See CCRF 744). Moreover, Respondent's assertion that Trojan's purchases of CellForce constitute less than 6% of Trojan's total purchases of separators is contradicted by testimony from Mr. Godber that Trojan is currently using CellForce in 16% of its batteries and intends on increasing that amount to 21%. (Godber, Tr. 176).

752. Trojan's CEO's testimony regarding disclosures of Trojan's testing information is inconsistent with the testimony of Mike Gilchrist, Microporous' former CEO, and Steve McDonald, Microporous' VP of Sales. Mr. Godber testified that he had made Microporous aware of Trojan's test results of the HD product since late spring 2006. (Godber, Tr. 286-87). Mike Gilchrist testified that Microporous had not been informed of Trojan's test results. Confirming this testimony is an email to Mr. Godber from Mike Gilchrist in September 2007, stating that no test results had been shared with Microporous concerning Trojan's test results of HD products:



[REDACTED]

(PX428 at 003, *in camera*)

**Response to finding No.752:**

Complaint Counsel has no specific response.

753. As a matter of logic, Trojan would not have shared test results that on their face would have reduced its negotiating "leverage." Again, these facts raise issues of credibility about Mr. Godber's testimony.

**Response to finding No.753:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. Respondent's assertion that if Trojan shared test results with Microporous it would have reduced its leverage and thus Mr. Godber's testimony is not credible, is contradicted by testimony and contemporaneous documents that clearly prove that Trojan successfully used HD as leverage in negotiations with Microporous on numerous occasions. (*See CCRF 748*).

754. Based on the above, the Court finds that the combination of these things all point to a simple fact, Trojan's purchases and Trojan's mode of dealing with Microporous was such that it used the prospect of Daramic's HD product as negotiating leverage and it had not achieved prior reductions or surcharge elimination based on the threat of switching to HD.

**Response to finding No.754:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. Respondent's assertion that Trojan's could not have used HD as leverage in negotiations with Microporous is contradicted by testimony and contemporaneous documents that clearly prove that Trojan successfully used HD as leverage in negotiations with Microporous on numerous occasions. (*See CCRF 748*).

755. Further, Trojan's purchases of Flex-Sil are such that there is no indication Trojan has made any real effort to move from either CellForce or to HD as Mr. Godber claims.

**Response to finding No.755:**

Respondent's ambiguous finding is unsupported by any evidence. To the extent that Respondent asserts that Trojan has made no real effort to move to Cellforce, such assertion is

contradicted by testimony from Mr. Godber that Trojan is currently using CellForce in 16% of its batteries and intends on increasing that amount to 21%. (Godber, Tr. 176).

(d) Trojan's Bias (and Use of Its Buying Power) Against Daramic

756. Trojan had been single sourcing its battery separator supply for a number of years and had made very little effort to obtain a second source. (Godber, Tr. 278-279.)

**Response to finding No.756:**

Respondent's assertion that Trojan made little effort to obtain a second source of battery separators is contradicted by testimony and documentary evidence indicating that Trojan did in fact look for a second source of battery separators to qualify for use in Trojan's batteries. First, in the 1990's Trojan made an attempt to work with Entek to get a second source of deep-cycle battery separators, but Entek was unable to meet Trojan's performance needs. (Godber, Tr. 289). At a later date, Trojan talked to a couple of other battery separator manufacturers about a second source of deep-cycle separators but they did not work out either. (Godber, Tr. 279).

Moreover, Trojan viewed the introduction of Daramic's HD separators as an opportunity to qualify a second source of separators for security of supply and to maintain competitive pricing. (Godber, Tr. 177-180). In early 2005, Trojan's laid out its separator strategy -- a strategy that included using Daramic for a "second source to ensure supply and competitive pricing." (PX1651). [REDACTED]

[REDACTED] } (PX1654, *in camera*). Trojan in fact tested and qualified HD for use in its Pacer batteries. (Godber, Tr. 170-171). Following Daramic's introduction of HD, Trojan made it clear to Microporous the amount of effort Trojan put into using HD as a second source of supply was dependent on the type of cost relief that Microporous would provide to Trojan. (PX1655 at 001-002). After sending this message, Trojan received cost

savings and/or reductions in proposed price increases in all subsequent price negotiations with Microporous because of the threat of HD as a second source of supply. (See CCRF 748).

757. Shortly after the merger, Trojan's CEO talked with EnerSys' CEO, John Craig, during which Trojan was invited to join an effort to fight Polypore's acquisition of Microporous. Trojan responded that it was willing to participate "wholeheartedly" in the effort. Trojan thereafter returned a questionnaire submitted by counsel selected by EnerSys and soon thereafter was in direct and regular communication with the FTC concerning this matter. (Godber, Tr. 280-282).

**Response to finding No.757:**

The statements in the first sentence attributed to Mr. Craig are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Godber, Tr. 280-281). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

Moreover, contrary to Respondent's assertion that Trojan merely joined onto to fight Polypore's acquisition of Microporous due to discussions with EnerSys, testimony at trial indicates that Mr. Godber was "extremely" concerned about the acquisition prior to any discussions with EnerSys. (Godber, Tr. 290). Trojan's concern stemmed from the fact that the "acquisition left us with no alternatives. We definitely had only one place we could go to buy a separator for our product." (Godber, Tr. 291).

758. As set forth below, Trojan's buying power and "wholehearted" efforts to fight the acquisition are shown in Trojan's negotiations with Daramic regarding a new long-term contract and price increases.

**Response to finding No.758:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. (PX0265 at 008, *in camera*). According to Daramic, { [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]}. (PX0265 at 004, 007-008, *in camera*).

{ [REDACTED]  
[REDACTED] } (PX0265 at 010, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0265 at 011, *in camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004 ("demonstrating pricing power in the market regardless of movements in material and energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included { [REDACTED] [REDACTED] }); PX0204 at 002 (Mr. Hauswald's 2006 goals included "Raise Daramic prices where possible to demonstrate pricing power regardless of cost movements")

Daramic's assessment that battery manufacturers lack buying power is confirmed by customer testimony at trial. (*see e.g.*, Gillespie, Tr. 3002, *in camera* (Exide believes that negotiations with Daramic are { [REDACTED] }); Gillespie, Tr. 3066-3068 (Exide has not used its size as leverage in negotiations with Daramic); Gillespie, Tr. 3097 (Exide has not used pressure points to negotiate and get their will); Craig, Tr. 2565 (EnerSys does not consider itself a power buyer, "not at all, not close."); Benjamin Tr. 3525, 3522 (Bulldog Battery received a 10% post-acquisition price increase which Bulldog considered "pretty exorbitant" but "[t]here was no way to try to negotiate a lower price. There was no place to go"; Godber, Tr. 242, *in camera* (Trojan concerned about Daramic's acquisition of Microporous because { [REDACTED] [REDACTED] [REDACTED] }); Godber Tr. 133, 232-233, 239-242, *in camera* (notwithstanding the fact that Trojan

is the world's largest manufacturer of deep cycle batteries, { [REDACTED] }  
[REDACTED] }).

759. Harry Seibert, Daramic's Vice President and Business Director, met with Trojan on October 1, 2008, to discuss Daramic's requested price increases for 2009 of 13% and 15% for FLEX-SIL and CellForce. (Seibert, Tr. 4196-98). The meeting was short and terse, as Trojan's CEO unequivocally rejected the price increase. (Seibert, Tr. 4196-4200) Seibert persisted in following up and shortly thereafter offered to compromise to 10% increases for both products, the implementation of the increases to be split between September 2008 and 2009. { [REDACTED] } (Seibert, Tr. 4200, *in camera*). { [REDACTED] } (Seibert, Tr. 4205-08, *in camera*; PX2115, *in camera*). { [REDACTED] } (Godber, Tr. 245, *in camera*). { [REDACTED] } (Godber, Tr. 246, *in camera*).

**Response to finding No.759:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (Godber, Tr. 232-235, *in camera*; Gilchrist, Tr. 408-410). It is simply disingenuous for Respondent to imply that Trojan has buyer power and/or bias in this matter based on Trojan's rejection of a price increase that it had no obligation to accept.

In September 2007, Trojan and Microporous agreed to fixed price increases for the period of December 1, 2008 until at least September 2009 of 2.5 percent for Flex-Sil and 1.5 percent for CellForce. This agreement was negotiated prior to Daramic's acquisition of Microporous when HD and Flex-Sil/CellForce were manufactured by independent entities. (PX1664). At the time, Trojan had used HD as competitive leverage in negotiations to achieve this agreement. (*See* CCRF 748). { [REDACTED] }  
[REDACTED] } (Gilchrist, Tr. 408-410; Godber, Tr. 214-215, 235, *in camera*). In fact, Daramic knew full well that the intent of the September 26, 2007 pricing agreement between Trojan and Microporous

was to limit all price increases during the two year time period to those laid out in the September agreement between Microporous and Trojan. (PX1664; Gilchrist, Tr. 410-411). Moreover, Daramic had actually informed Trojan that it was "prepared to stand behind the commitments that [Microporous] made to you before this acquisition." (PX1666). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1664; PX1666).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Godber, Tr. 236-238, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Godber, Tr. 236-238, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Godber, Tr. 238, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

Additionally, the statements in the second and third sentences attributed to Mr. Godber are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Siebert, Tr. 4196-4200, 4207, 4212, *in camera*). Polypore has failed to identify these statements

as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

760. { [REDACTED] }  
[REDACTED] }  
(Seibert, Tr. 4209-4210, *in camera*). {  
[REDACTED] } (Seibert, Tr. 4210, *in camera*). {  
[REDACTED] } (Seibert, Tr. 4211, *in camera*). {  
[REDACTED] } (Seibert, Tr. 4212, *in camera*).

**Response to finding No.760:**

The statements in the first through fifth sentences attributed to Mr. Godber (Seibert, Tr. 4209-4211, *in camera*) are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Seibert, Tr. 4207, 4212, *in camera*). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1666; Godber, Tr. 215-217, 238-241, *in camera*).

In fact, prior to the acquisition, all of the major terms of the contract had been agreed to by Trojan and Microporous (Godber, Tr. 217), { [REDACTED] } (Godber, Tr. 216, 239, *in camera*), and the pricing that Trojan would

pay for the separators under the contract. (Godber, Tr. 216). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

(Godber, Tr. 239-241, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Seibert, Tr. 4211, *in*

*camera*). { [REDACTED]

[REDACTED] }

761. In response to Trojan's continuing threats of a lawsuit, Daramic's CEO, in March 2009, initiated a telephone call to Trojan's CEO in response to Toth's request that he explained why there was this kind of disagreement that caused Trojan to threaten a lawsuit. Godber responded: "We need exclusivity and we need a long-term, secure supply position." (Toth, Tr. 1542-1543). Toth proceeded to give Trojan and Godber ideas about how the two companies could come together, to which Godber told Toth that he would have to call him back. (Toth, Tr. 1543-1544). Even after an additional message from Toth, however, Godber never returned the call. Instead, Daramic received another threat of a lawsuit, at which point Daramic decided to initiate a lawsuit in North Carolina in order to having been sued in California. (Toth, Tr. 1544-1545). Even in his cross-examination, { [REDACTED]

[REDACTED] } (Godber, Tr. 250, *in camera*). Nonetheless, { [REDACTED] } (Godber, Tr. 251, *in camera*).

**Response to finding No.761:**

The statements in the second and third sentences attributed to Mr. Godber (Toth Tr. 1542-1544) are hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Toth, Tr. 1540). Polypore has failed to identify these statements as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

762. Based on the foregoing findings of fact, the Court finds that Trojan is a sophisticated buyer that utilized its size and buying power to reject or hold down price increases with both Microporous and Daramic. Trojan has repeatedly and consistently used its superior economic power in its negotiations with Microporous.

**Response to finding No.762:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 748, 758-760). Moreover, it is disingenuous of Respondent to allege on the one hand that Trojan did not use HD as competitive leverage with Microporous and in turn call into question Mr. Godber's credibility (See RFOF 748, 751, 754-755), and then on the other hand to assert that Trojan repeatedly used economic power in negotiations with Microporous.

Testimony at trial made it clear that Trojan was only able to obtain price concessions from Microporous due to the presence of a competitive substitute product (Daramic's HD). (See Godber, Tr. 223 (HD was the only product that Trojan was able to successfully use as leverage in negotiations with Microporous over price); Godber, Tr. 258, *in camera* { [REDACTED] }; Gilchrist, Tr. 371-372, 379 (Trojan used the threat of switching to Daramic's HD as leverage in pricing negotiations with Microporous); Godber, Tr. 241, *in camera* { [REDACTED] }; see also CCRF 748).

763. The Court further finds that, consistent with its prior conduct with Microporous, Trojan used that economic power, the pendency of this proceeding and the threat of California-based lawsuits to negotiate a long-term contract and lower pricing for Daramic.

**Response to finding No.763:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 748, 758-76, 762).

764. The Court further finds, based on the above, that Trojan has the economic power to constrain prices of battery separator manufacturers, including Daramic.

**Response to finding No.764**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 748, 758-76, 762).

**B. The Other Buyers**

a. East Penn

765. East Penn Manufacturing ("East Penn") is a global lead-acid battery and wire and cable manufacturing company, with manufacturing facilities in the United States and China. (Leister, Tr. 3968-69). East Penn's annual sales revenue is approximately \$1.25 billion. (Leister, Tr. 3968).

**Response to finding No.765**

To the extent that Respondent asserts that East Penn has battery manufacturing facilities in locations other than the United States, such assertion is contradicted by testimony from Mr. Leister that East Penn does not manufacture any batteries in China. (Leister, Tr. 4030).

766. East Penn's business is segmented into "Wire and Cable," "Automotive," and "Industrial" divisions. (Leister, Tr. 3968-69). The automotive division manufactures starting, lighting and ignition ("SLI") batteries for use in cars, trucks, boats, recreational vehicles, power sports vehicles (e.g., "four-wheelers") and golf carts. (Leister, Tr. 3976-77). The industrial division is separated into motive power batteries used in forklifts and other equipment, and stationary batteries used for backup power systems. (Leister, Tr. 3977).

**Response to finding No.766**

Complaint Counsel has no specific response.

767. The separators used by East Penn have different base materials including PE, AGM and phenolic resin. (Leister, Tr. 3980). Primarily, East Penn used PE separators in its products. (Leister, Tr. 3978-79).

**Response to finding No.767**

Complaint Counsel has no specific response.

768. East Penn uses "straight PE" separators (i.e., containing no other additives) in the batteries it manufactures for golf carts, floor scrubbers, and other deep cycle batteries. (Leister, Tr. 3979).

**Response to finding No.768**

Respondent's assertion that East Penn uses "straight PE" separators in its golf cart and floor scrubber batteries is contradicted by testimony from Mr. Leister that East Penn actually uses Daramic HD separators in those batteries. (Leister, Tr. 4038-4039; *see also* Roe, Tr. 1220-1221). Mr. Leister was asked the following questions and gave the following answers on cross examination:

Q. And you're aware that the separators that East Penn uses in its golf carts contain a special formula to help reduce antimony transfer; correct?

A. Yes.

Q. And that's important in golf cart batteries; correct?

A. Correct.

Q. The reduction of antimony suppression is important in golf car batteries.

A. I have heard that. Yes.

Q. And the separator that East Penn is buying from Daramic for its golf car batteries has a special formula to do just that, to reduce antimony transfer; correct?

A. Yes.

Q. And that's the HD separator; correct?

A. Yes.

Q. And that's the same separator that you use in your floor scrubbers; correct?

A. Yes.

(Leister, Tr. 4038-4039).

769. The PE separators used by East Penn for SLI batteries and industrial motive batteries are made of the same material, and can be made using the same process and equipment. Only the finishing process is different. (Leister, Tr. 3984).

**Response to finding No.769**

Respondent's assertion that the PE separators used by East Penn for SLI batteries and motive batteries are indistinguishable other than with regard to the finishing process is contradicted by testimony by Mr. Leister on other variations between separators. (Leister, Tr. 4023-4024). Specifically, Mr. Leister testified that variations in separator properties including electrical resistance, puncture resistance and oxidation resistance, are all important in determining which separator to use in any particular end use application. (Leister, Tr. 4023-4024). Moreover, the CL separators that Daramic sells for motive power applications differ from Daramic's SLI separators in that CL is formulated from UHMWP, amorphous silica and proprietary "clean" oil for use in traction and stationary battery applications." (PX0582 at 050).

This clean oil is added to the PE in the mixer, well before the finishing stage of the manufacturing process. (Gilchrist, Tr. 593).

(a) East Penn Battery Separator Buying History

(i) Daramic

770. { [REDACTED] } (RX01519, in camera).

Response to finding No.770

Complaint Counsel has no specific response.

771. { [REDACTED] } (RX01519, in camera).

Response to finding No.771

Complaint Counsel has no specific response.

772. { [REDACTED] } (Leister, Tr. 3999-4000, in camera). { [REDACTED] } (Leister, Tr. 4000, in camera).

Response to finding No.772

{ [REDACTED] } (Leister, Tr. 4000, in camera). { [REDACTED] } (Leister, Tr. 4005, in camera). However, with Daramic's acquisition of Microporous, East Penn no longer has a second source of industrial separator supply. (Leister, Tr. 4027-4028). { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED] } (PX0257 at 001, *in camera*; PX0258 at 002).

773. { [REDACTED] } (RX01519, *in camera*).

**Response to finding No.773**

Complaint Counsel has no specific response.

774. { [REDACTED] } (RX01519, *in camera*). { [REDACTED] } (Leister, Tr. 4001-02, *in camera*; PX 1550).

**Response to finding No.774**

Complaint Counsel has no specific response.

775. Prior to the entry of the Purchase Agreement, Daramic and East Penn also engaged in negotiations regarding price increases, which resulted in a lesser price increase than Daramic originally requested. (RX00086).

**Response to finding No.775**

To the extent that Respondent asserts that Daramic historically lowered its prices to East Penn due to East Penn having buying power, such assertion is contradicted by evidence that the reason that Daramic historically lowered prices to East Penn was because of competition from Microporous. { [REDACTED] } (PX0243 at 002, *in camera*). In 2004, Daramic again reacted to Microporous price competition on motive power separators by lowering prices by 3 percent at East Penn to maintain that business. (PX0409 at 001; Roe, Tr. 1262-1263). { [REDACTED] } [REDACTED]

[REDACTED]

[REDACTED] } (PX0257 at 001, *in camera*; PX0258 at 002).

776. East Penn reviews its suppliers on a regular basis in the areas of quality, delivery performance, technology, information feedback and cost. (Leister, Tr. 3986). Daramic consistently ranks in the top 20 suppliers, with a score of 80%-90%. (Leister, Tr. 3987). Daramic rates "excellent" with East Penn in on-time delivery and technology, and is equal to all competitors with respect to quality. (Leister, Tr. 3988).

**Response to finding No.776**

Complaint Counsel has no specific response.

(ii) Microporous

777. East Penn has previously purchased small quantities of a rubber-based PE separator from Microporous for use in motive power batteries. The separators purchased from Microporous never exceeded 10% of the total amount of separators purchased for use by East Penn in motive power batteries. (Leister, Tr. 3980). East Penn has never purchased any other type of separator from Microporous for commercial use in any other battery application. (Leister, Tr. 3985-86, 3990, 3991).

**Response to finding No.777**

The material cited does not support Respondent's proposition that East Penn's purchases from Microporous never exceeded 10% of the total amount of separators purchased for use by East Penn in motive batteries. (Leister, Tr. 3980). Moreover, the mere presence of Microporous as a potential second source of motive separators enabled East Penn to get price reductions on all of its separators. (*See CCRF 775*).

778. East Penn has never had a long-term supply contract or a memorandum of understanding with Microporous for the purchase of separators. (Leister, Tr. 3989, Gilchrist, Tr. 503, *in camera*).

**Response to finding No.778**

Complaint counsel has no specific response.

779.

[REDACTED] } (Leister, Tr. 4002-03, *in camera*).  
[REDACTED] (Leister, Tr. 4003, *in camera*).

**Response to finding No.779**

[REDACTED]

(PX0243 at 002, *in camera*). In 2004, Daramic again reacted to Microporous price competition on motive power separators by lowering prices by 3% at East Penn to maintain that business.

(PX0409 at 001; Roe, Tr. 1262-1263). [REDACTED]

[REDACTED]

[REDACTED] } (PX0257 at 001, *in camera*;

PX0258 at 002).

780. In 2007, East Penn discussed the possibility of Microporous supplying PE separators to East Penn for use in SLI batteries. (Leister, Tr. 3990). East Penn provided Microporous part numbers and volumes that East Penn might be interested in purchasing from Microporous, but Microporous did not have the machinery or the tooling to supply the volumes that East Penn requested. (Leister, Tr. 3991).

**Response to finding No.780**

To the extent that Respondent asserts that East Penn lost interest in purchasing PE SLI separators from Microporous because in 2007 Microporous did not have the machinery to supply East Penn the volumes it had requested, such assertion is contradicted by evidence that East Penn was looking to the future for a supply relationship with Microporous. (See CCFOF 624-629). In fact, during East Penn's visit to Piney Flats in October 2007, East Penn indicated that purchases of PE SLI separators from Microporous could not commence prior to the first or second quarter of 2009. (PX0082 at 002). [REDACTED]

[REDACTED]

[REDACTED] } (PX2091, *in camera*; RX01519 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX2091 at 001-002, *in camera*).

781. Microporous never committed to East Penn that it could supply East Penn with the sizes and volumes of PE separators discussed in 2007. (Leister, Tr. 3991). East Penn did not want to enter into a memorandum of understanding (“MOU”) with Microporous, therefore, the discussions between the two companies “fizzled out” prior to Daramic’s acquisition of Microporous. (Leister, Tr. 4019).

**Response to finding No.781**

Respondent’s assertion that discussions between Microporous and East Penn fizzled out prior to Daramic’s acquisition of Microporous is contradicted by evidence that East Penn (i) wanted a new East Coast supplier of PE SLI separators, (ii) believed that Entek would not open a new facility on the East Coast, (iii) saw Microporous as a viable PE SLI supplier, (iv) indicated that it would be willing to enter a long term contract with Microporous as a sign of their seriousness, and (v) never ruled out the possibility of buying PE SLI separators from Microporous at some point in the future. (Leister, Tr. 4007-4008, 4016-4021; *see also* CCFOF 624-629). { [REDACTED]

[REDACTED] }

(PX2091, *in camera*; RX01519 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX2091 at 001-002, *in camera*).

782. Microporous has never been qualified by East Penn as an alternative supplier of PE separators.

**Response to finding No.782**

This bare assertion is unsupported by any evidence and is contradicted by [REDACTED]

[REDACTED] } (PX2091 at 001-002, *in camera*).

783. Based on the foregoing, this Court finds that there is no credible evidence that East Penn would have entered into any supply contract with Microporous had the merger not occurred. Complaint Counsel's suggestion otherwise is pure speculation.

**Response to finding No.783**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (*See* CCFOF 624-629; CCRF 780-781).

(iii) Entek

784. East Penn purchases approximately 30% of its SLI PE separator needs from Entek, plus or minus 10% depending on seasonality. (Leister, Tr. 3984-85).

**Response to finding No.784**

To the extent that Respondent asserts that prior to the acquisition of Microporous, East Penn planned to continue purchasing 30% of its PE SLI separators from Entek, such assertion is contradicted by testimony that East Penn was dissatisfied with the long lead times and added freight costs that East Penn faces when ordering PE SLI separators from Entek on the West Coast. (Leister, Tr. 4008). Prior to Daramic's acquisition of Microporous, East Penn turned to Microporous as a possible supplier of PE SLI separators because it was not satisfied with the supply situation from Entek. (*See* CCRF 780-781). Moreover, Microporous believed that it would have been producing PE SLI separators for East Penn, but for the acquisition. (Trevathan, Tr. 3722-3723 (Phase III for East Penn was "discontinued because of the acquisition of Microporous by Daramic.")).

785. Approximately three years ago, East Penn also purchased PE separators from Entek for use in deep-cycle applications. (Leister, Tr. 3985). When East Penn purchased separators for both SLI and deep-cycle applications from Entek, Entek supplied approximately 50% of all of East Penn's PE separator needs. (Leister, Tr. 3985).

**Response to finding No.785**

To the extent that Respondent asserts that East Penn can use PE separators from Entek for its deep-cycle battery applications, such assertion is contradicted by the record. First, East Penn does not even know whether Entek currently sells deep-cycle separators. (Leister, Tr. 4041). Second, whatever type of separators that East Penn previously purchased from Entek for use in some of its deep-cycle batteries, such separators would not be sufficient to prevent Daramic from raising the price on deep-cycle separators because even three years ago, East Penn was paying Entek higher prices for deep cycle separators than East Penn is currently paying to Daramic for HD separators. (Leister, Tr. 4041). Third, East Penn recognizes that the reduction of antimony transfer is important property for separators used in deep cycle batteries, and thus it currently uses Daramic HD separators in its golf cart and floor scrubber batteries in order to reduce antimony transfer in those batteries. (Leister, Tr. 4038-4039). Since Entek lacks the separator technology to make a separator that effectively reduces antimony transfer in deep-cycle batteries, Entek separators are not be a viable substitute for the HD separators that East Penn currently purchases from Daramic. (See CCFOF 85-87, 920, 932).

786. Entek has approached East Penn within the last year to supply separators that can be used in deep-cycle applications. (Leister, Tr. 3993).

**Response to finding No.786**

To the extent that Respondent asserts that East Penn can use PE separators from Entek for its deep-cycle battery applications, such assertion is contradicted by the record. (See CCRF 785).

787. East Penn considers Entek an alternative supplier of PE separators for use in deep-cycle applications. (Leister, Tr. 3993).

**Response to finding No.787**

To the extent that Respondent asserts that East Penn can use PE separators from Entek for its deep-cycle battery applications, such assertion is contradicted by the record. (See CCRF 785).

(iv) Today

788. East Penn's sales to date in 2009 are down approximately 10% over last year. ((Leister, Tr. 3970).

**Response to finding No.788**

Complaint Counsel has no specific response.

789. Although East Penn purchases PE separators from only Daramic and Entek, it has tested PE separators from Anpei and considers Anpei to be a viable alternative supplier for its operations in the United States. (Leister, Tr. 3992-93; RX00079).

**Response to finding No.789**

Respondent's proposition that East Penn considers Anpei to be a viable alternative supplier for its operations in the United States is contradicted by testimony at trial. East Penn is not currently seeking to obtain PE separators supplies from any Asian PE separator manufacturer, nor does East Penn even know if Anpei has the available capacity to supply East Penn with separators. (Leister, Tr. 4035-4036). East Penn believes that obtaining PE separator supplier from Anpei in Asia would be a logistical challenge that would pose an even greater challenge to East Penn than does its current supply situation with Entek. (Leister, Tr. 4035). Given that East Penn is currently dissatisfied with obtaining supply from Entek's West Coast manufacturing facility due to long lead times and added freight charges, turning to Anpei for supply would pose even greater problems for East Penn. (Leister, Tr. 4008-4009, 4035). Moreover, to the extent that Respondent asserts that East Penn has tested PE SLI, motive, stationary or deep-cycle separators from Anpei, such assertion is contradicted by testimony at trial that the only Anpei separators that East Penn has ever tested were separators for lawn mower batteries. (Leister, Tr. 4032).

b. **Crown Battery Manufacturing Co.**

790. Crown Battery Manufacturing Co. produces and sells SLI and industrial batteries. (Balcerzak, Tr. 4092).

**Response to Finding No 790:**

Because Crown labels its golf and scrubber batteries as SLI counter to convention within the industry, this finding is true, however misleading.

791. The SLI segment constitutes approximately half of Crown's business. (Balcerzak, Tr. 4092). Crown's SLI batteries are used in automotive replacement, truck and bus applications, as well as deep cycle applications such as golf carts, sweeper/scrubber and marine. (Balcerzak, Tr. 4092).

**Response to Finding No. 791.**

See response to Finding No. 790.

792. The motive power industrial segment constitutes the remaining half of Crown's business. (Balcerzak, Tr. 4092). These batteries are primarily used in forklift and mining equipment applications. (Balcerzak, Tr. 4092).

**Response to Finding No. 792:**

Complaint Counsel has no specific response.

793. Each year, Crown manufactures between 800,000 and 1 million automotive batteries. (Balcerzak, Tr. 4092-93). In its industrial division, Crown produces between 350,000 and 400,000 cells per year. (Balcerzak, Tr. 4093).

**Response to Finding No. 793:**

Complaint Counsel has no specific response.

794. Crown uses PE separators in nearly all of its batteries. (Balcerzak, Tr. 4093-95). In its golf cart batteries, Crown uses Flex-Sil separators. (Balcerzak, Tr. 4093).

**Response to Finding No. 794:**

Complaint Counsel has no specific response.

795. A number of batteries manufactured by Crown { [REDACTED] } (Balcerzak, Tr. 4113-14, *in camera*).

**Response to Finding No. 795:**

Complaint Counsel has no specific response.

(a) Crown Battery Separator Buying History

(i) Daramic

796. Crown and Daramic were parties to a Supply Agreement which was effective from January 1, 2005 to December 31, 2007. (RX00995 at 001). Pursuant to the terms of that contract, Crown purchased 100% of its PE separator requirements from Daramic. (RX00995 at 001).

**Response to finding No. 796:**

Complaint Counsel has no specific response.

797. Crown tested Daramic's HD product for use in its golf cart batteries, but HD did not perform as well as Flex-Sil. (Balcerzak, Tr. 4095). Based on those testing results, Crown did not consider switching from Flex-Sil to HD for use in its golf cart batteries. (Balcerzak, Tr. 4095). Crown has never used HD in its golf cart batteries. (Balcerzak, Tr. 4096, 4124).

**Response to finding No. 797:**

This finding is directly contradicted by the testimony of Mr. Balcerzak himself. Mr. Balcerzak explicitly acknowledged that HD had been approved for use in golf batteries at crown. (Balcerzak, Tr. 4123 ("Yes, PE with the HD [additive] has been qualified for golf.")).

798. During the labor stoppage at Daramic's Owensboro plant, Crown did not have to shut down any of its production lines and did not lose any production time. (Balcerzak, Tr. 4098-99). To help Crown stay in production, Daramic produced separators for Crown at its plants in Corydon, Indiana and Piney Flats, Tennessee. (Balcerzak, Tr. 4099-4100). In addition, Daramic maintained daily communications with Crown during the strike. (Balcerzak, Tr. 4100).

**Response to Finding No. 798:**

During the Daramic Strike at the Owensboro facility, Crown experienced some order disruption, coming close to shutting down productions lines as a result of the strike. (Balcerzak, Tr. 4099).

799. During the work stoppage, { [REDACTED] } (Balcerzak, Tr. 4117, *in camera*).

**Response to Finding No. 799:**

Complaint Counsel has no specific response.

800. Crown emerged "remarkably unscathed" from the labor stoppage and congratulated Daramic for doing "a heckuva good job" keeping Crown in production. (RX00330; Balcerzak, Tr. 4101-02).

**Response to Findign No. 800:**

According to a contemporaneous document Mr. Balcerzak informed Daramic that Daramic had "the distinction of being the only Crown supplier who has ever held BOTH our highest and lowest ratings." (PX0987 at 002). Crown highlighted three "primary reasons for this low rating. . . Poor product quality (10 Non-conformances over the past 12 months). . . Poor

delivery/product availability (product unavailable for production at least 5 times over past year).

.. Very poor corrective action response by Daramic..."(PX0987 at 002).

801. { [REDACTED] } (Balcerzak, Tr. 4109, *in camera*).

**Response to Finding No. 801:**

[REDACTED] (Balcerzak, Tr. 4118-4119, *in camera*).

802. The Owensboro work stoppage did not impact Crown's business. (Balcerzak, Tr. 4132).

**Response to Finding No. 802:**

See response to Finding No. 800.

(ii) Microporous

803. Crown uses Flex-Sil separators in its golf cart batteries. (Balcerzak, Tr. 4093). Crown has used Flex-Sil in its golf cart batteries since at least 1988. (Balcerzak, Tr. 4095).

**Response to Finding No. 803:**

Complaint Counsel has no specific response.

804. Crown has never used CellForce on a commercial basis in its golf cart batteries. (Balcerzak, Tr. 4096).

**Response to Finding No. 804:**

This finding is false, and is contradicted by testimony of Mr. Balcerzak who [REDACTED]

[REDACTED] }.  
(Balcerzak, Tr. 4118-4119, *in camera*).

805. Crown approved CellForce for use on a temporary variation basis during the Owensboro strike. (Balcerzak, Tr. 4119). Crown used CellForce in lieu of PE separators in its industrial batteries for two weeks during the strike. (Balcerzak, Tr. 4119-20).

**Response to Finding No. 805:**

See response to Finding No.801.

806. CellForce has not been qualified by Crown for general commercial use in any application. (Balcerzak, Tr. 4119-20).

**Response to Finding No. 806:**

[REDACTED] (PX0947 at 001, in

camera). This was a development that Daramic was very concerned about and on which it kept a close eye. (PX0998 (“Art Balcerzak said they must continue to evaluate Cell force (sic) because pricing is so attractive. If the Cellforce (sic) cells test, (sic) better than standard Daramic we may need to step up the qualification of HD.”). Daramic was, thus, concerned about competition from MPLP at Crown.

(iii) Entek

807. In the past, Entek supplied nearly 100% of Crown’s needs for industrial PE battery separators. (Balcerzak, Tr. 4097). Around 2002 or 2003, Entek moved the production of industrial separators to its facility in the United Kingdom. (Balcerzak, Tr. 4097). At that same time, the quality of Entek’s product deteriorated significantly, and Crown’s engineering department disqualified Entek’s separators for use in Crown’s industrial batteries. (Balcerzak, Tr. 4097).

**Response to Finding No. 807:**

Crown actually ceased purchasing from Entek for two reasons: first the quality was poor and Entek’s attempts to remedy the quality issues were unsuccessful; second, after Entek’s U.K. facility was opened it informed Crown that its separators would be sourced from this facility and Crown objected to the logistical difficulties that would impose on its supply chain. (Balcerzak, Tr. 4097, 4130).

808. When Entek began producing industrial separators in the United Kingdom, the logistics of obtaining separators from overseas did not create an impediment. (Balcerzak, Tr. 4129). The poor quality of Entek’s industrial separators, not the location of Entek’s plant, caused Crown to drop Entek as a supplier. (Balcerzak, Tr. 4128-29).

**Response to Finding No. 808:**

This finding is contradicted by the testimony of Mr. Balcerzak who maintained that the logistics were a problem for Crown. Mr. Balcerzak testified that Crown liked to keep “just in time” inventory and that having to ship separators from Europe would make that more difficult. (Balcerzak, Tr. 4130). See response to finding No 807.

809. Crown has not attempted to obtain industrial separators from Entek since the Owensboro strike because Crown does not need a second supplier. (Balcerzak, Tr. 4131).

**Response to Finding No. 809:**

Prior to having Daramic as its sole source of supply for battery separators, Crown purchased PE separators from Entek for its industrial batteries. (Balcerzak, Tr. 4097). Crown actually ceased purchasing from Entek for two reasons: first the quality was poor and Entek's attempts to remedy the quality issues were unsuccessful; second, after Entek's U.K. facility was opened it informed Crown that its separators would be sourced from this facility and Crown objected to the logistical difficulties that would impose on its supply chain. (Balcerzak, Tr. 4097, 4130).

810. Entek is currently developing a deep cycle separator. (Balcarzak, Tr. 4130-31, 4138-39). At the BCI conference in May 2009, Entek expressed a desire to supply samples of its deep cycle separator to Crown and indicated that it would provide samples this year. (Balcerzak, Tr. 4138-39).

**Response to Finding No. 810:**

This finding is not supported by any documentary evidence or the testimony of an Entek representative. Respondent failed to ask a single question to Entek at trial regarding this supposed deep-cycle project. (Weerts, Tr. 4450-4528). There is no evidence that Entek is actually intending to create such a product. In fact, Crown had been requesting samples form Entek for well over a year without ever receiving a single separator. (Balcerzak, Tr. 4138-4139).

(iv) Today

811. { [REDACTED] } (RX00994, *in camera*; Balcerzak, Tr. 4104, *in camera*). The effective date of the contract was January 1, 2008. (Balcerzak, Tr. 4097-98). { [REDACTED] } (Balcerzak, Tr. 4104, *in camera*).

**Response to Finding No. 811:**

Shortly after [REDACTED] and after the threat of MPLP had passed due to the acquisition, Daramic dropped to having the lowest rating of any of Crown's suppliers. (PX0987 at 002).

812. { [REDACTED] } (Balcerzak, Tr. 4105, *in camera*). Daramic's initial

contract proposal to Crown was for a term of three years. (Roe, Tr. 1722). In its response to Daramic's proposal, Crown asked for a term of five years. (Roe, Tr. 1722).

**Response to Finding No. 812:**

This finding is contradicted by testimony from Crown representative Art Balcerzak. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] { [REDACTED] }

(Balcerzak, Tr. 4111, *in camera*).

813. { [REDACTED] } (Balcerzak, Tr. 4108, *in camera*). { [REDACTED] } (Balcerzak, Tr. 4107, *in camera*). In fact, { [REDACTED] } (Balcerzak, Tr. 4107-08, *in camera*).

**Response to Finding No. 813:**

It is more relevant to note that Daramic did consider MPLP in making its contract pitch to Crown. Daramic went to certain customers offering beneficial contractual terms in order to secure their business and to prevent erosion of Daramic's customer base. (Roe, Tr. 1289-1291). In addition to beneficial pricing terms, Daramic offered those customers identified as at risk of loss to MPLP guaranteed delivery times, committed inventory stock, rebate schedules and consignment to secure the business with Daramic. (PX0258 at 001; Roe, Tr. 1292). [REDACTED]

[REDACTED]

[REDACTED] } (Roe, Tr. 1352, *in camera*).

814. { [REDACTED] } (Balcerzak, Tr. 4106-08, *in camera*). { [REDACTED] } (Balcerzak, Tr. 4106-08, *in camera*). { [REDACTED] } (Balcerzak, Tr. 4107-08, *in camera*). { [REDACTED] } (Balcerzak, Tr. 4107-08, *in camera*).

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT

VOLUME 3

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August 7, 2009

**Response to Finding No. 814:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0258 at 002; PX0255 at 001, *in camera*; Roe, Tr. 1291-1294, 1350-1354, *in camera*). [REDACTED]  
[REDACTED]

815. { [REDACTED] } (Balcerzak, Tr. 4108, *in camera*). { [REDACTED] } (Balcerzak, Tr. 4108, *in camera*).

**Response to Finding No. 815:**

After its acquisition of MPLP, Daramic is the only option for Crown's industrial separator supply. (Balcerzak, Tr. 4127-4128). When Daramic had quality problems with its separators at Crown, its salesman, Randy Hanschu understood that Crown had nowhere to turn. (PX0803 at 001 ("It is sure getting difficult to convince our customers we are not a monopoly.")).

816. Crown decided to sole-source its separators from Daramic because of Daramic's history of supplying high quality separators. (Balcerzak, Tr. 4125).

**Response to Finding No. 816:**

When Crown negotiated the contract with Daramic they did not considered other separator suppliers because other than MPLP and Daramic, [REDACTED] { [REDACTED]

[REDACTED] } [REDACTED]  
[REDACTED] (Balcerzak, Tr. 4106, *in camera*).

817. { [REDACTED] } (Balcerzak, Tr. 4109, *in camera*).

**Response to Finding No. 817:**

Crown was upset with Daramic's performance as a supplier and expressed its disappointment in letters to Randy Handshu at Daramic. (See Response to Finding No. 800).

818. As a customer, Crown has not seen any difference in the quality of Daramic's products since the acquisition. (Balcerzak, Tr. 4103). In fact, the acquisition has had absolutely no impact on Crown's business. (Balcerzak, Tr. 4103).

**Response to Finding No 818:**

This finding is contradicted by evidence that after the acquisition Daramic's rating as a supplier dropped precipitously, moving Daramic from the number one rated supplier prior to the merger to the worst after. (PX0987 at 002).

c. Douglas Battery Manufacturing Company

819. Douglas Battery Manufacturing Company ("Douglas Battery") is a battery manufacturer headquartered in Winston-Salem, North Carolina. (Douglas, Tr. 4048). This family owned and managed company was founded in 1921. (Douglas, Tr. 4048).

**Response to Finding No. 819:**

Complaint Counsel has no specific response.

820. Prior to 2005, Douglas Battery produced automotive batteries. (Douglas, Tr. 4048). In 2005, however, Douglas Battery made a strategic decision to no longer produce batteries for automotive applications. (Douglas, Tr. 4048).

**Response to Finding No. 820:**

Complaint Counsel has no specific response.

821. Douglas' decision to stop producing SLI batteries was driven by several factors, including the rising costs of raw materials, the consolidation of the battery manufacturing industry, and "intense" competition from offshore and south of the border. (Douglas, Tr. 4048-49, 4051-52).

**Response to Finding No. 821:**

The assertion that there is intense competition from offshore battery producers is contradicted by the fact that "U.S. based battery manufacturers dominate the lead acid battery market and have erected imposing barriers to entry, such as economies of scale and high brand awareness." (PX2110 at 004). [REDACTED]

[REDACTED]

[REDACTED]

(PX0403 at 005-006; Craig, Tr. 2552-2554, *in camera*).

822. Following the consolidation of the battery industry, only five battery manufacturers remain in the United States: (1) Johnson Controls, a "behemoth" of an organization, (2) Exide, a

large company that has experienced financial turmoil, including a bankruptcy, over the past few years, (3) East Penn, a "fine" private company, (4) Crown, a smaller player, and (5) Douglas Battery. (Douglas, Tr. 4049).

**Response to Finding No. 822:**

This finding is contradicted by a number of documents and a good deal of testimony. For example, Mr. Douglas does not list EnerSys, Bulldog Battery, Trojan, or U.S. Battery, all of whom testified at the hearing and are battery manufacturers in the United States. (CCFOF 1219-1220, 1222, 1227-1229, 1236-1237, 1239, 1245-1246). [REDACTED]

[REDACTED] } [REDACTED]  
[REDACTED] (PX1450, *in camera*; see also PX0026, *in camera*; PX0044 at 006-009, *in camera*).

823. Douglas Battery currently produces cycling batteries, including "material-handling batteries, coal mining batteries, and batteries for UPS and telecom." (Douglas, Tr. 4047-48, 4054).

**Response to Finding No. 823:**

This finding is contradicted by a great deal of testimony. An uninterruptible power supply or source ("UPS") battery is designed to be used as a backup power source usually for computer systems. (Brilmyer, Tr. 1832; Roe, Tr. 1736-1737; see also Axt, Tr. 2099). In the event of a power failure, the UPS batteries are designed to provide a quick burst of energy between 5 to 30 minutes in duration. The batteries are typically built using clear cases that allow for the easy visual inspection and maintenance of electrolyte levels within the battery. These batteries need to be trustworthy and are generally rated at 15 to 20 year life span. (Brilmyer, Tr. 1833). Thus UPS batteries are not "cycling" batteries as claimed by respondent in this finding.

The testimony cited by respondent does not support the finding. (Douglas, Tr. 4047-4048) (no statement at all related to "cycling batteries").

824. Douglas Battery purchases separators for both flooded lead-acid batteries and valve regulated lead-acid batteries. (Douglas, Tr. 4053-54). Douglas uses AGM separators in its VRLA batteries. (Douglas, Tr. 4053-54).

**Response to Finding No. 824:**

Complaint Counsel has no specific response.

(a) Douglas Battery Separator Buying History

(i) Daramic

825. Douglas Battery has purchased separators for its flooded lead acid batteries from Daramic since at least 1974. (Douglas, Tr. 4059). Jim Douglas, the Executive Vice President at Douglas, described Daramic as having the "highest integrity, good people devoted to the battery business" and Daramic's employees as "good, honest type people." (Douglas, Tr. 4060, 4062).

**Response to Finding No. 825:**

This finding is contradicted by a number of facts in evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]

[REDACTED] } (CCFOF 1139-1143;

Gilchrist, Tr. 414-415, 621). Daramic has entered into an illegal non-compete agreement with H&V in order to prevent H&V from entering any of the PE markets. (CCFOF 1180-81).

{ [REDACTED]

[REDACTED] } (PX1738 at 001-002; Whear, Tr. 4829-4833,

*in camera*).

826. { [REDACTED]

[REDACTED] } (Douglas, Tr. 4072, *in camera*; PX2058, *in camera*)

**Response to Finding No. 826:**

{ [REDACTED] }

(PX2058 at 017, *in camera*).

827. Douglas is, and has been, satisfied and impressed with the quality of Daramic's separators. (Douglas, Tr. 4061) Furthermore, Douglas believes the pricing it has received from Daramic has been "very fair" and "value-added." (Douglas, Tr. 4061).

**Response to Finding No. 827:**

[REDACTED]  
[REDACTED] { [REDACTED] }  
(PX0808 at 001; PX0116 at 001, *in camera* { [REDACTED] }  
[REDACTED] }

(ii) Microporous

828. Douglas Battery { [REDACTED] }.  
(Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*).

**Response to Finding No. 828:**

This finding is not supported by the evidence cited by respondent. (Douglas, Tr. 4063  
(no testimony about purchases prior to 2004); Douglas Tr. 4067, *in camera* { [REDACTED] }  
[REDACTED] }) Yet, Douglas had  
in fact discussed purchasing Microporous's motive separators in 2004. (Douglas, Tr. 4076).

Douglas also sought separators from Microporous again in 2007. (PX1810 at 001-002).

829. Microporous has not contacted Douglas about a possible supply relationship or agreement since 2004. (Douglas, Tr. 4063).

**Response to Finding No. 829:**

Mr. Douglas testified only that he was not aware of any contact with Microporous.  
(Douglas, Tr. 4063). In fact, Douglas Battery contacted Microporous in 2007 and the companies  
got as far as discussing pricing. (PX1810 at 001-002).

830. At that time, Steve McDonald, on behalf of Microporous, approached Douglas Battery about purchasing battery separators from Microporous. (Douglas, Tr. 4062-63).

**Response to Finding No. 830:**

Complaint Counsel has no specific response.

831. Douglas Battery found the Microporous product too brittle and decided not to purchase separators from or enter into a supply agreement with Microporous at that time, or at any later time. (Douglas, Tr. 4062-63, 4084).

**Response to Finding No. 831:**

This finding is contradicted by the fact that Douglas sought a quote from Microporous in 2007 because Daramic's prices were "extremely high." (PX1810 at 001). Mr. Douglas testified

that [REDACTED] } (Douglas, Tr. 4074, *in camera*).

The testimony cited by respondent does not support the proposition. Mr. Douglas testified only that he had tested a Microporous golf cart separator and found it to be too brittle, he did not testify that he would not enter into a supply agreement with Microporous at any later time. (Douglas, Tr. 4084 (tested separators for PX1402 and PX1400); Douglas, Tr. 4062-63 (unrelated to testing or a supply agreement with Microporous)).

832. Microporous has had no competitive influence on Douglas. In fact, Microporous has not even discussed the supply of separators with Douglas since 2004. (Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*).

**Response to Finding No. 832:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0255 at 001, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } [REDACTED] (PX2001 at 005, *in camera*; PX1810 at 001-002).

Douglas actually sought separators from Microporous in 2007 because it felt that Daramic's prices were "extremely high" and received lower prices from Microporous than from Daramic. (PX1810 at 001-002). Douglas also sought a quote from Entek, but Entek was not interested. (PX1810 at 001-002).

Mr. Douglas also testified that prior to the acquisition, both Daramic and Microporous made motive power separators, but that today, other than Daramic, there is no one else who sells a motive separator in North America. (Douglas, Tr. 4081, 4076).

833. [REDACTED] (Gilchrist, Tr. 503, *in camera*).

**Response to Finding No. 833:**

[REDACTED] (PX2001 at 005),  
in camera

(iii) Entek

834. Douglas Battery purchased separators from Entek many years ago when Douglas Battery was engaged in selling SLI separators. (Douglas, Tr. 4064). Douglas Battery has had no discussions about future supply with Entek since that time. (Douglas, Tr. 4064-65).

**Response to Finding No. 834:**

Entek does not make motive battery separators. (Douglas, Tr. 4064).

(iv) Today

835. Douglas Battery has felt the effects of the current economic recession. (Douglas, Tr. 4056). Sales for 2008 total approximately \$57 million. (Douglas, Tr. 4056-57). On the other hand, sales for 2009 are projected to be approximately \$33 to \$35 million. (Douglas, Tr. 4056).

**Response to Finding No. 835:**

[REDACTED] (Simpson, Tr. 3195, *in camera*).

836. [REDACTED] (PX2058, *in camera*; Douglas, Tr. 4066, *in camera*). [REDACTED] (PX2058 at 001, *in camera*).

**Response to Finding No. 836:**

[REDACTED] (PX2058 at 017, *in camera*).

837. [REDACTED] (Douglas, Tr. 4066, *in camera*, PX2058 at 015-17, *in camera*). [REDACTED] (Douglas, Tr. 4066-67, *in camera*).

**Response to Finding No. 837:**

Complaint Counsel has no specific response.

838. [REDACTED] } (Douglas, Tr. 4068, *in camera*).

**Response to Finding No. 838:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0255 at 001, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } [REDACTED] (PX2001 at 005, *in camera*; PX1810 at 001-002).

Douglas actually sought separators from Microporous in 2007 because it felt that Daramic's prices were "extremely high" and received lower prices from Microporous than from Daramic. (PX1810 at 001-002). Douglas also sought a quote from Entek, but Entek was not interested. (PX1810 at 001-002).

Mr. Douglas also testified that prior to the acquisition, both Daramic and Microporous made motive power separators, but that today, other than Daramic, there is no one else who sells a motive separator in North America. (Douglas, Tr. 4081, 4076).

839. Currently, Douglas is also in discussions with AmerSil, a Luxembourg company and manufacturer of PVC separators. (Douglas, Tr. 4063). Amersil contacted Douglas Battery in 2008 expressing an interest in "establishing a foothold in North America." (Douglas, Tr. 4063). Douglas Battery is currently waiting to test a new product technology that Amersil is developing. (Douglas, Tr. 4063-64).

**Response to Finding No. 839:**

Amer-Sil has [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0916 (Dauwe, Dep. at 115), *in camera*; PX0916 (Dauwe, Dep. at 117)).  
[REDACTED] } According to Amer-Sil's Managing Director, [REDACTED]

[REDACTED]  
[REDACTED] } (PX0916 (Dauwe, Dep. at 94-95), *in camera*). Amer-Sil's  
owners thought { [REDACTED] [REDACTED]  
[REDACTED] } (PX0916 (Dauwe, Dep. at 94), *in camera*).

840. This Court concludes based on the above findings, that Complaint Counsel has failed to show that Microporous was a competitive factor with respect to Douglas, Crown or East Penn (the companies comprising the so-called "MP Plan") at the time these companies entered into their contracts with Daramic in late 2007 or early 2008.

**Response to Finding No. 840:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. With respect to Douglas Battery, it is clear that Microporous was a competitive factor in the pricing and terms that it received from Daramic. { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0255 at 001, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } [REDACTED] (PX2001 at 005, *in camera*; PX1810  
at 001-002).

Douglas actually sought separators from Microporous in 2007 because it felt that Daramic's prices were "extremely high" and received lower prices from Microporous than from Daramic. (PX1810 at 001-002). Douglas also sought a quote from Entek, but Entek was not interested. (PX1810 at 001-002).

Mr. Douglas also testified that prior to the acquisition, both Daramic and Microporous made motive power separators, but that today, other than Daramic, there is no one else who sells a motive separator in North America. (Douglas, Tr. 4081, 4076).

It is more relevant to note that Daramic did consider MPLP in making its contract pitch to Crown. Daramic went to certain customers offering beneficial contractual terms in order to

secure their business and to prevent erosion of Daramic's customer base. (Roe, Tr. 1290-1291). Crown has qualified CellForce for Motive Power batteries. (PX0947 at 001). This was a development that Daramic was very concerned about and on which it kept a close eye. (PX0998 ("Art Balcerzak said they must continue to evaluate Cell force (sic) because pricing is so attractive. If the Cellforce (sic) cells test, (sic) better than standard Daramic we may need to step up the qualification of HD.") Daramic was, thus, concerned about competition from MPLP at Crown.

[REDACTED]

[REDACTED]

[REDACTED] (PX0258 at 002; PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, *in camera*, 1350-1354, *in camera*). MPLP had a competitive influence therefore whether or not Crown is aware of the impact.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(PX0243 at 02, *in camera*). In 2004, Daramic again reacted to Microporous price competition on motive power separators by lowering prices by 3% at East Penn to maintain that business.

(PX0409 at 01; Roe, Tr. 1262-1263). [REDACTED]

[REDACTED]

[REDACTED] red

[REDACTED] } (PX0257 at 001, *in camera*;  
PX0258 at 002).

During East Penn's visit to Piney Flats in October 2007, East Penn indicated that purchases of PE SLI separators from Microporous could not commence prior to the first or second quarter of 2009. (PX0082 at 002). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX2091, *in camera*; RX1519 at 008, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX2091 at 001-002, *in camera*).

East Penn (i) wanted a new East Coast supplier of PE SLI separators, (ii) believed that Entek would not open a new facility on the East Coast, (iii) saw Microporous as a viable PE SLI supplier, (iv) indicated that it would be willing to enter a long term contract with Microporous as a sign of their seriousness, and (v) never ruled out the possibility of buying PE SLI separators from Microporous at some point in the future. (Leister, Tr. 4007-4008, 4016-4021; see also CCFOF 624-629). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX2091, *in camera*; RX1519 at 008, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX2091 at 001-002, *in camera*).

In addition to beneficial pricing terms, Daramic offered those customers identified as at risk of loss to MPLP guaranteed delivery times, committed inventory stock, rebate schedules and consignment to secure the business with Daramic. (PX0258 at 01; Roe, Tr. 1292). Daramic

[REDACTED] } (Roe, Tr. 1352, *in camera*).

d. U.S. Battery

841. U.S. Battery Manufacturing ("U.S. Battery") is headquartered in Corona, California. (Wallace, Tr. 1927).

**Response to Finding No. 841:**

Complaint Counsel has no specific response.

842. U.S. Battery has two manufacturing facilities: one in Corona, California and another in Augusta, Georgia. (Wallace, Tr. 1957).

**Response to Finding No 842:**

Complaint Counsel has no specific response.

843. Although U.S. Battery purchases separators from North American suppliers, the separators are used in batteries that are sold across the globe. (Wallace, Tr. 1958-59). In fact, from its two North American manufacturing facilities, U.S. Battery sells batteries to customers in sixty countries worldwide. (Wallace, Tr. 1957-58).

**Response to Finding No 843:**

Complaint Counsel has no specific response.

844. U.S. Battery primarily manufactures batteries used in deep cycle applications, but also manufactures specialty batteries and batteries used in military SLI applications. (Wallace, Tr. 1927, 1930; Qureshi, Tr. 2075).

**Response to Finding No 844:**

Complaint Counsel has no specific response.

845. U.S. Battery's deep cycle batteries are used in golf carts, floor scrubbers, aerial lifts, marine applications, long-haul trucks, recreational vehicles, wind and solar power applications, and reserve power applications. (Wallace, Tr. 1955-56; Qureshi, Tr. 2076-77).

**Response to Finding No 845:**

Complaint Counsel has no specific response.

846. In fact, U.S. Battery can adjust the wiring of its deep cycle batteries so that the batteries can be used in a wide variety of end-use applications. (Wallace, Tr. 1956-57).

**Response to Finding No. 846:**

The cited testimony does not support this finding. The fact that the deep-cycle application is represented by several different end uses, and the batteries used in each end use

need to be wired, does not suggest that *how* a battery is wired can determine in what end use the battery will be used.

847. U.S. Battery's 2008 revenues were in excess of \$160 million. (Wallace, Tr. 1929-30).

**Response to Finding No 847:**

Complaint Counsel has no specific response.

848. In the past few years, U.S. Battery has been able to increase its revenue by aggressively developing new markets, such as Europe and the Pacific rim, and acquiring new accounts. (Wallace, Tr. 1930).

**Response to Finding No 848:**

Complaint Counsel has no specific response.

849. U.S. Battery's competitors include Trojan Battery, East Penn Manufacturing, Crown Battery, Exide, Superior Battery, and Johnson Controls. (Wallace, Tr. 1938).

**Response to Finding No 849:**

Complaint Counsel has no specific response.

850. U.S. Battery provides a warranty on its batteries based upon its level of confidence in the product. (Qureshi, Tr. 2066-67).

**Response to Finding No 850:**

Complaint Counsel has no specific response.

851. The warranty U.S. Battery offers on its premium line of batteries is one year. The warranty U.S. Battery offers on its economy line of batteries is six months. (Wallace, Tr. 1965-66). U.S. Battery prefers to use a Flex-Sil separator be used in any battery it offers under a one-year warranty. (PX1764 at 002). Consequently, U.S. Battery uses only Flex-Sil separators in its premium batteries. (Wallace, Tr. 1967; Qureshi, Tr. 2062).

**Response to Finding No. 851:**

On ten different models of batteries produced by U.S. Battery containing the HD separator, U.S. Battery offers a one year warranty. (Qureshi, Tr. 2066-67). Therefore, the extent of the warranty of a particular model depends only *partly* on the separator. In fact, as Mr. Qureshi explained at trial, the warranty length is more dependant on the number of lead plates within the battery than on the type of separator. (Qureshi, Tr. 2085).

(a) U.S. Battery Separator Buying History

852. Prior to the acquisition, U.S. Battery was purchasing separators from Daramic and Microporous. (Wallace, Tr. 1938). Microporous, however, was U.S. Battery's primary separator supplier. (PX0681 at 001).

**Response to Finding No 852:**

Complaint Counsel has no specific response.

853. U.S. Battery first began buying separators from Daramic for deep cycle applications in 2003. (Wallace, Tr. 1945; Qureshi, Tr. 2021). At this time, U.S. Battery was purchasing the Daramic DC separator. (Wallace, Tr. 1946-47; Qureshi, Tr. 2021). U.S. Battery began using Daramic HD, and stopped using Daramic DC, in 2006. (Qureshi, Tr. 2028).

**Response to Finding No 853:**

Complaint Counsel has no specific response.

854. U.S. Battery was also purchasing Flex-Sil separators from Microporous in 2003. (Wallace, Tr. 1945-46). In fact, U.S. Battery has been using Flex-Sil separators since at least 1993. (Qureshi, Tr. 2013).

**Response to Finding No 854:**

Complaint Counsel has no specific response.

855. Prior to the acquisition, U.S. Battery was purchasing Daramic HD separators for its low-end batteries and Flex-Sil separators for its premium batteries. (Wallace, Tr. 1958-60, 1967).

**Response to Finding No. 855:**

Mr. Wallace was asked about the quality range of products sold by U.S. Battery at trial, to which Mr. Wallace responded, "[a]ll of our products are premium products. There are different categories of those premium products." (Wallace, Tr. 1969). Later when Mr. Wallace was asked by respondent whether U.S. Battery considered Flex-Sil a superior product Mr. Wallace responded simply, "No." (Wallace, Tr. 1971). Mr. Wallace continued to testify that according to the tests run by U.S. Battery, the Flex-Sil separator was not superior in performance to HD. (Wallace, Tr. 1971-1972).

856. U.S. Battery purchased Flex-Sil separators from Microporous' Piney Flats, Tennessee facility and Daramic HD separators from Daramic's Owensboro, Kentucky facility. (Wallace, Tr. 1945, 1958-59).

**Response to Finding No 856:**

Complaint Counsel has no specific response.

(b) U.S. Battery Today

857. U.S. Battery currently purchases Daramic HD and Flex-Sil separators from Daramic for use in its deep cycle batteries. (Wallace, Tr. 1931, 1942-43). Flex-Sil, however, is the only separator U.S. Battery uses in its premium batteries. (Wallace, Tr. 1967; Qureshi, Tr. 2062; Whear, Tr. 4840, *in camera*).

**Response to Finding No. 857:**

The citations provided concerning Flex-Sil being the only separator used in "premium" batteries at U.S. Battery do not support that conclusion. Furthermore, as previously stated, along with those batteries which contain Flex-Sil and carry the one year warranty there are ten different models of batteries that have HD separators and carry a one year warranty at U.S. Battery.

(Qureshi, Tr. 2066-67).

858. U.S. Battery has two new products that it plans to bring to the market in 2009, US 27DC and US 31DC. Both batteries will use a Flex-Sil separator. (Wallace, Tr. 1948-49, Qureshi, Tr. 2044).

**Response to Finding No. 858:**

The irony of this finding is remarkable. The reason why U.S. Battery will be using Flex-Sil in these new models is because Daramic has refused to supply its HD separator which these batteries were specifically designed around. (Qureshi, Tr. 2042-2044; Wallace, Tr. 1948-1950).

859. U.S. Battery will soon be manufacturing a deep cycle battery that uses an absorptive glass mat ("AGM") separator. (Wallace, Tr. 1975). For these batteries, U.S. Battery intends to purchase AGM separators from a supplier in China and import the separators to its North American manufacturing facilities. (Wallace, Tr. 1975-76).

**Response to Finding No 859:**

Complaint Counsel has no specific response.

(c) Separators Used in Deep Cycle Applications

860. U.S. Battery considers itself, and in fact holds itself out to its customers, as the leading manufacturer of deep cycle batteries. (Wallace, Tr. 1955; Qureshi, Tr. 2076).

**Response to Finding No 860:**

Complaint Counsel has no specific response.

861. U.S. Battery is the second largest manufacturer of deep cycle batteries, with a market share of 45% - 48% in the deep cycle battery market. (Wallace, Tr. 1938-39).

**Response to Finding No 861:**

Complaint Counsel has no specific response.

862. U.S. Battery manufactures between 1.5 million and 2 million deep cycle batteries per year. (Qureshi, Tr. 2076).

**Response to Finding No 862:**

Complaint Counsel has no specific response.

863. Approximately 80% of U.S. Battery's revenue is attributable to sales of deep cycle batteries. (Wallace, Tr. 1930).

**Response to Finding No 863:**

Complaint Counsel has no specific response.

864. U.S. Battery's annual spend on separators used in deep cycle batteries is approximately \$8 million. (Wallace, Tr. 1931). In 2007, over 90% [REDACTED] of U.S. Battery's separator purchases were Flex-Sil separators. (Wallace, Tr. 1961-62; Qureshi, Tr. 2064-65; PX0949 at 229, *in camera*).

**Response to Finding No 864:**

Complaint Counsel has no specific response.

865. This is true even though a Flex-Sil separator costs twice as much as a Daramic HD separator. (Wallace, Tr. 1972; Qureshi, Tr. 2064).

**Response to Finding No. 865:**

This finding misstates and mischaracterizes the evidence. The Daramic DC separator, the progenitor to HD, was roughly half the cost of Flex-Sil at the time U.S. Battery was purchasing DC. (Qureshi, Tr. 2063-2064). Flex-Sil was not always twice the price of DC; MPLP lowered the price of its Flex-Sil separator in order to combat the entry of Daramic in to the deep-cycle market at U.S. Battery in 2003. (Qureshi, Tr. 2021-2023).

866. Premium batteries make up at least 80% of U.S. Battery's deep cycle business. (Wallace, Tr. 1967). However, less than 20% of U.S. Battery's deep cycle batteries are used in original equipment applications. (Wallace, Tr. 1976).

**Response to Finding No 866:**

Complaint Counsel has no specific response.

(d) Flex-Sil

867. U.S. Battery advertises to its customers that the components of its batteries maximize the life and performance of its batteries. (Wallace, Tr. 1963). This message is set forth on U.S. Battery's website. (Wallace, Tr. 1963).

**Response to Finding No 867:**

Complaint Counsel has no specific response.

868. On its website, U.S. Battery describes its batteries as using “premium micro-rib Flex-Sil separators.” (Wallace, Tr. 1964; RX01643). In fact, the website materials were created specifically to show that U.S. Battery’s batteries contained a Flex-Sil separators. (Wallace, Tr. 1978-79). In contrast, there is no reference to Daramic HD anywhere on U.S. Battery’s website. (Wallace, Tr. 1963-65).

**Response to Finding No 868:**

Complaint Counsel has no specific response.

869. Flex-Sil is the only separator U.S. Battery uses in its premium deep cycle batteries. (Wallace, Tr. 1967; Qureshi, Tr. 2062; Whear, Tr. 4840, *in camera*).

**Response to Finding No. 869:**

This finding is contradicted by the testimony of Mr. Wallace who stated that all U.S.

Battery batteries were considered premium. (Wallace, Tr. 1969). The warranty on batteries containing Flex-Sil separators and those containing HD are the same where the other components of the battery are of similar quality. (Qureshi, Tr. 2066 (Ten different U.S. Battery models contain HD and have a 1 year warranty)). Thus the reputation and financial responsibility of U.S. Battery as a company is no less at risk when using Flex-Sil or HD separators. Furthermore, U.S. Battery would be using more HD in place of Flex-Sil had Daramic not restricted U.S. Battery’s access. (Wallace, Tr. 1979).

870. Batteries with Flex-Sil separators have a minimum warranty of one year and the warranty could last for as long as two years. (Wallace, Tr. 1966). U.S. Battery distinguishes its premium batteries to its customers based on this extended warranty. (Wallace, Tr. 1970). The longer warranty is significant to customers who continue to purchase U.S. Battery’s premium batteries based in part on the longer warranty on these premium batteries. (Wallace, Tr. 1970-71).

**Response to Finding No. 870:**

The citations do not support the assertion in the above finding. Furthermore, the warranty on batteries containing Flex-Sil separators and those containing HD are the same where the other components of the battery are of similar quality. (Qureshi, Tr. 2066 (Ten different U.S. Battery models contain HD *and* have a 1 year warranty)).

(e) Daramic HD

871. While premium batteries make up at least 80% of U.S. Battery's deep-cycle business, U.S. Battery does not use Daramic HD separators in its premium batteries. (Wallace, Tr. 1967).

**Response to Finding No. 871:**

Complaint Counsel has no specific response.

872. Furthermore, Daramic HD has not been qualified by U.S. Battery for deep cycle batteries that are used in original equipment end-use applications. (McDonald, Tr. 3822; Roe, Tr. 1762).

**Response to Finding No. 872:**

This finding is directly contradicted by the testimony of Mr. Wallace, who testified that in fact U.S. Battery *does* sell batteries containing Daramic's HD separator to original equipment manufacturers. (Wallace, Tr. 1933-1935).

873. U.S. Battery did develop a new, low-cost golf cart battery using Daramic HD that would be sold without a warranty. (McDonald, Tr. 3822; Roe, Tr. 1762; Whear, 4840).

**Response to Finding No. 873:**

The battery referred to in this finding, US 1800, was developed in 2003 and although it did not carry a warranty, it used Daramic DC, not HD. (Wallace, Tr. 1945).

874. Daramic HD has the disadvantage of being more flexible than Flex-Sil, which causes problems on U.S. Battery's production lines. (Qureshi, Tr. 2072).

**Respond to Finding No. 874:**

To the extent that the flexibility was a problem with HD that issue has been largely resolved as the workers become more familiar with the product's handling characteristics.

875. [REDACTED] (McDonald, Tr. 3914; PX1746 at 002; RX00780 at 001; RX1093; RX657, *in camera*)

**Response to Finding No. 875:**

This Finding is utterly without merit. U.S. Battery uses HD in several battery models, ten of which carry its maximum warranty. (Qureshi, Tr. 2066). U.S. Battery could not use HD if it had failed prematurely. Mr. Wallace testified that according to the tests run by U.S. Battery, the Flex-Sil separator was not superior in performance to HD. (Wallace, Tr. 1972).

876. U.S. Battery offers a six month warranty for batteries made with Daramic HD. (Wallace, Tr. 1965).

**Response to Finding No. 876:**

This finding is false and contradicted by testimony from U.S. Battery. U.S. Battery uses HD in several battery models, ten of which carry its maximum one year warranty. (Qureshi, Tr. 2066).

877. For these reasons, U.S. Battery has never switched from Flex-Sil to Daramic HD in a golf cart battery. (McDonald, Tr. 3945-46, 3956-58).

**Response to Finding No. 877:**

This finding is false and directly contradicted by the very testimony Respondent cites in support. When asked what U.S. Battery would have used if they had not decided to use HD in its E line golf cart batteries, Mr. McDonald admitted it would have been Flex-Sil. (McDonald, Tr. 3946 (“Q: And if they didn’t use HD, what other kind of separator could they use in the new battery? A: They would have used Flex-Sil most likely.”))

878. U.S. Battery suspended purchases of Daramic HD in late 2007. (Qureshi, Tr. 2073).

**Response to Finding No. 878:**

The citation does not support this finding. In fact, U.S. Battery has not suspended its purchases of HD. (Qureshi, Tr. 2086-2087). Furthermore, U.S. Battery designed new models around the HD separator only to be told after the merger that it was not available in the size requested. (Qureshi, Tr. 2042-2044; Wallace, Tr. 1948-1950).

(f) CellForce

879. In 2007, U.S. Battery informed Microporous that it would not recommend a CellForce separator for use in its premium batteries. (Qureshi, Tr. 2070; PX1763 at 003).

**Response to Finding No. 879:**

The citation does not support the assertion. Mr. Qureshi testified that at the time in question U.S. Battery simply did not have sufficient evidence to make the judgment on whether or not to qualify CellForce in its top of the line batteries. (Qureshi, Tr. 2070).

e. Bulldog Battery

880. Bulldog Battery manufacturers flooded lead-acid batteries for motive power industrial applications. (Benjamin, Tr. 3504). The batteries manufactured by Bulldog are used primarily in fork truck (fork lift) applications. (Benjamin, Tr. 3504).

**Response to Finding No. 880:**

Complaint Counsel has no specific response.

881. Bulldog is headquartered and has its sole manufacturing facility in Wabash, Indiana. (Benjamin, Tr. 3533).

**Response to Finding No. 881:**

Complaint Counsel has no specific response.

882. There are only five North American battery manufacturers producing and selling motive power batteries. (Benjamin, Tr. 3537).

**Response to Finding No. 882:**

Complaint Counsel has no specific response.

883. Bulldog comprises 10% of the North American motive power market and competes with EnerSys, Douglas and East Penn. (Benjamin, Tr. 3507).

**Response to Finding No. 883:**

Complaint Counsel has no specific response.

884. Bulldog uses a .140 width separator profile for 95% of its batteries. (Benjamin, Tr. 3534-3535, 3545).

**Response to Finding No. 884:**

Complaint Counsel has no specific response.

885. The .140 width separator used by Bulldog is an off-size thickness for a battery separator. (Benjamin, Tr. 3537). The .140 width separator used by Bulldog is the thickest battery separator found in forklift batteries. (Benjamin, Tr. 3537). Bulldog is the only North American manufacturer of motive power batteries that uses a .140 width separator. (Benjamin, Tr. 3537).

**Response to Finding No. 885:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

886. It is difficult for battery separator suppliers to manufacture a .140 width separator. (Benjamin, Tr. 3537-3539).

**Response to Finding No. 886:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

887. Bulldog has encountered several quality issues with the .140 width separator, including pinholes in the separator. (Benjamin, Tr. 3538).

**Response to Finding No. 887:**

Where as Bulldog Battery consistently experienced quality issues when Daramic manufactured its motive separators prior to Bulldog Battery's switch to Microporous's motive separators, when Microporous began supplying Bulldog, there were no quality problems after the first three weeks of their relationship. (Benjamin, Tr. 3509, 3511, 3538-3539). To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

888. A battery separator supplier needs a particular calender roll in order to manufacture a .140 width separator. (Benjamin, Tr. 3539-3540).

**Response to Finding No. 888:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

(a) Bulldog Battery Separator Buying History

(i) Through 2002

889. Through 2002, Bulldog purchased all of its battery separators from Daramic. (Benjamin, Tr. 3509).

**Response to Finding No. 889:**

Complaint Counsel has no specific response.

(ii) 2003

890. In 2003, Bulldog began purchasing all of its separator requirements for the .140 width separator profile from Microporous. This represented 95% of Bulldog's battery separator needs. (Benjamin, Tr. 3534-3535).

**Response to Finding No. 890:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

891. The remaining 5% of Bulldog's battery separator needs continued to be supplied by Daramic, as Microporous did not have the tooling to manufacture these particular separator profiles. (Benjamin, Tr. 3512-3513, 3534-3535).

**Response to Finding No. 891:**

The assertion Respondent's make in their finding is not supported by Benjamin, Tr. 3512-3513.

892. After the switch to Microporous, Bulldog began using Microporous' CellForce battery separator product for the .140 width separator. (Benjamin, Tr. 3518, 3535).

**Response to Finding No. 892:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

893. From 2003 until the acquisition, Bulldog used only the CellForce battery separator product for the .140 width separator. (Benjamin, Tr. 3518, 3535).

**Response to Finding No. 893:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

894. Before Microporous could supply .140 width separators to Bulldog, it was necessary for Microporous to purchase a new calender roll that was capable of manufacturing .140 width separators. (Benjamin, Tr. 3512, 3514, 3540).

**Response to Finding No. 894:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

895. Microporous required Bulldog to enter into a supply agreement with Microporous before it would agree to acquire the new calender roll. (Benjamin, Tr. 3540).

**Response to Finding No. 895:**

The proposition that Bulldog Battery had to commit to a supply agreement before Microporous would agree to acquire the new calender roll is contradicted by evidence in the record. Mr. Benjamin proposed to Microporous that Bulldog Battery would buy the calender roll if Microporous would run it. Microporous countered this proposal by offering to buy the tool if Bulldog Battery signed a one year supply agreement. Bulldog Battery was free to choose what ever option it wanted. Thus, Bulldog Battery had two options, buy the calender roll for Microporous or sign a one year supply agreement with Microporous and get the tool for free. (Benjamin, Tr. 3513-3514).

896. After Bulldog switched suppliers and began purchasing all of its .140 width separator requirements from Microporous, Daramic scrapped the calender roll it had been using to manufacturer .140 width separators. (Benjamin, Tr. 3541).

**Response to Finding No. 896:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

897. From the time Daramic scrapped the calender roll it had been using to manufacturer .140 width separators for Bulldog up through the present, Microporous (and now Daramic post-acquisition) was the only battery separator supplier in the world that had a calender roll capable of manufacturing a .140 width separator. (Benjamin, Tr. 3542-3543).

**Response to Finding No. 897:**

To the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

898. From 2005 up until the present, it would take only about 12 weeks for any other separator supplier to be able to manufacture and supply Bulldog with .140 width separators. (Benjamin, Tr. 3543).

**Response to Finding No. 898:**

The proposition that a calender roll takes 12 weeks to manufacturer is contradicted by the fact that Mr. Benjamin did not know how long it took to purchase and grove a calender roll. (Benjamin, Tr. 3541). Thus, the assertion Respondent's make in their finding is not supported by Benjamin, Tr. 3543.

(iii) 2006

899. Daramic approached Bulldog Battery in 2006 with a proposal to regain Bulldog's business for the .140 width separator. (Benjamin, Tr. 3516, 3545).

**Response to Finding No. 899:**

Complaint Counsel has no specific response.

900. At this time, Daramic would have needed to acquire and groove a new calender roll in order to be able to manufacturer a .140 separator for Bulldog. (Benjamin, Tr. 3541).

**Response to Finding No. 900:**

The proposition is contradicted by the record evidence. Having calender rolls is not a necessary requirement for bidding on a customer's separator business. (Benjamin, Tr. 3559). Purchasing calender rolls to use for Bulldog Battery would be an extra expense for Daramic. (Benjamin, Tr. 3558).

901. Bulldog ultimately kept its business with Microporous in 2006. (Benjamin, Tr. 3549).

**Response to Finding No. 901:**

The proposition is contradicted by the record evidence. Bulldog Battery received a lower price from Microporous after telling the Microporous's salesman, Roger Berger, that Daramic had offered Bulldog Battery lower pricing. (Benjamin, Tr. 3516-3517). Bulldog Battery received a letter from Microporous notifying it that Microporous would be lowering the pricing to Bulldog Battery in order to come close to Daramic's pricing. Roger Berger told Mr. Benjamin that Microporous was lowering Bulldog Battery's pricing because "Well, we want to stay

competitive. We want to keep your business.” (Benjamin, Tr. 3516-3517). Microporous’s pricing was competitive and Bulldog Battery was happy with the quality of Microporous’s CellForce separator. (Benjamin, Tr. 3516, 3555).

902. Pricing was not a factor in Bulldog’s decision to keep Microporous as its sole supplier for the .140 width separator. (Benjamin, Tr. 3516).

**Response to Finding No. 902:**

The proposition is contradicted by the record evidence. Bulldog Battery compared Microporous’s pricing to Daramic’s pricing to determine if Microporous was charging it a competitive price. (Benjamin, Tr. 3523-3525). In 2006, Microporous’s pricing was competitive. (Benjamin, Tr. 3516).

903. Bulldog actually informed Microporous of the proposal it received from Daramic. (Benjamin, Tr. 3546).

**Response to Finding No. 903:**

The proposition is contradicted by the record evidence. Bulldog Battery received a lower price from Microporous after telling the Microporous’s salesman, Roger Berger, that Daramic had offered Bulldog Battery lower pricing. (Benjamin, Tr. 3516-3517). Bulldog Battery received a letter from Microporous notifying it that Microporous would be lowering its pricing to Bulldog Battery in order to come close to Daramic’s pricing. Roger Berger told Mr. Benjamin that Microporous was lowering Bulldog Battery’s pricing because “Well, we want to stay competitive. We want to keep your business.” (Benjamin, Tr. 3516-3517). Microporous’s pricing was competitive and Bulldog battery was happy with the quality of Microporous’s CellForce separator. (Benjamin, Tr. 3516, 3555).

904. At that time, Bulldog also informed Microporous that it had no intention of leaving Microporous and made it clear that Bulldog was not threatening Microporous with the Daramic proposal. (Benjamin, Tr. 3546-3547).

**Response to Finding No. 904:**

Complaint Counsel has no specific response.

905. In fact, Bulldog did not have any intention of switching its supplier of the .140 width separator from Microporous to Daramic. (Benjamin, Tr. 3545).

**Response to Finding No. 905:**

The proposition is contradicted by the record evidence. Bulldog Battery received a lower price from Microporous after telling the Microporous's salesman, Roger Berger, that Daramic had offered Bulldog Battery lower pricing. (Benjamin, Tr. 3516-3517). Bulldog Battery compared Microporous's pricing to Daramic's pricing to determine if Microporous was charging it a competitive price. (Benjamin, Tr. 3523-3525). In 2006, Microporous's pricing was competitive. (Benjamin, Tr. 3516). Microporous's pricing was competitive and Bulldog Battery was happy with the quality of Microporous's CellForce separator and the reliable delivery. (Benjamin, Tr. 3516-3517, 3555).

906. Bulldog did not use the Daramic proposal as an ultimatum to obtain price concessions from Microporous. (Benjamin, Tr. 3547).

**Response to Finding No. 906:**

The proposition is contradicted by the record evidence. Bulldog Battery received a lower price from Microporous after telling the Microporous's salesman, Roger Berger, that Daramic had offered Bulldog Battery lower pricing. (Benjamin, Tr. 3516-3517). Bulldog Battery received a letter from Microporous notifying it that Microporous would be lowering its pricing to Bulldog Battery in order to come close to Daramic's pricing. Roger Berger told Mr. Benjamin that Microporous was lowering Bulldog Battery's pricing because "Well, we want to stay competitive. We want to keep your business." (Benjamin, Tr. 3516-3517). Microporous's pricing was competitive and Bulldog Battery was happy with the quality of Microporous's CellForce separator. (Benjamin, Tr. 3516, 3555).

907. In actuality, Bulldog informed Microporous of Daramic's proposal so that Microporous would be aware of Daramic's intentions in the marketplace. (Benjamin, Tr. 3547).

**Response to Finding No. 907:**

Complaint Counsel has no specific response.

908. Microporous lowered the price of the .140 width battery separator to Bulldog as a thank-you for Bulldog informing Microporous of Daramic's activities in the marketplace. (Benjamin, Tr. 3548).

**Response to Finding No. 908:**

The proposition is contradicted by the record evidence. Bulldog Battery received a lower price from Microporous after telling the Microporous's salesman, Roger Berger, that Daramic had offered Bulldog Battery lower pricing. (Benjamin, Tr. 3516-3517). Bulldog Battery received a letter from Microporous notifying it that Microporous would be lowering its pricing to Bulldog Battery in order to come close to Daramic's pricing. Roger Berger told Mr. Benjamin that Microporous was lowering Bulldog Battery's pricing because "Well, we want to stay competitive. We want to keep your business." (Benjamin, Tr. 3516-3517). Microporous's pricing was competitive and Bulldog Battery was happy with the quality of Microporous's CellForce separator. (Benjamin, Tr. 3516, 3555).

909. This price adjustment took effect January 2, 2007. (Benjamin, Tr. 3547-3548).

**Response to Finding No. 909:**

Complaint Counsel has no specific response.

910. Less than one year after Microporous lowered the price of the .140 width separator, Bulldog received a price increase on the .140 width separator from Microporous consisting of a price increase and a rubber surcharge. (Benjamin, Tr. 3548-49).

**Response to Finding No. 910:**

To the extent that Respondent is suggesting that Microporous's price decrease was short term, it should be noted that the price decrease that Microporous gave Bulldog Battery was at a minimum 364 days. (Benjamin, Tr. 3547-3548). Moreover, the price increase that Bulldog Battery received from Microporous occurred because Microporous was simply passing along its cost. (Benjamin, Tr. 3553).

Additionally, to the extent that Respondent is suggesting that .140 width is in mills, the evidence in the record contradicts this point. The .140 width separator that Bulldog purchases is a 140 rim or said another way 140 thousands. (Benjamin, Tr. 3535).

(iv) Post-Acquisition

911. Bulldog Battery continues to use the CellForce separator today for at least 95% of its battery separator requirements. (Benjamin, Tr. 3504, 3518, 3535-36).

**Response to Finding No. 911:**

Complaint Counsel has no specific response.

912. Similar to the pre-acquisition time period, post-acquisition only one battery separator supplier produces the CellForce separator. (Benjamin, Tr. 3549).

**Response to Finding No. 912:**

Complaint Counsel has no specific response.

913. Bulldog has not qualified Daramic's HD separator product for use in its batteries. (Benjamin, Tr. 3564).

**Response to Finding No. 913:**

The proposition is contradicted by the fact that Bulldog Battery could use Daramic's HD in its motive batteries if it wanted to. Today, if there was an independent Microporous, Bulldog Battery would have a choice of purchasing HD separators manufactured by Daramic or CellForce separators manufactured by Microporous. (Benjamin, Tr. 3555).

914. Setting aside any quality issues during the Owensboro strike, Bulldog is pleased with the quality of the .140 width separator being manufactured by Daramic. (Benjamin, Tr. 3556).

**Response to Finding No. 914:**

The proposition is contradicted by the record evidence. When Bulldog Battery bought motive separators from Daramic prior to its switch to Microporous, those separators came from Daramic's Owensboro plant. When Bulldog Battery bought motive separators from an independent Microporous, those separators were manufactured at Microporous's Piney Flats facility. Now that Daramic has acquired Microporous, Bulldog Battery's motive separators still come from the Piney Flats facility. Thus, post-acquisition, there has been no change in the manufacturing location of Bulldog Battery's motive battery separators. (Benjamin, Tr. 3509).

915. Bulldog has had no discussions with Entek regarding its battery separator needs over the past several years. (Benjamin, Tr. 3521).

**Response to Finding No. 915:**

To the extent that Respondent is suggesting that Bulldog Battery failed to look at Entek as a possible motive separator supplier, this assertion is contradicted by the evidence. In the past Entek has refused to supply separators for this application despite a request to do so by Bulldog Battery. (Benjamin, Tr. 3519). Based on its conversation with Entek about a supply relationship, Bulldog Battery concluded that Entek was simply not interested in supplying industrial battery applications with separators. After Entek told Bulldog Battery that it was "not interested in getting into the industrial. We don't want to manufacture the material that you're using, and we're quite happy with the market that we have. So, we're going to stay there." Bulldog Battery took Entek off its supplier list and no longer pursued them as a supplier of motive battery separators. (Benjamin, Tr. 3520-3521). Entek has never approached Bulldog Battery in an effort to supply its motive separator needs. (Benjamin, Tr. 3521).

(v) Price Adjustments

916. When Daramic was forced to implement an energy surcharge in 2008, Bulldog accepted the surcharge. (Benjamin, Tr. 3521).

**Response to Finding No. 916:**

Complaint Counsel has no specific response.

917. Daramic also notified Bulldog of a price increase effective January 1, 2009. (Benjamin, Tr. 3521-3522).

**Response to Finding No. 917:**

Complaint Counsel has no specific response.

918. Daramic's energy surcharge and 2009 price adjustment were based on raw material cost increases. (Benjamin, Tr. 3523).

**Response to Finding No. 918:**

The proposition is contradicted by the record evidence. Bulldog Battery has no ability to determine whether these price increases are justified by increases in Daramic's raw material costs. (Benjamin, Tr. 3524-3525). However, compared to past pricing increases from motive separator suppliers, the President of Bulldog Battery feels the 10% price increase is "pretty exorbitant."

(Benjamin, Tr. 3525). For example, in the five year period during which Bulldog Battery purchased CellForce separators from Microporous, the cumulative price increases from Microporous totaled about 3% and the largest price increase was 1-1/2%. (Benjamin, Tr. 3526).

In the past, Bulldog Battery would have been able to assess whether the costs increases were justified by comparing the cost increases Daramic announced to those that Microporous announced. (Benjamin, Tr. 3523). If Bulldog Battery got a price increase letter "... from one and not the other, that would raise some questions." (Benjamin, Tr. 3524-3525).

919. Bulldog did not protest Daramic's price adjustments because Bulldog understood Daramic was just passing along its cost increases. (Benjamin, Tr. 3553-3554).

**Response to Finding No. 919:**

The proposition is contradicted by the record evidence. After Daramic notified Bulldog Battery that a ten percent price increase effective January 1, 2009 would be occurring, Mr. Benjamin, the President, stated he did not try to negotiate a lower price with Daramic because "[t]here was no way to negotiate a lower price. There was no place to go." (Benjamin, Tr. 3522). After the announced price increase Bulldog Battery did not look to source their needs from another motive battery separator manufacture because there is no other supplier. (Benjamin, Tr. 3526).

920. In 2009, Daramic lowered the price of the .140 width separator to Bulldog by rescinding the energy surcharge. (Benjamin, Tr. 3554).

**Response to Finding No. 920:**

The proposition is contradicted by the record evidence. Although Daramic may have discontinued the price increase that was called the "energy surcharge," a new energy related price increase took its place in 2009. Bulldog Battery received a price increase letter that stated prices would increase by 10% on January 1, 2009. One of the reasons for this 10% price increase according to Daramic was the "unprecedented increases in energy," which included natural gas and electricity. (PX0415).

(vi) Owensboro Strike

921. In the fall of 2008, a strike at Daramic's Owensboro facility resulted in Bulldog receiving partial shipments from Daramic. (Benjamin, Tr. 3529, 3531).

**Response to Finding No. 921:**

The proposition is contradicted by the record evidence. On two separate occasions Bulldog Battery was forced to shutdown part of its motive battery manufacturing operations for two days because it had not received any shipments of separators. (Benjamin, Tr. 3532-3533). Because Bulldog Battery shutdown part of its motive battery manufacturing operations for a total of four days during the Owensboro strike, Bulldog Battery's customers experienced delayed deliveries. (Benjamin, Tr. 3532-3533). Bulldog Battery could not get motive separators from another separator producer in order to save part of its motive battery building operation from being shutdown because Daramic is the only manufacturer of motive separators today. (Benjamin, Tr. 3533).

922. Daramic stayed in constant communication with Bulldog during the course of the Owensboro strike and informed Bulldog that it was using all means necessary to fulfill Bulldog's separator supply needs. (Benjamin, Tr. 3551-3552).

**Response to Finding No. 922:**

The proposition is contradicted by the record evidence. Not one person at Daramic called anyone at Bulldog Battery to tell them that there was a strike going on at Daramic's Owensboro plant and that Bulldog Battery would be receiving partial shipments. (Benjamin, Tr. 3529-3532). Mr. Benjamin called his former Daramic salesman, Randy Hanschu, to tell him that Bulldog Battery was about to run out of motive separators that afternoon. Randy Hanschu told him that there was a strike in the Owensboro plant. (Benjamin, Tr. 3531-3532). Mr. Benjamin then called Tucker Roe to explain the grave circumstances that Bulldog Battery was about to be facing if Daramic did not immediately ship more motive separators to them. (Benjamin, Tr. 3532).

923. In fact, Daramic informed Bulldog that it would attempt to get Bulldog as much of its requested supply as possible during the strike. (Benjamin, Tr. 3531).

**Response to Finding No. 923:**

The proposition is contradicted by the record evidence. Daramic informed Bulldog Battery after it had already been receiving partial shipments of motive separators and after Mr. Benjamin called both Randy Hanschu and Tucker Roe to explain that Bulldog Battery was about to run out of motive separators and would have to close part of its motive battery building operation. (Benjamin, Tr. 3529-3532).

924. Bulldog threatened legal action against Daramic because of the supply issues during the Owensboro strike. (Benjamin, Tr. 3552).

**Response to Finding No. 924:**

Complaint Counsel has no specific response.

925. Bulldog did not commence any legal proceedings against Daramic, however, because it was Bulldog's opinion that Daramic was doing everything within its power to supply Bulldog with separator material. (Benjamin, Tr. 3552).

**Response to Finding No. 925:**

The proposition is contradicted by the record evidence. According to Mr. Benjamin, who stated twice that the legal proceedings against Daramic did not commence because legal action would not have been cost effective. (Benjamin, Tr. 3552, 3562). Mr. Benjamin went on to explain the reason in more detail, when given the opportunity. He stated the suit "was kind of a veiled threat, because I was desperate to get material, and I figured if I threatened with some legal action, it might give me some influence on their response... Bringing a legal action for four days' lost production would not be practical." (Benjamin, Tr. 3562).

**VI. The Competition**

A. Entek

a. Company Background

926. Entek consists of three companies: Entek Holding Company, Entek International LLC and Entek International Ltd. Entek Holding Company is a holding company that controls and operates Entek International LLC, which is located in Lebanon, Oregon, and Entek International

Ltd., which is located in the United Kingdom. (Weerts, Tr. 4450). Unless otherwise stated, "Entek" refers to all of them.

**Response to Finding No. 926:**

Complaint Counsel has no specific response.

927. { [REDACTED] } (RX00116, *in camera*). Entek is the largest battery separator manufacturer for SLI in North America { [REDACTED] }. (Gilchrist, Tr. 624; RX00124, *in camera*).

**Response to Finding No. 927:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0949 at 190-214, *in camera*; PX1833 at 013-065, *in camera*, PX0033 at 041 (Simpson report), *in camera*; CCFOF 305). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (RX00124, *in camera*).

928. { [REDACTED] } (Roe, Tr. 1365, *in camera*; Gillespie, Tr. 3126, 3128, *in camera*). { [REDACTED] } (Gillespie, Tr. 3125, *in camera*, RX00116 at 006, *in camera*).

**Response to Finding No. 928:**

{ [REDACTED] }  
(Gillespie, Tr. 3128, *in camera*). { [REDACTED] }  
[REDACTED] } (Weerts, Tr. 4503-4504, *in camera*). However, Entek's reputation is that it does not manufacture industrial battery separators. (Gilchrist, Tr. 429-430 (Entek has chosen to focus on the SLI separator market); Benjamin, Tr. 3519-3521 (Entek not interested in supplying separators to Bulldog Battery despite a direct request from Bulldog); Gillespie, Tr. 3037, *in camera* { [REDACTED] }  
[REDACTED] }; Gillespie, Tr. 3129, *in camera* { [REDACTED] }  
[REDACTED]

[REDACTED]; Burkert, Tr. 2353, *in camera* { [REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED] } (Weerts, Tr. 4509, *in camera* { [REDACTED] });

Weerts, Tr. 4515-4516, *in camera* { [REDACTED]

[REDACTED] }; PX1902 at 001, *in camera*; Gillespie, Tr. 3129-

3135, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED] } (Godber, Tr. 288-290 (Trojan worked

with Entek in 1990's on deep cycle separator that did not perform adequately, and does not

believe that Entek has any new technology for this application); PX1515 at 002, *in camera*

{ [REDACTED]

[REDACTED] }; Gilchrist, Tr.

363, 365, 389-390 (Entek unlikely to develop a separator for the deep-cycle market because it

was unsuccessful in developing a competitive product for this market in 1996, and Entek's

separators are based on polyethylene material which is inert and has no effect on inhibiting the

antimony transfer process.))

929. A company related to Entek is in the business of selling equipment that can be used to make a PE line. (Hauswald, Tr. 1167). { [REDACTED]

[REDACTED] } (RX00146 at 002, *in camera*).

**Response to Finding No. 929:**

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4498-4499, *in camera*). { [REDACTED]

[REDACTED]

(RX00015 at 002, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00146 at 002, *in camera*).

930. [REDACTED] } (Weerts, Tr. 4456, *in camera*;  
RX00114 at 004, *in camera*).

**Response to Finding No. 930:**

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr.

4504, *in camera*).

931. [REDACTED] } (RX00114 at 006, *in camera*). {  
[REDACTED] } (RX00114 at 006-07, *in camera*).

**Response to Finding No. 931:**

Complaint Counsel has no specific response.

932. [REDACTED] } (Weerts, Tr. 4457-4458, *in camera*).

**Response to Finding No. 932:**

Complaint Counsel has no specific response.

933. Entek serves the world from only two facilities, one in North America and one in the U.K. (Weerts Tr. 4450-51) { [REDACTED] } (Weerts, Tr. 4460, *in camera*; RX0115 at 002, *in camera*). { [REDACTED] } (Weerts, Tr. 4460, *in camera*). { [REDACTED] } (Weerts, Tr. 4460, *in camera*).

Response to Finding No. 933:

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Entek has a manufacturing plant in

North America where North American battery manufacturers have a strong preference for local

supply. (Leister, Tr. 4007-4009, 4020 (East Penn prefers local supply to reduce supply risk);

Balcerzak, Tr. 4129-4130 (sourcing from overseas would interfere with efforts to maintain just in

time delivery of separator supply); Douglas, Tr. 4080 (Douglas has a preference for local supply

in order to reduce distance, time, and travel, and to maintain just-in-time deliveries and facilitate

quick response from separator suppliers); Axt, Tr. 2108 (EnerSys prefers to have local suppliers

in North America to reduce shipping costs, inventory carrying costs, freight forward fees, lead

times, timeliness of supply, and duties); Gillespie, Tr. 3034-3037, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED]

[REDACTED] } (RX00114 at 024-077, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (RX00115 at 003, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Roe, Tr. 1233-1234; Thuet, Tr. 4357-4358, *in camera*).

934. { [REDACTED] } (Weerts, Tr. 4461, *in camera*).

**Response to Finding No. 934:**  
Complaint counsel has no specific response.

935. { [REDACTED] } (Weerts, Tr. 4461, *in camera*). { [REDACTED] } (Weerts, Tr. 4461-62, *in camera*).

**Response to Finding No. 935:**  
Complaint counsel has no specific response.

936. { [REDACTED] } (RX00117, *in camera*; Weerts Tr. 4465-4466, *in camera*). { [REDACTED] } (RX01001, *in camera*; RX00114, *in camera*; PX0907, *in camera*; PX1833)

**Response to Finding No. 936:**  
Complaint Counsel has no specific response.

937. { [REDACTED] } (Weerts, Tr. 4466-67, *in camera*).

**Response to Finding No. 937:**  
Complaint Counsel has no specific response.

938. { [REDACTED] } (Weerts, Tr. 4492, *in camera*). { [REDACTED] } (Weerts, Tr. 4456-57, *in camera*)

**Response to Finding No. 938:**  
{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand); *see also* PX1833 at 008, *in camera* { [REDACTED] } { [REDACTED] }

[REDACTED]

[REDACTED] } (RX00114 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (PX1806 at 001, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4503-4504, *in camera*; RX00114 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] }

(Weerts, Tr. 4504, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (RX00014 at 008, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4515-4516, *in camera*).

{ [REDACTED]

[REDACTED] } (Weerts, Tr. 4515-

4516, *in camera*; see also RX00114 at 008, *in camera* { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr.

4516, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4516, *in camera*).

{ [REDACTED]  
[REDACTED]

[REDACTED] } (Weerts, Tr. 4492-

4493, *in camera*; PX1833 at 004, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED] } (PX1830 at 011, *in camera*).

939. { [REDACTED]  
[REDACTED] } (RX00114 at 005, *in camera*). { [REDACTED]  
[REDACTED] } (RX00114 at 005-06, *in camera*). { [REDACTED]  
[REDACTED] } (RX00114 at 006, *in camera*).

**Response to Finding No. 939:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (RX00114, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4493-4494, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4515, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4515-4516, *in camera*). { [REDACTED]  
[REDACTED] }

(Weerts, Tr. 4516, *in camera*). { [REDACTED]  
[REDACTED] } (RX00114 at 008, *in camera*).

940. { [REDACTED] } (Weerts, Tr. 4522, *in camera*). { [REDACTED] } (Weerts, Tr. 4489, *in camera*).

**Response to Finding No. 940:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }  
{ [REDACTED]  
[REDACTED]  
[REDACTED] } (See e.g., Weerts, Tr. 4484, *in camera* { [REDACTED]  
[REDACTED] }; PX1810 at 001, *in camera* { [REDACTED]  
[REDACTED] }; Benjamin, Tr. 3519-3521 (Bulldog Battery understood that Entek did not want to bid on its industrial separator business)).

{ [REDACTED]  
[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative

Demand; see also CCRF 938)). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3130, 3134-3135, *in camera*).

[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera* { [REDACTED]  
[REDACTED] }; Weerts, Tr. 4509, *in camera*; Gillespie, Tr.

3040, *in camera* { [REDACTED]  
[REDACTED] }; PX1823 at 001, *in camera* { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*; Gagge, Tr. 2522, *in camera*).

b. Entek's Competitors

941. { [REDACTED]  
[REDACTED] } (RX00115 at 007, *in camera*; Weerts, Tr. 4465, *in camera*; RX00115 at 007-08). { [REDACTED]  
[REDACTED] } (RX00124 at 005, *in*

camera; Weerts, Tr. 4468, *in camera*). { [REDACTED] } (RX00124 at 005, *in camera*; Weerts, Tr. 4468, *in camera*).

**Response to Finding No. 941:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502, *in camera*). { [REDACTED] }  
[REDACTED] }  
(Weerts, Tr. 4500-4503, *in camera*). { [REDACTED] }  
[REDACTED] } (Weerts, Tr. 4501, *in camera*).

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*).

942. { [REDACTED] } (RX00124 at 004, *in camera*). { [REDACTED] } (RX00124 at 004, *in camera*). { [REDACTED] } (Weerts, Tr. 4468-69, *in camera*).

**Response to Finding No. 942:**

The material cited by Respondent mischaracterizes the evidence and is directly contradicted by Entek's testimony and documents. { [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (RX00124 at 004, in camera). [REDACTED]

[REDACTED]

(RX00124 at 004, in camera [REDACTED]

[REDACTED]).

[REDACTED]

[REDACTED]

(RX00355 at 32, in camera [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; RX00259 at 027, in camera [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (Weerts, Tr. 4517, in camera).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Weerts, Tr. 4500-4503, 4517, in camera).

c. Entek's Current Excess Capacity Crisis

943. [REDACTED]

[REDACTED] (Weerts, Tr. 4459-60, in camera). [REDACTED]

[REDACTED] (Weerts, Tr. 4495-96, in camera).

**Response to Finding No. 943:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*; Gagge, Tr. 2521-2522, *in camera*; Simpson, Tr. 3195-3196, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3408, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3442, *in camera*; see also 3024-3025, *in camera*). [REDACTED]

(Simpson, Tr. 3197, *in camera*). As a matter of economic theory, most-favored nation clauses tend to make firms less competitive by preventing them from making selective price cuts.

(Simpson, Tr. 3197-3198). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3224, *in camera*,  
*see generally* 3209-3224, *in camera*).

944. { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4522-23, *in camera*). { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4522-23, *in camera*).

**Response to Finding No. 944:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson,  
Tr. 3195, *in camera*). { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*).  
{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (Gillespie, Tr. 3024-3025, *in camera*; Simpson, Tr. 3442, *in camera*; see also 3024-3025, *in camera*).

[REDACTED]  
[REDACTED] (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand; see also CCRF 938). [REDACTED]

[REDACTED]  
[REDACTED] (PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*). [REDACTED]

[REDACTED] (Gillespie, Tr. 3130, 3134-3135, *in camera*). [REDACTED]

[REDACTED] (PX1515 at 002, *in camera* [REDACTED]

[REDACTED]; Godber, Tr. 288-290 (Trojan worked with Entek in 1990's on deep cycle separator that did not perform adequately, and Trojan does not believe that Entek has any new technology for this application); Gilchrist, Tr. 363, 365 (Entek unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996, and Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process)).

[REDACTED]  
[REDACTED]  
[REDACTED] (PX1902 at 001, *in camera* [REDACTED]  
[REDACTED]; Weerts, Tr. 4509, *in camera*; Gillespie, Tr.

3040, *in camera* { [REDACTED] }; PX1823 at 001, *in camera* { [REDACTED] };  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*; Gagge, Tr. 2522, *in camera*; Simpson, Tr. 3195-3196, 3408, *in camera*).

945. Based on the foregoing findings of fact, the Court finds that Entek's excess capacity is significant economic motivation for Entek to pursue customers for all types of PE separators and to lower prices. The Court further finds that today's existing economic conditions and Entek's excess capacity are significant motivation for Entek to lower prices and compete aggressively based on price, which will constrain price increases by competitors, including Daramic.

**Response to Finding No. 945:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 943-944).

d. Entek's Growth

946. { [REDACTED] } (RX00133, *in camera*; Weerts, Tr. 4483, *in camera*). { [REDACTED] } (Weerts, Tr. 4470, *in camera*). { [REDACTED] } (RX00133, *in camera*; Weerts, Tr. 4483, *in camera*). { [REDACTED] } (RX01119, *in camera*). Additionally, Entek was recently approached by Trojan battery about becoming a second source of supply for Trojan at the 2009 BCI convention. (Godber, Tr. 278). Entek continues to compete with Daramic for East Penn's business. (Seibert, Tr. 4176-77).

**Response to Finding No. 946:**

[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] } (RX00116 at 004, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4470, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3022, *in camera*). [REDACTED]

[REDACTED] } (Gillespie, Tr.  
3021, 3124, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Gillespie, Tr. 3021, 3123, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]

(PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera* { [REDACTED] }  
[REDACTED] ); Gillespie, Tr.

3130, 3134-3135, *in camera* { [REDACTED] }

[REDACTED]

[REDACTED] ); PX1902 at 001, *in camera*; Gillespie, Tr. 3040, *in camera* { [REDACTED] }

[REDACTED] ); Gillespie, Tr. 3038-3039, *in camera* { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 2953-2954

(only one provider of deep cycle separators today); Gillespie, Tr. 2933 (Flex-Sil and HD are the only separators that meet the performance criteria of Exide's deep cycle batteries); Gillespie, Tr.

3041, *in camera* { [REDACTED] }

[REDACTED] }; Gillespie, Tr.

3049, *in camera* { [REDACTED] }

[REDACTED] }.

Moreover, prior to the acquisition, Microporous was positioned to win some of Exide's business and to become deeply established as a third competitor in the PE SLI market, thereby creating a more competitive environment in the PE SLI separator market. (Gillespie, Tr. 2976 (Exide had "full intention" of buying PE SLI separators in North America from Microporous

beginning in 2010); Gillespie, Tr. 2976-2977 (Exide wanted to multi-source its separator business because it felt that “the more competition that is in the marketplace, the better it would be in the long run, and the better from a cost standpoint we would be”)).

The material cited in the fourth sentence does not support the assertion that Entek approached Trojan about becoming a second supplier for Trojan. (Godber, Tr. 278). Furthermore, Trojan’s testimony directly contradicts the assertion that Entek might be a second source for Trojan’s deep cycle separator needs. (Godber, Tr. 289 (Trojan does not believe that Entek has the technology to make deep cycle separators); Godber, Tr. 290 (Entek has not called on Trojan with regards to deep cycle separators since the mid-90’s)).

The material cited in the fifth sentence does not support the assertion that Daramic competes for East Penn’s motive, stationary or deep cycle business, and is contradicted by testimony at trial. (Leister, Tr. 4027-4028 (Entek not making motive separators); Leister, Tr. 4028 (Entek not approved for East Penn’s industrial separators); Leister, Tr. 4041 (Entek not price competitive for separators for deep cycle)). [REDACTED]

[REDACTED] } (Leister, Tr. 3998-3999, *in camera*; RX01519 at 001, *in camera*; Leister, Tr. 4007-4009 (East Penn wants local supply from an east coast supplier); Leister Tr. 4020-4021 (East Penn does not believe that Entek will open up an east coast manufacturing facility); Leister, Tr. 4007-4021 (East Penn negotiated with Microporous about possible supply of PE SLI separators in order to obtain more local supply of PE SLI separators)).

947. From the above findings, the Court further finds that Entek is highly motivated to produce industrial PE separators and to be a deterrent to Daramic, or anyone else in raising prices.

**Response to Finding No. 947:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. Daramic did not lower prices on industrial PE separators due to competition from Entek prior to the acquisition of Microporous, nor has it done so since the acquisition of Microporous. (Roe, Tr. 1264-1266, 1812-1813, 1278-1279; (PX0911 (Roe, Dep. at 16, *in camera*)). [REDACTED]

(CCRF 938-940, 943-946).

(a) JCI

948. [REDACTED] (RX00133, *in camera*). [REDACTED] (Weerts, Tr. 4469, *in camera*).

**Response to Finding No. 948:**  
Complaint Counsel has no specific response.

949. [REDACTED] (Weerts, Tr. 4472, *in camera*; RX00131, *in camera*). [REDACTED] (RX00133, *in camera*; Weerts, Tr. 4469, *in camera*).

**Response to Finding No. 949:**  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (PX1510 at 006, *in camera*; see also Hall, Tr. 2884, *in camera*) ([REDACTED])

950. [REDACTED] (Hauswald, Tr. 909, *in camera*).

**Response to Finding No. 950:**  
Complaint Counsel has no specific response.

951. { [REDACTED] }  
(RX00133, *in camera*; Weerts, Tr. 4476, *in camera*).

**Response to Finding No. 951:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2874, *in camera*;  
RX00072, *in camera*).

952. { [REDACTED] } (Weerts, Tr. 4473-74, *in camera*). { [REDACTED] } (RX00129 at  
001-02, *in camera*; Weerts, Tr. 4474, *in camera*).

**Response to Finding No. 952:**

Complaint Counsel has no specific response.

953. { [REDACTED] }  
[REDACTED] } (RX00133, *in camera*, Weerts, Tr. 4478, *in camera*).

**Response to Finding No. 953:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3197-3198, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). { [REDACTED] }  
[REDACTED]

[REDACTED]

(Simpson, Tr. 3224, *in camera*, see generally 3209-3224, *in camera*).

[REDACTED]

[REDACTED] (Simpson, Tr. 3390-3391, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED] (Simpson, Tr. 3195, *in camera*). [REDACTED]

[REDACTED]

(Simpson, Tr. 3196-3197, *in camera*).

[REDACTED]

[REDACTED] (Simpson, Tr. 3441-3442, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3442, *in camera*; see also 3024-3025, *in camera*).

954. [REDACTED] (RX00133, *in camera*, Weerts, Tr. 4477, *in camera*).

**Response to Finding No. 954:**

Complaint Counsel has no specific response.

955. { [REDACTED] } (RX00131, *in camera*, Weerts, Tr. 4458, *in camera*). { [REDACTED] } (Weerts, Tr. 4458, *in camera*).

**Response to Finding No. 955:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1510 at 006,  
*in camera*; see also Hall, Tr. 2884, *in camera* { [REDACTED] }  
[REDACTED] ))

956. { [REDACTED] } (Weerts, Tr. 4496, *in camera*). { [REDACTED] } (Weerts, Tr. 4458, 4496, *in camera*). { [REDACTED] } (Weerts, Tr. [REDACTED] ) (Weerts, Tr. 4459, *in camera*; Hall Tr. 2828, *in camera*; RX00065 at 007, *in camera*).

**Response to Finding No. 956:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED] (See CCRF 955).

957. { [REDACTED] } (Weerts, Tr. 4457-58, *in camera*). { [REDACTED] } (Weerts, Tr. 4458, *in camera*).

**Response to Finding No. 957:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]

[REDACTED] } (Hall, Tr. 2886-2887, *in camera*). { [REDACTED]

[REDACTED] } (Hall, Tr. 2887, *in camera*).

958. { [REDACTED] } (Weerts, Tr. 4496-97, *in camera*). { [REDACTED] } (Weerts, Tr. 4497, *in camera*).

**Response to Finding No. 958:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2875, *in camera*).

{ [REDACTED] }  
[REDACTED]  
[REDACTED] }

(Hall, Tr. 2886-2887, *in camera*).

959. { [REDACTED] } (Weerts, Tr. 4479-80, *in camera*). { [REDACTED] } (Hauswald, Tr. 943, *in camera*). { [REDACTED] } (RX000133, *in camera*; Weerts, Tr. 4477, *in camera*)

**Response to Finding No. 959:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4480, *in camera*; Hall, Tr. 2825, *in camera*). { [REDACTED] }

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (Hall, Tr. 2705, 2874, *in camera*; PX1515 at 002, *in camera*; PX1514, *in camera*).

960. { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4521, *in camera*).

**Response to Finding No. 960:**

{ [REDACTED]  
[REDACTED] } (Hall, Tr.  
2747, *in camera*; Weerts, Tr. 4521, *in camera*), { [REDACTED]  
[REDACTED]  
[REDACTED] }

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 008, *in camera*). According to Daramic, { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 004, 007-008, *in camera*).

{ [REDACTED]  
[REDACTED] } (PX0265 at 010, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 011, *in camera*).

Because it is the separator suppliers that have the power in the industry, Daramic's leadership is regularly called upon to demonstrate pricing power. (PX0832 at 004 ("demonstrating pricing power in the market regardless of movements in material and energy costs."); PX0468 at 001, *in camera* (Mr. Toth's goals for 2008 included { [REDACTED] }); PX0204 at 002 (Mr. Hauswald's 2006 goals included "[r]aise Daramic prices where possible to demonstrate pricing power regardless of cost movements").

Daramic's assessment that battery manufacturers lack buying power is confirmed by customer testimony at trial. (*See, e.g.*, Gillespie, Tr. 3002, *in camera* (Exide believes that negotiations with Daramic are { [REDACTED] }); Gillespie, Tr. 3066-3068 (Exide has not used its size as leverage in negotiations with Daramic); Gillespie, Tr. 3097 (Exide has not used pressure points to negotiate and get their will); Craig, Tr. 2565 (EnerSys does not consider itself a power buyer, "not at all, not close."); Benjamin, Tr. 3525, 3522 (Bulldog Battery received a 10% post-acquisition price increase which Bulldog considered "pretty exorbitant" but "[t]here was no way to try to negotiate a lower price. There was no place to go"); Godber, Tr. 242, *in camera* (Trojan concerned about Daramic's acquisition of Microporous because { [REDACTED] }); Godber, Tr. 133, 232-233, 239-242, *in camera* (notwithstanding the fact that Trojan is the world's largest manufacturer of deep cycle batteries, { [REDACTED] }); 961 { [REDACTED] } (RX00132, *in camera*). { [REDACTED] } (Weerts, Tr. 4483, *in camera*).

**Response to Finding No. 961:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4483, *in camera*;

RX00132, *in camera*).

962. { [REDACTED] }  
(RX00150, *in camera*; RX183, *in camera*).

**Response to Finding No. 962:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } In fact, JCI's testimony at trial was that it did

not know of any separator manufacturer other than Daramic that can supply a deep cycle battery separator that will work in JCI's batteries. (Hall, Tr. 2705).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (RX00183 at 002, *in camera* { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

(b) Exide

963. { [REDACTED] } (Weerts, Tr. 4483, *in camera*; Gillespie, Tr. 3021, *in camera*). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3126, *in camera*). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3021, *in camera*).

**Response to Finding No. 963:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3038-3039, in  
camera). { [REDACTED]  
[REDACTED] } (PX1086, in camera; Gillespie, Tr.  
3021, in camera). { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3021, 3123, in camera). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3037, in camera).

964. { [REDACTED]  
[REDACTED] } (RX00114 at 008, in  
camera). { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4488-99, in camera). { [REDACTED]  
[REDACTED] } (RX00114 at 008, in camera).  
{ [REDACTED]  
[REDACTED] } (Weerts, Tr. 4489, in camera).

**Response to Finding No. 964:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4484, in camera; PX1815 at 001, in camera). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4507, in camera; see also

PX1812 at 001, *in camera* { [REDACTED]  
[REDACTED] }.

[REDACTED]  
[REDACTED] }

(Gillespie, Tr. 3129, *in camera*). { [REDACTED]  
[REDACTED]

[REDACTED] }  
[REDACTED] }

[REDACTED] } (Gillespie, Tr. 3129, *in camera*; PX1902 at 001,  
*in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3129-3130, *in camera*).

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3040, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] }

(PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera* { [REDACTED]

[REDACTED] }; Gillespie, Tr.

3130, 3134-3135, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }; PX1902 at 001, *in camera*; Gillespie, Tr. 3040, *in camera* { [REDACTED]

[REDACTED] }; Gillespie, Tr. 3038-3039, *in*

*camera* { [REDACTED] }.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4515-4516, *in camera*; see also RX00114 at 008, *in camera*

{ [REDACTED]

[REDACTED] }; PX1902 at 001, *in camera* { [REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED] }

(PX1806 at 001, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4515-4516, *in camera*).

965. { [REDACTED] }

(Weerts, Tr. 4485, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3021, *in camera*).

**Response to Finding No. 965:**

{ [REDACTED]

[REDACTED]

[REDACTED] } (Weerts,

Tr. 4484-4486, *in camera*).

966. { [REDACTED]

[REDACTED] } (RX00145, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4484, *in camera*).

{ [REDACTED] }  
(Weerts, Tr. 4485, *in camera*).

**Response to Finding No. 966:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1812 at 001, *in camera*; see also Weerts,

Tr. 4507, *in camera* [REDACTED]

[REDACTED]

[REDACTED]; RX00114 at 008, *in camera* { [REDACTED] [REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3040, *in*

*camera*; see also CCRF 964).

967. { [REDACTED]

[REDACTED] } (RX00141, *in camera*; Gillespie, Tr. 3124, *in camera*).

**Response to Finding No. 967:**

Complaint Counsel has no specific response.

968. { [REDACTED]

} (Weerts, Tr. 4489, *in camera*). {

[REDACTED] } (Weerts, Tr. 4522, *in camera*). {

[REDACTED] } (Weerts, Tr. 4522-23, *in camera*).

**Response to Finding No. 968:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

(Weerts, Tr. 4489, 4522-4523, *in camera*). { [REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED] }

(PX1902 at 001, *in camera* { [REDACTED]

[REDACTED] }; Weerts, Tr. 4515-4516, *in camera*; { [REDACTED]

[REDACTED] }; PX1806 at 001, *in camera* { [REDACTED]

[REDACTED] }; Weerts, Tr. 4515-4516, *in camera* { [REDACTED]

[REDACTED] }; RX00114 at 008, *in*

*camera*; { [REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3124-3125, *in camera*; *see also* CCRF 964).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Simpson, Tr. 3195, *in camera*).

969. { [REDACTED] } (Weerts, Tr. 4494, *in camera*).

**Response to Finding No. 969:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00114 at 008, *in*  
*camera* (Entek's response to FTC Civil Investigative Demand); *see also* PX1833 at 008, *in*  
*camera* { [REDACTED]

[REDACTED] { [REDACTED]  
[REDACTED] }

(PX1806 at 001, *in camera*). { [REDACTED]  
[REDACTED] } (RX00114  
at 008, *in camera*).

{ [REDACTED]  
[REDACTED] } (Weerts, Tr. 4493-4494, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4515, *in camera*). { [REDACTED]  
[REDACTED]

[REDACTED] } (RX00114 at 008, *in camera*; *see also* Weerts, Tr. 4515-  
4516, *in camera* { [REDACTED]

[REDACTED]  
[REDACTED] }; RX00114 at 008, *in camera* { [REDACTED]  
[REDACTED]  
[REDACTED] }

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (RX00183 at 002, *in camera* { [REDACTED]

[REDACTED]  
[REDACTED] }; *see also*

Godber, Tr. 289 (Entek does not have the technology to make deep cycle separators)).

970. { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3037, *in camera*).

**Response to Finding No. 970:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX1902 at 001, *in camera* {[REDACTED]

[REDACTED] }); Weerts, Tr. 4515-4516, *in camera*; {[REDACTED]

[REDACTED]

[REDACTED] }); PX1806 at 001, *in camera* {[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX1902 at 001, *in camera*;

Gillespie, Tr. 3129, *in camera*; {[REDACTED]

[REDACTED] }); Gillespie, Tr. 3130, 3134-3135, *in camera* {[REDACTED]

[REDACTED]

[REDACTED] }); PX1902 at 001, *in camera*; Gillespie, Tr. 3040, *in camera* {[REDACTED] });

Gillespie, Tr. 3038-3039, *in camera* {[REDACTED] } {[REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3040, *in camera*; see also CCRF 964).

971. [REDACTED]

[REDACTED] } (RX00146, *in camera*; Weerts, Tr. 4487-88, *in camera*). [REDACTED]

[REDACTED] } (Weerts, Tr. 4490, in camera).

**Response to Finding No. 971:**

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3021, in camera) { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3021, 3040, in camera).

972. { [REDACTED] } (Weerts, Tr. 4487-88, in camera). { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4488, in camera).

**Response to Finding No. 972:**

{ [REDACTED]  
[REDACTED] }  
(Gillespie, Tr. 3021, in camera) { [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3021, 3040, in camera).

e. Entek as a Supplier

973. { [REDACTED] } (Weerts, Tr. 4463, in camera.)

**Response to Finding No. 973:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4510-4511, in camera).

f. Entek's Relationship with Dumas

974. Around 2000, Entek entered into an alliance with Dumas, an AGM manufacturer. (Roe, 1745; RX151). Entek and Dumas presented themselves jointly in the marketplace. (Roe, Tr. 1745). This prompted Daramic to enter into a similar alliance with H&V. (Roe, Tr. 1745).

**Response to Finding No. 974:**

The proposition that Daramic entered into an alliance with H&V because of the Entek/Dumas alliance is contradicted by evidence that Daramic entered into a Cross Agency Agreement with H&V in order to keep H&V from entering the PE separator markets. (PX0169 at 001; CCFOF 1167-1196)

The statement in the second sentence attributed to Mr. Roe is hearsay, offered for state of mind, and not offered for the truth of the matter asserted. (Roe, Tr. 1745). Polypore has failed to identify the statement as such pursuant to the court's Order on Post Trial Briefs of June 16, 2009, and they should be stricken.

g. Summary Findings

975. Based on the foregoing findings, the Court further finds that: Entek's 2008 capacity expansion is a significant factor which impacts the supply of PE battery separators because it increases the PE battery separator production capacity worldwide and in North America.

**Response to Finding No. 975:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (CCRF 928, 938-939, 942-944, 947, 953).

976. Entek's underutilized capacity will result in its aggressive solicitation of new business and the reduction of its prices. Entek's extra capacity and the global economy are factors that will constrain prices for all battery separator manufacturers, including Daramic.

**Response to Finding No. 976:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (CCRF 928, 938-939, 942-944, 947, 953).

B. Other Competitors

a. BFR

977. [REDACTED]

[REDACTED] (RX00049; RX00050 at 004, *in camera*; Hauswald, Tr. 1033, *in camera*; RX32, *in camera*). James Kung, who built the PE lines that are currently in operation at BFR, was also a partial owner when BFR was established. (Hauswald, Tr. 1033). [REDACTED] (RX00069, *in camera*).

**Response to Finding No. 977:**

Respondent attempts to support this finding with a document (RX00069) it did not use at trial.

978. [REDACTED] (RX00053, *in camera*; RX00052, *in camera*; Hall, Tr. 2715-16; Hall, Tr. 2820-21, *in camera*).

**Response to Finding No. 978:**

[REDACTED] (Hall, Tr. 2820-2821, *in camera*).

979. [REDACTED] (RX00032, *in camera*; Hall, Tr. 2825, *in camera*).

**Response to Finding No. 979:**

Complaint Counsel has no specific response.

980. Currently, BFR operates four production lines. (Hauswald, Tr. 1034). [REDACTED] (RX00032, *in camera*; Hall, Tr. 2769, 837-38, 2860, *in camera*; PX0922 (Roe, IH at 328), *in camera*).

**Response to Finding No. 980:**

Complaint Counsel has no specific response.

981. [REDACTED] (Hall, Tr. 2765, *in camera*). [REDACTED] (RX00032, *in camera*; Hall, Tr. 2766, *in camera*). [REDACTED] (RX00032, *in camera*; Hall, Tr. 2770, *in camera*).

**Response to Finding No. 981:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (Hall, Tr. 2765, in camera). [REDACTED]  
[REDACTED]

(Hall, Tr. 2765, in camera). [REDACTED]

[REDACTED] (Hall, Tr. 2878-2879, in camera). [REDACTED]

[REDACTED] (Hall, Tr. 2771, in camera), [REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2771-2777, in camera).

982. [REDACTED]  
[REDACTED] (RX00032, in camera).

**Response to Finding No. 982:**

Complaint Counsel has no specific response.

983. [REDACTED] (Hall, Tr. 2844-45, in camera). [REDACTED] (RX00057, in camera).  
[REDACTED]  
[REDACTED] (Hall, Tr. 2769-2770, 2844, in camera).

**Response to Finding No. 983:**

[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2769-2770, 2844, in camera).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2735-2736, 2764, in camera).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2727-2735, *in camera*;  
PX1522 at 005, *in camera*; see generally CCFOF 213-229, 234-240, 243-246). { [REDACTED]  
[REDACTED]  
[REDACTED] } (CCFOF 208-212). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 172-173, *in camera*)). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265, at 018, *in camera*).

984. BFR also believes that it will continue to become more price competitive. (RX00056).

**Response to Finding No. 984:**

The material cited (RX00056) asserting that BFR will become more price competitive for sale to customers in North America as time moves on, was not used at trial, mischaracterizes the evidence, and is contradicted by documents and testimony on the record. The document cited by Respondent (RX00056) is dated from February 2007 and indicates that BFR will become more competitive when the fourth production line is added. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2727-2735, *in camera*; PX1522 at 005, *in camera*; see generally CCFOF 213-229, 234-240, 243-246). { [REDACTED]  
[REDACTED] } (Hall, Tr. 2735-2736, 2764, *in camera*).

[REDACTED]  
[REDACTED] (CCFOF 208-212). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (PX0907, (Kung, Dep. at 172-173, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] (PX0265, at 018, *in camera*).

985. [REDACTED]  
[REDACTED] (RX00050 at 011, *in camera*). JCI's intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers," and its operations could expand outside of Asia. (RX51; RX00055). [REDACTED]  
[REDACTED] (RX58, *in camera*).

**Response to Finding No. 985:**

[REDACTED]  
[REDACTED] (Hall, Tr. 2856, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2746, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2878, *in camera*;  
PX1509 at 009, *in camera*). [REDACTED]  
[REDACTED] (PX0907 (Kung  
Dep. at 186-187, *in camera*)).

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] (PX0907 (Kung, Dep. at 92, in camera)) { [REDACTED]  
[REDACTED] } (Hall, Tr. 2842, in camera; RX00058, in camera; see also PX0907 at 015 (Kung, Dep. at 106, in camera) { [REDACTED]  
[REDACTED] }; PX0907 at 015 (Kung, Dep. at 103, in camera) { [REDACTED]  
[REDACTED] }

986. BFR competes with both Entek and Daramic, as well as other smaller separator manufacturers. (Hauswald, Tr. p. 1034).

**Response to Finding No. 936:**

BFR competes with Entek and Daramic for sales in Asia, but to the extent that

Respondent alleges that BFR competes with Entek and Daramic for sales of separators in North America, [REDACTED] { [REDACTED] } Mr. Roe testified that Daramic had never competed with BFR for business in North America. (Roe, Tr. 1807). Moreover, Daramic has never had to make price concessions to customers in North America due to competition from BFR or any other Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] } (See generally, CCFOF 207-246). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, in camera). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, in camera). { [REDACTED]

[REDACTED]

[REDACTED] } (PX0907 (Kung Dep. at 186-187, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*).

987. Daramic's witnesses testified that Daramic has lost business to BFR, and that the business "goes back and forth." (Hauswald, Tr. 1034; Thuet, Tr. 4331, 4348, 4445).

**Response to Finding No. 987:**

To the extent that Respondent asserts that Daramic has lost business to BFR in North America, such assertion is contradicted by testimony at trial from Daramic's own witnesses. Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). [REDACTED] [REDACTED] } (Roe, Tr. 1807; Thuet, Tr. 4379-4380; Seibert, Tr. 4165, *in camera*; PX0902 (Keith Dep. at 81, 127-128, *in camera*); PX0907 (Kung, Dep. at 186-187, *in camera*)). Nor has Daramic ever lowered prices on separators sold to customers in North America due competition from BFR. (Roe, Tr. 1812-1813).

988. Using its access to competitive material, Daramic has tested BFR's PE separators and has found them to be comparable to Daramic's product, with no significant difference in the material. (Thuet, Tr. 4335-36).

**Response to Finding No. 988:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2771-

2773, *in camera*; see also CCFOF 983-986).

989. { [REDACTED] } (RX00048, in camera; RX00049; Hall, Tr. 2853-54, in camera).

**Response to Finding No. 989:**

{ [REDACTED] } (RX00049, in camera). { [REDACTED] } (PX0672 at 006, in camera). { [REDACTED] } (PX0672 at 006, in camera).

990. { [REDACTED] } (Hall, Tr. 2838-39, in camera).

**Response to Finding No. 990:**

{ [REDACTED] } (Hall, Tr. 2776-2777, in camera; see generally CCFOF983-986).

991. { [REDACTED] } (RX00059, in camera; RX00060, in camera; RX00025, in camera; RX0026, in camera; RX00027, in camera { [REDACTED] }; RX0061, in camera; RX00062, in camera). { [REDACTED] } (RX00061, in camera).

**Response to Finding No. 991:**

{ [REDACTED] } (See generally CCFOF 947-950, 966-967,

969, 972-974, 983-986). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2881, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Axt, Tr. 2218, *in camera*; see  
also Gagge, Tr. 2499, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2881, *in  
camera*). { [REDACTED] }  
{ [REDACTED] }  
(PX0907 (Kung, Dep. at 262, *in camera*); Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499,  
*in camera*). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2881-2882, *in  
camera*; PX0907 (Kung, Dep. at 291, *in camera*)). { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2881-2882, *in camera*).  
{ [REDACTED] }  
{ [REDACTED] }. (Axt, Tr. 2219, *in  
camera*). { [REDACTED] }  
{ [REDACTED] } (Axt, Tr. 2220, *in camera*).  
{ [REDACTED] }  
{ [REDACTED] } { [REDACTED] }  
(PX0907 (Kung, Dep. at 283, *in camera*)). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2880-2881, *in camera*).

Furthermore, none of the documents cited in this finding were used at trial.

992. { [REDACTED] } (Axt, Tr. 2218, *in camera*)

**Response to Finding No. 992:**  
Complaint Counsel has no specific response.

993. { [REDACTED] } (Burkert, Tr. 2388, *in camera*).

**Response to Finding No. 993:**  
{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Burkert, Tr. 2362, *in camera*;  
Gagge, Tr. 2498-2499, *in camera*; Axt, Tr. 2218, *in camera*; PX0907 (Kung, Dep. at 262), *in camera*)).

994. { [REDACTED] } (Gagge, Tr. 2500, *in camera*).

**Response to Finding No. 994:**  
{ [REDACTED] }  
[REDACTED]  
[REDACTED] } (Burkert,  
Tr. 2363-2364, *in camera*).

995. { [REDACTED] } (Hall,  
Tr. 2846-47, *in camera*). { [REDACTED] } (Thuet, Tr.  
at 4352, *in camera*) { [REDACTED] } (Thuet Tr. at 4353, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Hall, Tr. 2846-47, 2880, *in camera*).  
{ [REDACTED] } (Hall, Tr. 2894, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Thuet, Tr. 4434; RX00677, *in camera*).

**Response to Finding No. 995:**

{ [REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2880, *in camera*

{ [REDACTED] }

{ [REDACTED]

[REDACTED] } (Hall, Tr. 2846-2847, 2879, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } { [REDACTED]

[REDACTED]

[REDACTED] } (PX0903 (Thuet Dep. at 29,

*in camera* { [REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (See e.g., Axt. Tr. 2220, *in camera*; Gillespie, Tr. 3024-3025, *in camera*; CCFOF 207-246, 251).

{ [REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*; see also CCFOF 207-

246). { [REDACTED]

[REDACTED] } (Hall, Tr. 2727, *in camera*; PX1522 at 005, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1522 at 005, *in camera*; Hall, Tr.

2727, 2734-2735, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2735-

2736, 2764, *in camera*). [REDACTED]

[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 172-173, *in camera*)). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1522 at 005, *in camera*; see also CCFOF 234-242).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2745, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in camera* [REDACTED]

[REDACTED] } [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3024-3025, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (RX01497 at 001-002, *in camera*; see also Toth, Tr. 1404 (the Asian separator manufacturers are not selling separators in North America because the margins are not high enough)).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Roe, Tr. 1812-1813; Weerts, Tr. 4501, 4512, *in camera*; see also Weerts, Tr. 4502-4503, *in camera* [REDACTED]  
[REDACTED]  
[REDACTED] }

996. In addition to Entek and BFR, there are numerous companies throughout the world that compete with Daramic in the sale of battery separators. (Hauswald, Tr. 853, 859, *in camera*; Hauswald, Tr. 1032-37; RX00239, *in camera*). These companies have become prolific in the

past few years and their influence and reach is expanding rapidly. (Hauswald, Tr. 1032-37; Thuet, Tr. 4331, 4348, 4445).

**Response to Finding No. 996:**

Daramic competes with various companies for sales of separators in Asia and other parts of the world, but to the extent that Respondent alleges that Daramic competes in North America with any company other than Entek for sales of PE SLI separators, or has any competition whatsoever in North America for sales of deep-cycle, motive and/or UPS separators, [REDACTED]

[REDACTED] { [REDACTED] [REDACTED] [REDACTED] [REDACTED] }

Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). { [REDACTED]

[REDACTED] } (Roe, Tr. 1236-1237, 1807, 1812-1813; Thuet, Tr. 4379-4380; Seibert, Tr. 4165, *in camera*; PX0902 (Keith, Dep. at 81, 127-128, *in camera*); PX0907 (Kung, Dep. at 186-187, *in camera*)). Nor has Daramic ever lowered prices on separators sold to customers in North America due competition from any of the Asian battery separator manufacturers. (Roe, Tr. 1812-1813).

Notwithstanding post-acquisition price increases, Daramic has not lost any North American motive power or deep cycle business to any competitor since the acquisition of Microporous, nor has it had to adjust prices in North America on such separators due to competition from any other supplier since the acquisition of Microporous. (Roe, Tr. 1217-1218, 1236-1237, 1279, 1812-1813).

{ [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (See CCFOF 251-252). { [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED] }

(Weerts, Tr. 4500-4503, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501,

4512, *in camera*).

{ [REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 186-187, *in camera*)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2746, *in camera*).

b. NSG

997. { [REDACTED]

[REDACTED] } (PX0917 (Cullen, Dep. at 251), *in camera*;

PX0922 (Roe, IHT at 331-32, *in camera*). {

[REDACTED] } (Hauswald, Tr. 867, *in camera*).

**Response to Finding No. 997:**

Complaint Counsel has no specific response.

998. NSG is a public company that releases and publishes its financial condition. (Thuet, Tr. 4386).

**Response to Finding No. 998:**

Complaint Counsel has no specific response.

999. The capacity of NSG's Japanese plant is approximately 30 million square meters, and the capacity of the line in China is 10 million square meters. (Hauswald, Tr. 1108; Thuet, Tr. 4330).

**Response to Finding No. 999:**

The evidence in the record contradicts the size of NSG's PE plant. According to the

{ [REDACTED]  
[REDACTED] } (RX01073 at 015, *in camera*; RX01084  
at 001, *in camera*).

1000. Daramic considers NSG to be one of its primary competitors. (Thuet, Tr. 4330; PX0522).

**Response to Finding No. 1000:**

This proposition is contradicted by the fact that Daramic { [REDACTED]  
[REDACTED] } (RX01084 at 001, *in camera*; RX01085 at 009, *in camera*; Roe, Tr.

1235; Simpson, Tr. 3390, *in camera*; Seibert, Tr. 4261, *in camera*). Dr. Kahwaty confirmed that

{ [REDACTED] } (Kahwaty, Tr. 5343, *in  
camera*). In fact, Tucker Roe stated no Asian suppliers have ever supplied PE separators to

North America. (Roe, Tr. 1236; *see generally* CCFOF 288, 295, 298, 305, 939). Moreover, if  
NSG is a primary competitor, than Daramic's competition are way back in the rear view mirror  
because Daramic in its { [REDACTED]

[REDACTED] }  
(PX0265 at 016, *in camera*; Hauswald, Tr. 934-936). [REDACTED]

[REDACTED] { [REDACTED] } (PX0196 at 006, *in  
camera*).

Additionally, NSG refused to quote on Exide's RFP due of NSG's new relationship with  
Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie,  
Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the  
majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact

Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

Lastly, when Mr. Thuet testified that NSG was a primary competitor of Daramic, he was specifically discussing primary competitors in Asia. Mr. Thuet also stated "... we have much more competition in Asia compared to other regions in the world." (Thuet, Tr. 4330). [REDACTED]

[REDACTED] (RX01073 at 22, *in camera*; Seibert, Tr. 4259-4260, *in camera*).

1001. [REDACTED] (Hauswald, Tr. 867, *in camera*).

**Response to Finding No. 1001:**

Complaint Counsel has no specific response.

1002. [REDACTED] (Hauswald, Tr. 870, *in camera*; Hauswald, Tr. 1108; Thuet, Tr. 4325)

**Response to Finding No. 1002:**

Complaint Counsel has no specific response.

1003. [REDACTED] (Hauswald, Tr. 869-70, *in camera*; RX01435, *in camera*; PX0923 (Hauswald IHT at 261-62), *in camera*).

**Response to Finding No. 1003:**

[REDACTED]  
[REDACTED]  
[REDACTED] (PX0196 at 002, *in camera*). One of the objectives listed in the [REDACTED]

[REDACTED] } (PX0231 at 011, *in camera*; PX0966 at 025, *in camera*).

1004. { [REDACTED] } (Hauswald, Tr. 878-79, *in camera*).

**Response to Finding No. 1004:**

Complaint Counsel has no specific response.

1005. { [REDACTED] } (PX0923 (Hauswald, IHT at 267-68), *in camera*). NSG does not use a Jungfer line, but has designed its own PE line. (Hauswald, Tr. 1185).

**Response to Finding No. 1005:**

Complaint Counsel has no specific response.

1006. { [REDACTED] } (PX0923 (Hauswald, IH at 267-268), *in camera*).

**Response to Finding No. 1006:**

Daramic operates the Tianjin plant, not NSG. (Toth, Tr. 1396). [REDACTED]

[REDACTED]  
[REDACTED] } [REDACTED]  
[REDACTED] (PX0196 at 005, *in camera*).

1007. { [REDACTED] } (Siebert, Tr. 4260, *in camera*; RX01073, *in camera*).

**Response to Finding No. 1007:**

{ [REDACTED] } (RX01084 at 001, *in camera*; RX1085 at 009, *in camera*; Roe, Tr. 1235; Simpson, Tr. 3390, *in camera*; Seibert, Tr. 4261, *in camera*). Dr. Kahwaty confirmed that [REDACTED] (Kahwaty, Tr. 5343, *in*

camera). In fact, Tucker Roe stated no Asian suppliers have ever supplied PE separators to North America. (Roe, Tr. 1236-1237; *see generally* CCFOF 288, 295, 298, 305, 939).

[REDACTED]  
[REDACTED] { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 016, *in camera*; Hauswald, Tr. 934-936). [REDACTED]  
[REDACTED] { [REDACTED] } (PX0196  
at 006, *in camera*).

Additionally, this proposition is contradicted by the fact that NSG refused to quote on Exide's RFP due of NSG's new relationship with Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

Lastly, Daramic has an option to buy NSG's interest in the joint venture. (Thuet, Tr. 4402). [REDACTED] { [REDACTED]  
[REDACTED] } (Thuet, Tr. 4410, *in camera*). [REDACTED] { [REDACTED]  
[REDACTED] } (RX01073 at 022, *in camera*; Seibert, Tr. 4259-4260).

1008. . In addition to its facility in Japan, NSG has a footprint in North America with a facility in North Carolina. (Thuet, Tr. 4382-84, 4441-42)

**Response to Finding No. 1008:**

This proposition is contradicted by the fact that Mr. Thuet is not aware of NSG selling any PE separators for automotive, deep-cycle, motive, UPS, or stationary products in North America. (Thuet, Tr. 4384). Moreover, Mr. Thuet is not aware of any Asian separator manufacturer who plans to build a separator manufacturing plant in North America. (Thuet, Tr. 4385).

1009. Since the joint venture between Daramic and NSG was consummated, Daramic has continued to test NSG's competitive product from Japan, and has continued to find NSG's separators to be comparable to its own separators. (Thuet, Tr. 4335-36; PX0194, *in camera*).

**Response to Finding No. 1009:**

Daramic operates the Tianjin plant, not NSG. (Toth, Tr. 1396). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (PX0196 at 005, *in camera*).

1010. [REDACTED] } (PX0923 (Hauswald, IHT at 267-68), *in camera*).

**Response to Finding No. 1010:**

Complaint Counsel has no specific response

1011. Daramic faces competition from NSG not only throughout Asia, but also in Eastern Europe and other parts of the world. (Thuet, Tr. 4340).

**Response to Finding No. 1011:**

[REDACTED]

[REDACTED] } (RX1084 at 001, *in camera*; RX1085 at 009, *in camera*; Roe, Tr.

1235; Simpson, Tr. 3390, *in camera*; Seibert; Tr. 4261, *in camera*). [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5343,

*in camera*). In Fact, Tucker Roe stated no Asian suppliers have ever supplied PE separators to North America. (Roe, Tr. 1236-1237; *see generally* CCFOF 288, 295, 298, 305, 939).

[REDACTED]

[REDACTED] { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0265 at 016, *in camera*; Hauswald, Tr. 934-936). [REDACTED]  
[REDACTED] { [REDACTED] } (PX0196  
at 006, *in camera*).

Additionally, this proposition is contradicted by the fact that NSG refused to quote on Exide's RFP due of NSG's new relationship with Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

1012. Daramic faces competition with NSG for both automotive and industrial separators, both directly in Asia; and indirectly throughout the world. For example, Asian companies, such as Leoch in China, export industrial batteries containing NSG separators to North America. (Thuet, Tr. 4348).

**Response to Finding No. 1012:**

This proposition is contradicted by the fact that Mr. Thuet is not aware of NSG selling any PE separators for automotive or motive separators in North America. (Thuet, Tr. 4384).

{ [REDACTED] } (RX1084 at 001, *in camera*;  
RX1085 at 009, *in camera*; Roe, Tr. 1235; Simpson, Tr. 3390, *in camera*; Seibert, Tr. 4261, *in camera*). Dr. Kahwaty confirmed that { [REDACTED] }  
[REDACTED] } (Kahwaty, Tr. 5343, *in camera*). In Fact, Tucker Roe stated no Asian suppliers have ever supplied PE separators to North America. (Roe, Tr. 1236-1237; *see*

generally CCFOF 288, 295, 298, 305, 939). [REDACTED]

[REDACTED] [REDACTED]  
[REDACTED] } (PX0265 at 016, *in camera*; Hauswald, Tr. 934-936). [REDACTED] [REDACTED]

[REDACTED] } (PX0196 at 006, *in camera*). Lastly, Leoch is not a competitor of NSG or Daramic because Leoch neither manufactures nor sells industrial battery separators. (Thuet, Tr. 4382).

Additionally, this proposition is contradicted by the fact that NSG refused to quote on Exide's RFP due of NSG's new relationship with Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

1013. [REDACTED]  
[REDACTED] } (PX0917 (Cullen Dep. at 245-46, 251), *in camera*; RX00095, *in camera*).

**Response to Finding No. 1013:**

Whether NSG is a competitive threat in AGM separators is not germane to this case because AGM separators are used in AGM batteries, not flooded lead-acid batteries. (PX0925 (Porter, Dep. at 23-24, *in camera*)). AGM batteries, *i.e.*, absorbed glass mat, are not flooded lead-acid batteries. (Wallace, Tr. 1978). Flooded lead-acid batteries are different from valve-

regulated and AGM technology. (Douglas, Tr. 4052-4053). Flooded batteries have electrolyte freely flowing while valve-regulated batteries use an absorbed glass mat that absorbs the acid like a thick toilet tissue so there is no free acid in the battery. (Douglas, Tr. 4053-4054). AGM separators are more expensive than PE battery separators. (Gillespie, Tr. 2982).

1014. Exide requested that NSG bid on the RFP it provided to worldwide battery separator manufacturers in 2007. NSG did not submit a quote because it did not have capacity at its Japanese facility. (PX1079; Gillespie, Tr. 2953).

**Response to Finding No. 1014:**

This proposition is contradicted by the fact that NSG refused to quote on Exide's RFP due of NSG's new relationship with Daramic, despite previous assurances that it wanted to bid on Exide's PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, "Daramic has the management authority to decide product mix and customer pricing." (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003; *see also* CCFOF 937).

c. Anpei

1015. Anpei is a Taiwanese company with plants in Tianjin, China, Guangzhou, China, and Taiwan. Anpei's PE plant is in Tianjin, China. (Hauswald, Tr. 1030).

**Response to Finding No. 1015:**

Complaint Counsel has no specific response.

1016. { [REDACTED] } (PX0907 (Kung Dep. at 42-43), *in camera*).

**Response to Finding No. 1016:**

The proposition of the second sentence is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED] (PX0907 (Kung Dep. at 45-46, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]...” (PX0907 (Kung Dep. at 46, *in camera*)).

1017. [REDACTED]  
[REDACTED] (PX0907 (Kung Dep. at 50-51), *in camera*; RX00043-03, *in camera*).

**Response to Finding No. 1017:**

The proposition that [REDACTED]

[REDACTED]

[REDACTED] million square meters of PE separators. (RX01084, *in camera*; RX0185, *in camera*

[REDACTED] million square meters, with

[REDACTED] square meters being for motorcycle separators)). Included in the [REDACTED] millions

square meters of PE separators are [REDACTED] million square meters of separators used in

motorcycle batteries. Additionally, none of the cites provided by Respondent state Anpei’s total capacity. (RX01084, *in camera*).

1018. [REDACTED] [REDACTED] (Hauswald, Tr. 859-60, *in camera*; Hauswald, Tr. 1030; Thuet, Tr. 4331; PX0917 (Cullen Dep. at 283, *in camera*; PX0907 (Kung Dep. 42-43, 50-51), *in camera*).

**Response to Finding No. 1018:**

Complaint Counsel has no specific response.

1019. Anpei sells and ships its product throughout the world. (Hauswald, Tr. 860-63, *in camera*; Hauswald, Tr. 1030; Thuet, Tr. 4331, 4340; RX01064; RX01342).

**Response to Finding No. 1019:**

The proposition in this finding is contradicted by the record evidence. [REDACTED]

[REDACTED] (Seibert, Tr.

4165, *in camera*). [REDACTED]

[REDACTED] (Thuet, Tr. 4381-4382; Seibert, Tr. 4266-4267, *in camera*).

Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). { [REDACTED] } (RX01084, *in camera*; RX0185, *in camera*).

According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead-acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). { [REDACTED]

[REDACTED] } (Kahway, Tr. 5343, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

1020. { [REDACTED] } (RX00342 at 072, *in camera*).

**Response to Finding No. 1020:**

The proposition in this finding is contradicted by testimony at trial from Daramic, { [REDACTED] }, and documents contradict this finding. Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] } (Weerts, Tr. 4500-4503, *in camera*).

To the extent that Respondent is suggesting that [REDACTED]  
[REDACTED]  
[REDACTED] } (Seibert, Tr. 4165, *in camera*). { [REDACTED]  
[REDACTED] } (Thuet, Tr. 4381-4382;  
Seibert, Tr. 4266-4267, *in camera*; RX01084, *in camera*; RX0185, *in camera*). Nor has Daramic  
ever seen any instances of Asian PE battery separator manufacturers selling PE separators for  
flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*).

1021. Anpei's product, like that of BFR and NSG, is considered to be comparable to the product  
manufactured by Daramic and Entek. Anpei produces high quality PE separators which are  
used in OEM applications. (Hauswald, Tr. 1037).

**Response to Finding No. 1021:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-  
4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers  
selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr.  
4379-4380). { [REDACTED]  
[REDACTED] } (RX01084, *in camera*; RX0185, *in camera*).

According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead-acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5343, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

1022. { [REDACTED] } (Seibert, Tr. 4165, 4175-76, *in camera*; Thuet, Tr. 4340; RX000342 at 072-73, *in camera*)

**Response to Finding No. 1022:**

The proposition in this finding is contradicted by the fact that { [REDACTED]

[REDACTED] } (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). { [REDACTED]

[REDACTED] } (RX01084, *in camera*; RX0185, *in camera*). According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE

separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead-acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). [REDACTED]

[REDACTED] }  
(Kahwaty, Tr. 5343, *in camera*). [REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] }

(Weerts, Tr. 4501, 4512, *in camera*).

1023. Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (Thuet, Tr. 4336, 4349)

**Response to Finding No. 1023:**

The proposition that Anpei's separators are comparable to Daramic's separators is contradicted by the record evidence. [REDACTED]

[REDACTED]  
[REDACTED] (PX0265 at 016,  
*in camera*).

1024. [REDACTED]  
[REDACTED]  
(Axt, Tr. 2219, *in camera*)

**Response to Finding No. 1024:**

[REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2217, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2218, *in camera*). EnerSys is  
working to locate a source of [REDACTED]  
[REDACTED] (Burkert, Tr. 2360, *in camera*). [REDACTED]  
[REDACTED] (Axt, Tr. 2218, *in camera*). When [REDACTED]  
[REDACTED] could actually supply EnerSys with  
product. (Burkert, Tr. 2360, *in camera*; see also Gagge, Tr. 2500, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in camera*)  
[REDACTED]  
[REDACTED].}

1025. { [REDACTED] } (Axt, Tr. 2272-73, *in camera*).

**Response to Finding No. 1025:**

The proposition that { [REDACTED] } is contradicted by the record evidence. { [REDACTED] } (Axt, Tr. 2218, *in camera*).

EnerSys is working to locate a source of { [REDACTED] } (Burkert, Tr. 2360, *in camera*). When { [REDACTED] } could actually supply EnerSys with product. (Burkert, Tr. 2360, *in camera*; see also Gagge, Tr. 2500, *in camera*).

Moreover, the proposition that { [REDACTED] } today for new tooling is contradicted by the evidence. Mr. Axt testified that { [REDACTED] } (Axt, Tr. 2272-2273, *in camera*).

Lastly, { [REDACTED] } (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in camera* { [REDACTED] } )

1026. { [REDACTED] } (Axt, Tr. 2272-73, *in camera*).

**Response to Finding No. 1026:**

The proposition that { [REDACTED]

[REDACTED] } is contradicted by the record evidence. EnerSys's statements demonstrate that

{ [REDACTED]

[REDACTED] } (See Burkert, Tr. 2360, *in camera* (When { [REDACTED]

[REDACTED] } could actually supply EnerSys with product.); *see*

also Gage, Tr. 2500, *in camera*). Mr. Axt stated { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2272-2273, *in camera*).

1027. { [REDACTED]

[REDACTED] } (Burkert, Tr. 2388, *in camera*).

**Response to Finding No. 1027:**

The proposition that { [REDACTED] }

is contradicted by the record evidence. The only testing that { [REDACTED]

[REDACTED] } However, { [REDACTED]

[REDACTED] } (Burkert, Tr. 2388, *in camera*).

1028. East Penn has also solicited a quote for PE separators from Anpei. (Leister, Tr. 3993).

**Response to Finding No. 1028:**

The proposition is contradicted by the evidence in the record. In 2003, East Penn had discussions with Anpei for PE separators to be used in lawn mower batteries. (Leister, Tr. 4032).

The discussions between East Penn and Anpei never progressed. (Leister, Tr. 4032). Mr. Leister stated that Anpei did not have the capability to supply a customer in the United States. (Leister, Tr. 4035). Mr. Liester is not aware of any instance where East Penn used the presence of Anpei

to leverage price negotiations with Daramic or Entek. (Leister, Tr. 4036). East Penn is not currently looking to be sourced by Anpei. (Leister, Tr. 4035).

1029. East Penn has tested and approved the Anpei separators. (Leister, Tr. 3993, 4032-33).

**Response to Finding No. 1029:**

The proposition is contradicted by the evidence in the record. In 2003, East Penn had discussions with Anpei for PE separators to be used in lawn mower batteries. (Leister, Tr. 4032). The discussions between East Penn and Anpei never progressed. (Leister, Tr. 4032). Mr. Leister stated that Anpei did not have the capability to supply a customer in the United States. (Leister, Tr. 4035). Mr. Liester is not aware of any instance where East Penn used the presence of Anpei to leverage price negotiations with Daramic or Entek. (Leister, Tr. 4036). East Penn is not currently looking to be sourced by Anpei. (Leister, Tr. 4035).

1030. Mr. Leister from East Penn testified that if the PE separator industry were to change such that East Penn could not obtain supply from its current PE suppliers, it would consider Anpei to be an alternative supplier. (Leister, Tr. 3993).

**Response to Finding No. 1030:**

The proposition is contradicted by the evidence in the record. In 2003, East Penn had discussions with Anpei for PE separators to be used in lawn mower batteries. (Leister, Tr. 4032). The discussions between East Penn and Anpei never progressed. (Leister, Tr. 4032). Mr. Leister stated that Anpei did not have the capability to supply a customer in the United States. (Leister, Tr. 4035). Mr. Liester is not aware of any instance where East Penn used the presence of Anpei to leverage price negotiations with Daramic or Entek. (Leister, Tr. 4036). East Penn is not currently looking to be sourced by Anpei. (Leister, Tr. 4035).

d. Separindo

1031. Separindo is a company located in Indonesia that produces PE separators for SLI and industrial applications. Its lines were built by James Kung and have a total capacity of 17-20 million square meters. Separindo is about the same size as the former Microporous. (Hauswald, Tr. 1036; PX1073; Seibert, Tr. 4160, *in camera*; Thuet, Tr. 4331; PX0922 (Roe, IHT at 337), *in camera*).

**Response to Finding No. 1031:**

The proposition that Separindo has { [REDACTED] } is contradicted by the record evidence. { [REDACTED] } million square meters of PE separators. (RX01084, *in camera*; RX00185, *in camera* { [REDACTED] } million square meters)).

Moreover, prior to the acquisition, Microporous was planning to expand by building two PE lines in Feistritz, Austria and one slated to be built in Piney Flats, Tennessee. (Gaugl, Tr. 4576, 4560). When Microporous began ordering equipment for the expansion, it ordered equipment for three lines. (Gaugl, Tr. 4576). The former Microporous's two PE lines in Austria became operational shortly after the acquisition and had a total capacity of { [REDACTED] } million square meters. (Gilchrist, Tr. 300; Roe, Tr., 1377, *in camera*). { [REDACTED] } million square meters of PE separators, without including the Feistritz expansion capacity in this total. (RX01084, *in camera*). { [REDACTED] } (RX01084, *in camera*; Roe, Tr., 1377, *in camera*).

{ [REDACTED] } (RX01084, *in camera*).

1032. Daramic has tested Separindo separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (Thuet, Tr. 4335-36; 4542-43)

**Response to Finding No. 1032:**

The proposition that Separindo's separators are "quite good" and comparable to Daramic's separators is contradicted by the record evidence. { [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 016,  
*in camera*).

1033. { [REDACTED]  
[REDACTED] } (PX0922 (Roe, IHT at 328), *in camera*).

**Response to Finding No. 1033:**

Complaint Counsel has no specific response.

e. Sebang

1034. Sebang is located in Korea. { [REDACTED]  
[REDACTED] }  
(Gilchrist, Tr. 563; Hauswald, Tr. 1035; Seibert Tr. 4264-65, *in camera*; Thuet, Tr. 4331;  
(PX0922 (Roe, IH at 337), *in camera*).

**Response to Finding No. 1034:**

The proposition that Sebang has { [REDACTED] } is contradicted by  
the record evidence. { [REDACTED]  
[REDACTED] } million square meters of PE separators. (RX01084, *in camera*; see also  
PX0275 at 020, *in camera* ( [REDACTED] } of capacity)).

The proposition that Sebang sells to { [REDACTED] } is contradicted by the  
record evidence. Approximately { [REDACTED] } of Sebang's PE separators are { [REDACTED]  
[REDACTED] } (RX01084, *in camera*; Seibert,  
Tr. 4264-4265, *in camera*).

1035. { [REDACTED]  
[REDACTED] } (PX0922 (Roe, IH at 329), *in camera*).

**Response to Finding No. 1035:**

To the extent that Respondent is suggesting that Sebang will provide more available  
capacity to the marketplace, it should be remembered that Sebang uses approximately { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0922 (Roe, IH at 329, in camera)).

1036. { [REDACTED]  
[REDACTED] } (Gaugl, Tr. 4532; PX0905 (Gaugl, Dep. at 10-12), in camera).

**Response to Finding No. 1036:**

Complaint Counsel has no specific response.

1037. At the time that the Jungfer lines were installed at Sebang/Global, Mr. Gaugl was required to prove that the lines could produce material that was "in spec" and capable of running a certain "throughput," both of which were defined in the equipment purchase agreement between the two companies. (Gaugl, Tr. 4539-40).

**Response to Finding No. 1037:**

Complaint Counsel has no specific response.

1038. To be "in spec" means that the separator is specified by certain characteristics, including, but not limited to, tensile strength, pin puncture resistance, electrical resistance, dimensional stability. All these specs were specified in the contract, and Mr. Gaugl and his team were required to show that the material produced on those lines met the specifications. (Gaugl, Tr. 4539-40).

**Response to Finding No. 1038:**

Complaint Counsel has no specific response.

1039. In order to prove that the material was "in spec," a head-to-head comparison was made with other separators, including those of Daramic, Entek and Jungfer, showing that the new lines at Global/Sebang were able to produce a separator of equal quality. The results proved the material was in spec and capable of the required throughput. (Gaugl, Tr. 4541-42).

**Response to Finding No. 1039:**

The proposition is contradicted by the record evidence. { [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] } (PX0265 at 016, *in camera*).

Moreover, Mr. Gaugl stated that the Jungfer line he installed at Baotou produced "in spec" separators. However, according to Mr. Hauswald, Baotou could only produce separators with a backweb thickness of 250. Mr. Hauswald also wrote after touring Baotou's facility that it could not produce separators with a backweb thickness of 250 due to "pinhole reasons," which created a high scrap rate. (PX0654 at 004). In another email, Mr. Hauswald wrote that "sand wind entering every where in the plant, and creating stoppage and pinholes." (PX0697 at 001).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)). { [REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)).

1040. Daramic has tested Sebang separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (Thuet, Tr. 4335-36; 4542-43).

**Response to Finding No. 1040:**

The proposition that Global's separators are "quite good" and comparable to Daramic's separators is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0265 at 016, *in camera*).

f. Baotou

1041. Baotou is located in Inner Mongolia, Northern China. It produces PE separators for industrial and automotive applications with one Jungfer line that was installed in the late-1990s. (Gilchrist, Tr. 563; Hauswald, Tr. 1035, 1110; Thuet, Tr. 4336; PX0184, *in camera*).

**Response to Finding No. 1041:**

Complaint Counsel has no specific response.

1042. The line at Baotou was originally installed by Peter Gaugl. The line has a capacity of 7 million square meters. (Gaugl, Tr. 4532-33).

**Response to Finding No. 1042:**

Complaint Counsel has no specific response.

1043. Daramic has tested Baotou material and found it to be comparable to Daramic material, with no significant difference in the quality of the material. (Thuet, Tr. 4336, 4349).

**Response to Finding No. 1043:**

The proposition that Baotou's separators are comparable to Daramic's separators is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0265  
at 016, *in camera*).

Moreover, according to Mr. Hauswald, Baotou could only produce separators with a backweb thickness of 250. (PX0654 at 004). And these separators were not of equal quality of Daramic's because Baotou's factory had "sand wind entering every where in the plant, and creating stoppage and pinholes." (PX0697 at 001). { [REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 19, *in camera*)). { [REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 109-110, *in camera*)).

{ [REDACTED]  
[REDACTED] }  
(PX0913 (Whear, Dep. at 177, *in camera*)). { [REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)).

1044. Further, at the time that Mr. Gaugl installed the line at Baotou, he was responsible for testing the material that came off the line and ensuring that it was within certain specifications outlined in the agreement between Jungfer and Baotou. The specifications constituted the industry standards at that time for separators sold by all competitors. (Gaugl, Tr. 4538).

**Response to Finding No. 1044:**

The evidence in the record shows that Baotou was not able to produce a separator that met industry standards. [REDACTED]  
[REDACTED]  
[REDACTED].} (PX0265 at 016, *in camera*).

Moreover, according to Mr. Hauswald, Baotou could only produce separators with a backweb thickness of 250. (PX0654 at 004). And these separators were not of equal quality of Daramic's because Baotou's factory had "sand wind entering every where in the plant, and creating stoppage and pinholes." (PX0697 at 001). [REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 119, *in camera*)). [REDACTED]  
[REDACTED].} (PX0907 (Kung, Dep. at 109-110, *in camera*)).  
[REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)). [REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)).

1045. Mr. Gaugl and Jungfer were able to prove that the material produced on the Baotou lines was "in spec" in a head-to-head comparison with Daramic, Entek and Jungfer separators, and capable of the required throughput. (Gaugl, Tr. 4541-42).

**Response to Finding No. 1045:**

The evidence in the record shows that Baotou was not able to produce a separator that met industry standards. [REDACTED]

[REDACTED]  
[REDACTED] } (PX0265 at 016,  
*in camera*).

Moreover, according to Mr. Hauswald, Baotou could only produce separators with a backweb thickness of 250. (PX0654 at 004). And these separators were not of equal quality of Daramic's because Baotou's factory had "sand wind entering every where in the plant, and creating stoppage and pinholes." (PX0697 at 001). { [REDACTED]  
[REDACTED]. } (PX0907 (Kung, Dep. at 119, *in camera*)). { [REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 109-110, *in camera*)).  
{ [REDACTED]  
[REDACTED] }  
(PX0913 (Whear, Dep. at 177, *in camera*)). [REDACTED]  
[REDACTED] } (PX0913 (Whear, Dep. at 177, *in camera*)).

g. Smaller Competitors

(a) Epoch

1046. Epoch is a company formed by former employees of BFR which started operations in late 2006 or early 2007. (Thuet 4333-34). Epoch operates one 6 million square meter production line near Shanghai. (Hauswald, Tr. 1036; Thuet, Tr. 4331-32). The line was not built by Jungfer. (Hauswald, Tr. 1185).

**Response to Finding No. 1046:**

The proposition that Epoch was legally formed from former BFR employees is contradicted by the record evidence. { [REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at  
113, *in camera*)). { [REDACTED]

[REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 113, 123, *in camera*)).

1047. Daramic considers Epoch to be very aggressive in the global separator market. Today, Daramic faces competition from Epoch in China, as well as exports from Epoch in other areas of the world, including Europe. (Thuet, Tr. 4333; Hauswald, Tr. 1035-36; RX00195; PX0994, *in camera*; RX00551 at 004, *in camera*; RX01003 at 007, *in camera*).

**Response to Finding No. 1047:**

This entire finding is contradicted by the record evidence. [REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 113, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 113, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 113,

123, *in camera*)). [REDACTED] } (PX0907 (Kung,

Dep. at 123, *in camera*)).

[REDACTED]

[REDACTED]

[REDACTED] (PX0903 (Thuet, Dep. at 58-60, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]

(Thuet, Tr. 4413-4414, *in camera*).

[REDACTED]

[REDACTED] } (Seibert, Tr. 4165,

4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of

Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to

customers in North America. (Thuet, Tr. 4379-4380). According to Polypore's CEO, the Asian

separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). { [REDACTED] }  
{ [REDACTED] } (Kahway, Tr. 5343, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

1048. Mr. Thuet testified that Epoch is currently producing and selling separators, and Daramic continues to meet Epoch in the competitive market every day. (Thuet, Tr. 4333)

**Response to Finding No. 1048:**

This entire finding is contradicted by the record evidence. { [REDACTED] }

{ [REDACTED] } (PX0907 (Kung, Dep. at 113, *in camera*)). { [REDACTED] }

{ [REDACTED] }

(PX0907 (Kung, Dep. at 113, 123, *in camera*)). { [REDACTED] }

{ [REDACTED] } (PX0907 (Kung, Dep. at 132, *in camera*)).

Daramic does not continue to meet Epoch in North America. { [REDACTED] }

{ [REDACTED] } (Seibert, Tr. 4165,

4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of

Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to

customers in North America. (Thuet, Tr. 4379-4380). According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). [REDACTED]  
[REDACTED]  
[REDACTED] } (Kahway, Tr. 5343, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

1049. [REDACTED]  
[REDACTED] } (Thuet, Tr. 4411, *in camera*).

**Response to Finding No. 1049:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (Seibert, Tr. 4165,  
4266-4267, *in camera*, Thuet, Tr. 4381-4382).

(b) M-Arrow and Genius

1050. M-Arrow is a very small operation in India, with only 1 to 1.5 million square meters of capacity. M-Arrow began operations in 2006, and [REDACTED]  
[REDACTED] } (Hauswald, Tr. 932-33, *in camera*; Thuet, Tr. 4332-4334).

**Response to Finding No. 1050:**

The proposition that Asian battery separator manufacturers like M-Arrow are

{ [REDACTED] } is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED]. (PX0265 at 016, *in camera*; Hauswald, Tr. 935, *in camera*). The drivers were the following: { [REDACTED]

[REDACTED]

[REDACTED] } (PX0265 at 016, *in camera*; Hauswald, Tr. 935, *in camera*).

1051. Genius is another small separator manufacturer, with one million square meters of capacity. It competes with Daramic in China. (Thuett, Tr. 4332).

**Response to Finding No. 1051:**

Complaint Counsel has no specific response.

h. The Threat of Other Competition

1052. { [REDACTED] } (RX00115 at 007, *in camera*; Weerts, Tr. 4465, *in camera*; RX01003, *in camera*).

**Response to Finding No. 1052:**

{ [REDACTED] }  
[REDACTED]

(Seibert, Tr. 4165, 4266-4267, *in camera*, Thuett, Tr. 4381-4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuett, Tr. 4379-4380). { [REDACTED]

[REDACTED]

[REDACTED] } (RX01084, *in camera*; RX00185, *in camera*). According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404).

Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP

where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). { [REDACTED]

[REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5343, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

Microporous did not consider the regional Asian suppliers as potential competitors for its separator business in North America. (Gilchrist, Tr. 308). Mr. Gilchrist explained, aside from Daramic and Entek, there were no other competitors that [REDACTED]  
[REDACTED] against Daramic and Entek. (Gilchrist, Tr. 424).  
in camera

Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] }  
(Weerts, Tr. 4501, 4512, *in camera*).

Additionally, the { [REDACTED] } from a manufacturing operations perspective. It has been Mr. Gillespie's experience that the { [REDACTED] } than US separator manufacturers.

(Gillespie, Tr. 3031-3032, *in camera*). According to Mr. Gillespie, [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } (Gillespie, Tr. 3032, *in camera*). { [REDACTED] }

[REDACTED]

[REDACTED]

{ [REDACTED] } (Burkert, Tr. 2366-2367, *in camera*).

Asian firms do not compare favorably to the former Microporous. { [REDACTED] }

[REDACTED]

{ [REDACTED] } (Axt, Tr. 2221,

*in camera*). Because { [REDACTED] } are located in { [REDACTED] } technical visits are more

difficult and time consuming, as well as additional transportation costs and times, duties, and

extra inventory. (Axt, Tr. 2223, *in camera*). { [REDACTED] }

{ [REDACTED] } (Axt, Tr. 2223, *in camera*; see

*generally*, CCFOF 971-982).

1053. Further, Daramic has had to react competitively to the surplus capacity all over the world, including that of Asian competitors, by being as creative as possible with new products and making sure its customer service is as good, if not better, than its competition. Daramic has also had to adjust its prices in response to aggressive competition from Asian separator manufacturers. (Thuet, Tr. 4342-43).

**Response to Finding No. 1053:**

The proposition in this finding is contradicted by the evidence in the record. Daramic does not compete with any Asian battery separator producer in North America. (Seibert, Tr.

4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances

of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). [REDACTED]

[REDACTED] (RX01084, *in camera*; RX00185, *in camera*).

The testimony of several of Daramic's management and its Economic expert contradict the above finding. According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236-1237). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). Dr. Kahwaty confirmed that { [REDACTED]

[REDACTED] }  
(Kahwaty, Tr. 5343, *in camera*).

Lastly, Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813).

1054. { [REDACTED]  
[REDACTED] } (Weerts, Tr. 4469, *in camera*)

**Response to Finding No. 1054:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4502, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*).

1055. { [REDACTED] } (Weerts, Tr. 4468, *in camera*).

**Response to Finding No. 1055:**

The proposition is contradicted by testimony from Mr. Weerts. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

(Weerts, Tr. 4501, 4512, *in camera*).

{ [REDACTED]

[REDACTED] } (Weerts, Tr. 4502, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501, *in camera*).

1056. { [REDACTED] } (Weerts, Tr. 4468, *in camera*).

**Response to Finding No. 1056:**

Complaint Counsel has no specific response.

1057. Additionally, Asian deep-cycle batteries for use in floor-scrubbers and golf carts are already being imported into North America by at least two Chinese companies, Leoch and RPS, which is exporting deep-cycle batteries to Florida from China. (Thuet, Tr. 4446-47).

**Response to Finding No. 1057:**

The proposition is contradicted by testimony from Mr. Thuet. Mr. Thuet did not know the volume of batteries that either Leoch or RPS was importing into North America, which means its cannot be much of a competitive restraint. (Thuet, Tr. 4447).

1058. Based on the foregoing findings, the Court finds that there are numerous battery separator manufacturers who have the ability to produce, and have a history of producing, battery separator products comparable to Daramic and Entek. Many of these manufacturers are located in Asia.

**Response to Finding No. 1058:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings 1002, 1008-1009, 1011, 1020, 1022-1025, 1028, 1030, 1033, 1040-1041, 1044-1045, 1049, 1051, 1053 that are incorrect and/or invalid, as detailed in CCRF for 1002, 1008-1009, 1011, 1020, 1022-1025, 1028, 1030, 1033, 1040-1041, 1044-1045, 1049, 1051, 1053. (CCRF 1002, 1008-1009, 1011, 1020, 1022-1025, 1028, 1030, 1033, 1040-1041, 1044-1045, 1049, 1051, 1053). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (PX0265 at 016, *in camera*). [REDACTED]

[REDACTED] } were also included as the "Worst In Industry" in Daramic's Strategy Audit in the same categories as [REDACTED] in addition to these two categories – [REDACTED]

[REDACTED] } (PX0265 at 016, *in camera*).

1059. The Court further finds that given the excess capacity in the marketplace, these manufacturers are likely to begin aggressive efforts to sell separators in North America.

**Response to Finding No. 1059:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057 that are incorrect and/or invalid, as detailed in CCRF for 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057. (CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057). [REDACTED] [REDACTED] (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382, *in camera*). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380).

The testimony of several of Daramic's management and its Economic expert contradict the above finding. According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237).

Lastly, Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813).

1060. The Court further finds that current market conditions, including without limitation the number of Asian suppliers, the strength of competition, and the amount of excess capacity, will constrain pricing and prevent any potential anti-competitive effects of the acquisition.

**Response to Finding No. 1060:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057, 1060 that are incorrect and/or invalid, as detailed in CCRF for 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057, 1060. (CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057, 1060).

[REDACTED]

(Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380).

**VII. Ease of Entry**

A. Timeliness

a. Construction of a PE Production Line

1061. A PE separator production line can be completely installed and begin commercial operation in [REDACTED]. (Gaugl, Tr. 4543; PX0907 (Kung, Dep. at 27-29, 43), *in camera*). On average, it takes [REDACTED]. (Gaugl, Tr. 4543; Hauswald, Tr. 873-75, 880, 883, *in camera*).

**Response to Finding No. 1061:**

This finding's assertion is not supported by the evidence relied upon. Mr. Gaugl testified that the shortest time to install a PE separator line was 16 months and that the longest was 19 to 20 months. (Gaugl, Tr. 4543). He further testified that the average time to install a line is 18 months. (Gaugl, Tr. 4543). Mr. Gaugl never testified that a line could be installed in 12 months.

[REDACTED] PX0907

(Kung, Dep. at 27-29), *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Hauswald, Tr. 873-875, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (PX0207 at 050, 072, *in camera*). Therefore,

from planning to installation the plant took approximately two years to complete.

The installation of a line also does not include the planning, designing, debugging, and satisfaction of customer testing and qualification requirements. Installation of a PE line usually ends with a 24-hour test run, which demonstrates that the line is capable of producing in-spec

material at a certain throughput. (Gaugl, Tr. 4539) { [REDACTED]

[REDACTED] (PX0905 (Gaugl, Dep. at 43-44). Debugging of new  
in camera

lines continues well after the initial 24-hour test. (Gaugl, Tr. 4594-4595). { [REDACTED]

[REDACTED] (PX0907 (Kung, Dep.

at 132), *in camera*). Passing the 24-hour test run does not mean that a new PE line will operate without problems. (Gaugl, Tr. 4595). Problems that occur after the 24-hour test are not always obvious at the time of the 24-hour test. (Gaugl, Tr. 4595). In addition, the determination of whether the PE material from a new PE production line is "in-spec," does not include testing the separator in a battery. (Gaugl, Tr. 4620). The battery maker makes the decision about testing a separator in a battery. (Gaugl, Tr. 4620)

Microporous's PE/CellForce line in Tennessee took over two years from planning to commercial product. { [REDACTED]

[REDACTED] (PX2235 at 004, *in camera*).

Beginning in early 2001, MPLP began producing CellForce on a production line at its Piney Flats facility. (Gilchrist, Tr. 321-322). Planning for and developing a new separator plant takes more than two years. The expansion undertaken by Microporous in Austria was difficult and required "a very significant effort" by Microporous. (Trevathan, Tr. 3650-3660). Microporous began planning to build a new plant in Europe in early 1999. (Gilchrist, Tr. 329-330). Before he ordered the equipment for Microporous's Austrian expansion, Mr. Gaugl had to design the specifications of the equipment for the line. (Gaugl, Tr. 4608-4609). Mr. Gaugl designed the equipment to be installed in Austria in 2005. (Gaugl, Tr. 4609). { [REDACTED]

[REDACTED]  
[REDACTED] } (PX0611; PX0905 (Gaugl, Dep. at 128-129), *in camera*).

1062. Generally, the time period to install a PE line can be broken down as follows: The layout of the production line and specifications of the equipment can be completed in 2 months. (Gaugl, Tr. 4543). The longest lead time equipment takes about 10 months to procure. (Gaugl, Tr. 4543-44). Engineering details of the line are typically finalized while waiting for the equipment to arrive, so there is no additional time needed for this step. (Gaugl, Tr. 4544). Installation of the equipment can be completed in approximately 4 months, and the initial start-up and debugging of the production line takes about 2 months. (Gaugl, Tr. 4544).

**Response to Finding No. 1062:**

Complaint counsel has no specific response to the finding's assertion to the extent it provides a general 18 month time line for installation-only of a PE separator line. On average it takes an experienced PE line builder approximately 18 months to install a PE separator line in an existing facility. (Gaugl, Tr. 4543). But that time may range up to 20 months. (Gaugl Tr. 4543). The long lead time items for a PE line can take from ten to twelve months to arrive (Trevathan, Tr. 3600), 2 months longer than the 10 months stated by the finding as the time to acquire the longest lead equipment. The long lead time items included the dryers, extruders, and the calender systems. (Trevathan, Tr. 3600).

In addition, remedying problems that occur after the 24-hour test run are not included within the 18 months. For example, Mr. Gaugl discovered problems with the line he installed at Piney Flats after the one year warranty period given to Microporous by Jungfer. The new line at Piney Flats encountered problems with the extraction system that caused the PE material to wrinkle, which only appeared after the line was operating on a day-to-day basis, and after the warranty period. (Gaugl, Tr. 4597, 4599). Wrinkled material is a problem for battery producers. (Gaugl, Tr. 4597). It is also a problem for Microporous, because wrinkled PE material results in scrap material. (Gaugl, Tr. 4597). Scrap material leads to higher production costs because the PE line has less throughput. (Gaugl, Tr. 4598-4599).

1063. PE separators have been manufactured for over fifty (50) years and the manufacturing technology for such separators is well known. (Hauswald, Tr. 957-59) Daramic uses the original equipment installed on its lines in Owensboro in 1981. (Hauswald, Tr. 960-61).

**Response to Finding No. 1063:**

This finding's assertion that PE separators have been manufactured for over fifty (50) years is wrong. W.R. Grace expanded its Owensboro plant to become the first PE separator 37 years ago in 1972. (PX0582 at 014). The testimony Respondent relies on to support this finding states that W.R. Grace started the separator business in 1954; however, it did not produce PE separators until much later. (Hauswald, Tr. 959; PX0582 at 014).

Additionally, Respondent's assertion that the manufacturing technology for PE separators is well known is contradicted by the evidence. (See generally, CCFOF 817-846; 1009-1029).

The process for making PE separators "is not available to everybody." (Gaugl, Tr. 4547). The

PE production process is a [REDACTED] Only a limited number of people in the world have the necessary experience to oversee a project involving

installation of a new PE line. (PX0907 (Kung, Dep. at 102), *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] }

(PX0907 (Kung, Dep. at 98-100), *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (PX0907 (Kung, Dep. at 101), *in*

*camera*).

1064. The equipment used to build a PE production line can be purchased from several different vendors located in the U.S. and Europe. (Gaugl, Tr. 4544). Most pieces of equipment, including the mixers, the extruder, the calender, the dryers, the slitter and the windup, are purchased "off the shelf." (Gaugl, Tr. 4545). { [REDACTED]

[REDACTED] } (Weerts, Tr. 4499, *in camera*). { [REDACTED]

(Weerts, Tr. 4498-99, *in camera*).

**Response to Finding No. 1064:**

Respondent's claim that "most pieces" of equipment can be purchased "off-the-shelf" is contradicted by evidence. The process requires 15 to 18 different pieces of equipment. (Gaugl, Tr. 4610; *see also* PX0907 (Kung, Dep. at 134-135), *in camera* (one PE line at { [REDACTED] } [REDACTED])). One cannot call a machine supplier and order a complete PE battery separator line. (Gaugl, Tr. 4610-4611). Moreover, "long-lead-time items," which include some special-order items, cannot be purchased "off-the-shelf." (Gaugl, Tr. 4544). Mr. Gaugl, Respondent's witness that was responsible for setting up the Feistritz facility, testified that the long-lead items included the calender, the distillation unit, and the dryers. (Gaugl, Tr. 4544). He also testified that the distillation unit, the condensation unit, the carbon beds and the extractor, were "special-order equipment which you cannot buy right off the shelf." (Gaugl, Tr. 4544-4545). Moreover, the equipment is far from off-the-shelf. [REDACTED]

{ [REDACTED] } (Hall, Tr. 2769-2770, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED]

{ [REDACTED] } (Gaugl, Tr. 4612; PX0905 (Gaugl, Dep. at 77), *in camera*; Gaugl, Tr. 4612). The machine suppliers draw up blueprints for the equipment based on the specifications Microporous provided. (Gaugl, Tr. 4611-4612). { [REDACTED]

[REDACTED] }  
(PX0924 (Jensen, Dep. at 24-25, *in camera*)).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Weerts, Tr. 4498-4499, *in camera*).

1065. Other pieces of equipment, such as the distillation unit, the condensation unit, the carbon beds and the extractor, must be ordered. (Gaugl, Tr. 4544-45). Although this equipment must be ordered, there is nothing special or unique about it. For instance, a distillation unit may be ordered for a PE production line, but it can also be ordered for other applications, such as making alcohol. (Gaugl, Tr. 4545-46).

**Response to Finding No. 1065:**

Respondent's assertion that there is nothing special or unique about PE equipment that must be ordered is contradicted by the evidence. The extractor for example is far from ordinary: "Separator manufacturers typically hire engineers to fabricate these extractors, since they are not currently commercially available." (PX0950 at 040). [REDACTED]

[REDACTED] } (PX0924 (Jensen, Dep. at 24-25, *in camera*)). Likewise, prior to its acquisition by Daramic, Microporous also had its machine suppliers sign non-disclosure agreements that prevent the machine suppliers from giving the specifications of the machines that it was ordering to Microporous's competitors. (Gaugl, Tr. 4612). [REDACTED]

[REDACTED] } (Gaugl, Tr. 4612; PX0905 (Gaugl, Dep. at 77, *in camera*)). If, as Respondent contends, "there is nothing special or unique" about equipment that must be ordered, then there would be no need to keep the specifications confidential. Even with regard to the distillation unit, which Respondent uses to illustrate the lack of uniqueness, Mr. Gaugl testified that one must still specify what type of throughput you want to run on the distillation and what kind of liquids you want to separate." (Gaugl, Tr. 4546).

1066. Calender rolls can be procured in 12-14 weeks from any one of several vendors located in the U.S. and Europe. (Gaugl, Tr. 4553-54).

**Response to Finding No. 1066:**

Complaint Counsel has no specific response.

1067. It is not difficult to find and learn about the equipment needed to build a PE line. (Gaugl, Tr. 4546). Anyone can learn about the equipment by visiting trade shows, researching online, or reviewing catalogues provided by vendors. (Gaugl, Tr. 4546).

**Response to Finding No. 1067:**

This finding's assertion that it is not difficult to learn about the equipment is ambiguous.

To the extent that Respondent is asserting that it is not difficult to learn about the equipment, such that one could, for each machine supplier: 1) specify each individual component needed, 2) provide the machine supplier with the correct specifications, work with an engineer to specially design the extractor, which is not commercially available, and 3) provide the machine supplier with the design of the connection points so that the machines would all work together, the evidence contradicts Respondent's assertion. (This response will not address the difficulties of learning about the equipment in a manner sufficient to run it to produce acceptable material. For findings on that topic. (See e.g. CCFOF 824, 830-837).) For example, by the time Mr. Gaugl became responsible for designing the Microporous line in Piney Flats, Tennessee, he had seven years of experience setting up PE production lines. (Gaugl, Tr. 4595). [REDACTED]

[REDACTED] ((PX0590 (Gaugl, Arb. Dep. at 56-57) *in camera*); Gaugl, Tr. 4590). The new line at Piney Flats also encountered problems with the extraction system that caused the PE material to wrinkle, which only appeared after the line was operating on a day-to-day basis, and after the warranty period had expired. (Gaugl, Tr. 4597, 4599). Wrinkled material is a problem for battery producers. (Gaugl, Tr. 4597). It is also a problem for the separator manufacturer, because wrinkled PE material results in scrap material. (Gaugl, Tr. 4597). Scrap material leads to higher production costs because the PE line has lower throughput. (Gaugl, Tr. 4598-4599).

1068. The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). To the contrary, there are "a lot of people" who know the process. (Gaugl, Tr. 4547).

**Response to Finding No. 1068:**

The manufacturing process for making PE separators "is not available to everybody."

(Gaugl, Tr. 4547). Although Mr. Gaugl claimed there are many people who know the technology, he only identified James Kung, two former Jungfer employees – Dr. Winkler and Mr. Duya – and "certain people at Daramic as well as at Entek" that he believed could design and put together a line. (Gaugl, Tr. 4642). { [REDACTED]

{ [REDACTED] } (PX0907 (Kung, Dep. at 92, *in camera*)).

Daramic considers the process to be a trade secret. { [REDACTED]

{ [REDACTED] } (PX2237 at 002, *in camera*). The process Mr.

Gaugl installed at Piney Flats for Microporous was basically the Jungfer process. (Gaugl, Tr. 4627). { [REDACTED]

{ [REDACTED] } (PX0590, (Gaugl, Arb. Dep. at 96) *in camera*). { [REDACTED]

{ [REDACTED] } (PX2237 at 006, *in camera*). { [REDACTED]

{ [REDACTED] } (PX0533 at 003,

*in camera*). Daramic claims that the Jungfer process is a Daramic trade secret. (Hauswald, Tr.

1153). **One reason why Daramic sued Microporous was to prevent them from using the**

**Jungfer process for the automotive separator business. Daramic claimed the process was a**

**Daramic trade secret.** (Hauswald, Tr. 1153-1154; PX2241 at 007. ). Daramic

considers every aspect of the technology and equipment that Daramic bought from Jungfer to be

a Daramic trade secret. (Hauswald, Tr. 1155; *see also* CCFOF 1023-1029).

1069. Several individuals in the battery separator industry know how to install a PE separator line. (Gaugl, Tr. 4547-48). For example, James Kung, Dr. Herwig Winkler, a former Jungfer employee, and Hans-Peter Gaugl, who is not under a non-compete with Daramic, knows how to install a PE line. (Gaugl, Tr. 4547-48, 4611; Kung Depo, 10). { [REDACTED]

[REDACTED] } (RX58, *in camera*).

**Response to Finding No. 1069:**

This finding is contradicted by the evidence. The manufacturing process for making PE separators “is not available to everybody.” (Gaugl, Tr. 4547). [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 103), *in camera*). [REDACTED]  
[REDACTED] } (PX0907  
(Kung, Dep. at 106, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 27), *in camera*). [REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at  
101), *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 102), *in camera*).

1070. [REDACTED] have all developed and set up new production lines in 18 months or less. (RX00147 at 001, *in camera*; RX01314 at 001, *in camera*; RX01045 at 001, *in camera*). For example, Daramic built a greenfield production facility in Prachinburi, Thailand with a capacity of 15 million square meters in approximately 16 months. (Hauswald, Tr. 1111-12). When Daramic moved two production lines from Austria to Thailand, it took [REDACTED] to reassemble the lines and begin producing product. (Hauswald, Tr. 873-75, *in camera*; RX00699 at 032, *in camera*). Moreover, Daramic built a 30 million square meter line and began producing PE separators on that line [REDACTED] (Hauswald, Tr. 880, 883, *in camera*).

**Response to Finding No. 1070:**

This finding’s assertion is contradicted by the evidence. Respondent’s contention that a PE production line can be “developed” and installed in less than 18 months is contrary to the evidence. Respondent’s witness that was called to testify specifically about the time it took to install a line stated that the shortest time to install a PE separator line was 16 months, and the

longest was 19 to 20 months. (Gaugl, Tr. 4543). He further testified that the average time to install a line is 18 months. (Gaugl, Tr. 4543). The planning and development work, were not specifically included in his estimates. Moreover, Mr. Gaugl never testified that a line could be installed in 12 months. [REDACTED]

[REDACTED] PX0907 (Kung, Dep. at 27-29), *in camera*. [REDACTED]

[REDACTED] (Hauswald, Tr. 873-875, *in camera*). [REDACTED]

[REDACTED] (PX0207 at 050, 072, *in camera*;

Hauswald, Tr. 875-876).

1071. [REDACTED]

[REDACTED] } (Weerts, Tr. 4496, *in camera*). [REDACTED]

[REDACTED] } (Weerts, Tr. 4496, 4516-17, *in camera*).

**Response to Finding No. 1071:**

[REDACTED] } (PX1510 at 006,  
*in camera*; see also Hall, Tr. 2884, *in camera* ([REDACTED]  
[REDACTED])).

1072. Microporous installed a PE production line and began commercial production from its facility in Austria in [REDACTED]. (RX01045, *in camera*).

**Response to Finding No. 1072:**

The citation does not support this finding. The document appears to be a time line that was updated on December 7, 2007, showing activity on Microporous's expansion going back to June 2006. However, the timeline's activity does not cover the time prior to June 2006.

Respondent acknowledges that Microporous's expansion plans go back at least to 2005. (RFOF 369). In fact, Microporous began planning to build a new plant in Europe in early 1999.

(Gilchrist, Tr. 329-330). Before he ordered the equipment for Microporous's Austrian expansion, Mr. Gaugl had to design the specifications of the equipment for the line. (Gaugl, Tr. 4608-4609). Mr. Gaugl designed the equipment to be installed in Austria in 2005. (Gaugl, Tr. 4609). { [REDACTED]

[REDACTED] } (PX0611; PX0905 (Gaugl, Dep. at 128-129), *in camera*). With regard to the activities at the Austrian facility after the timeline was updated, the facility did not operate on a regular schedule until June 2008, not March of 2008 as is indicated. (Gaugl, Tr. 4603).

1073. { [REDACTED] } (Gaugl, 4543-44, 4550); RX1029, *in camera*; RX01045, *in camera* { [REDACTED] }; RX1046, *in camera*).

**Response to Finding No. 1073:**

This finding's contention that Microporous purchased and installed, and then began producing PE industrial separators with, the Jungfer line at Piney Flats within 16 to 20 months is contradicted by the evidence. The development of the CellForce product took many years.

(Gilchrist, Tr. 323). CellForce was initially developed by Microporous in 1995-1996. (Gilchrist, Tr. 316-317, 324-325). { [REDACTED]

[REDACTED] } (PX 2235 at 004, *in camera*).

Beginning in early 2001, MPLP began producing CellForce on a production line at its Piney Flats facility. (Gilchrist, Tr. 321-322). Moreover, the line did not make a profit until 2004,

about three years after it was installed. (Gilchrist, Tr. 393). The Piney Flats line had a number of problems that persisted well after the one year warranty period given to Microporous by Jungfer. (Gaugl, Tr. 4596-97, 4599).

1074. James Kung, one of the individuals who knows how to install a PE line, { [REDACTED] } (PX0907 (Kung, Dep. at 27-28), *in camera*). Additionally, Kung { [REDACTED] } (PX0907 (Kung, Dep. at 43), *in camera*).

**Response to Finding No. 1074:**

Complaint counsel has no specific response to the finding's assertion that generally installation-only of a PE separator line takes 18 months. (See CCRF 1061-1062).

1075. { [REDACTED] } (RX00053, *in camera*). { [REDACTED] } (RX00032, *in camera*).

**Response to Finding No. 1075:**

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Hall, Tr. 2765, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] (Hall, Tr. 2765, *in camera*). { [REDACTED] }  
[REDACTED] (Hall, Tr. 2878, *in camera*). { [REDACTED] }  
[REDACTED] (Hall, Tr. 2771, *in camera*), { [REDACTED] }  
[REDACTED]  
[REDACTED] (Hall, Tr. 2771-2777, *in camera*).

b. Testing of PE Product

1076. A battery separator manufacturer does not need to complete construction of a new PE separator line before it can begin testing products from that line. Rather, much of the required testing { [REDACTED] }. (RX01045-001, *in camera*).

**Response to Finding No. 1076:**

The finding's contention that a separator manufacturer does not need to complete construction of a line before it can begin testing product from that line makes no sense and is not supported by the document cited. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX01045, *in camera*).

Because no witness testified about this document, it is dubious support for Respondent's proposition in this finding. In any event, it is not clear how one would test a product from a line before completing the line.

In addition, Dr. Simpson discounted one's ability to enter the battery separator industry by doing multiple steps concurrently. Dr. Simpson noted that some of these assets needed to be acquired sequentially – "you can't test a product until you develop a product and you can't get learning by doing until you're actually producing the product and figuring out through producing it how to make it more efficiently." (Simpson, Tr. 3206, *in camera*).

Moreover, it is the battery manufacturer, not the separator manufacturer, whose testing matters, which adds significantly to the amount of time it takes to enter any of the markets. In 2006, Mr. Hauswald expressed { [REDACTED]

[REDACTED]

[REDACTED] (PX2267 at 004, *in camera*). This delay was due to the fact that [REDACTED]

[REDACTED] (PX2267 at 004, *in camera*).

Additionally, customers require that they test production samples, separators made on a supplier's production line, and generally will not give their final approval for separators made only in a laboratory off of pilot lines. (Gagge, Tr. 2484-2486).

For example, At EnerSys the process for testing and validating a new separator product involves preliminary material tests of separator samples, which are typically made in a laboratory, and final tests of production samples in actual batteries. The preliminary tests involve testing the separator material in puncture, shrinkage and electrical resistance tests, as well as analyzing its brittleness and composition, *i.e.*, particularly oil. (Gagge, Tr. 2484-2485, 2487). If the separator samples pass these preliminary tests, EnerSys will request the potential supplier to provide production samples, *i.e.*, separators made on the supplier's production line. (Gagge, Tr. 2484-2486).

After receiving production samples from a potential separator supplier, EnerSys builds test batteries with the new separators. These test batteries undergo performance and battery life tests. The performance tests essentially analyze whether the battery with the new separator will generate the electrical current specified for the battery. The battery life tests are time-consuming because they are designed to determine whether the battery will perform well for the duration of the battery's warranty period. These tests involve placing the test batteries in a box which has an elevated temperature. (Gagge, Tr. 2484-2487, 2488-2489). The elevated temperature helps age the battery. (Gagge, Tr. 2489).

Qualifying a separator to meet the performance specifications is not the only step that is required before the separator can be sold in commercial batteries. (Gillespie, Tr. 2935-2936).

After a separator is qualified, a battery manufacturer must make sure the separator is runnable in the battery manufacturing facilities. (Gillespie, Tr. 2936; *see also* Gagge, Tr. 2488). Use of a new separator requires the battery manufacturer to understand and tweak the battery manufacturing machines to be able to run a different type of product. (Gillespie, Tr. 2936).

With regard to the finding's contention that testing and building a line can be done within the applicable two year time frame, the evidence contradicts this contention, and supports the proposition that testing alone takes over two years. Respondent itself recognizes that testing for most applications takes more than two years. Testing for traction batteries takes up to 3 years. (Whear, Tr. 4798; PX0568; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*; CCFOF 906-908). Testing for motive power and stationary is a very long-term process that takes about two years to complete. (Whear, Tr. 4801, (PX0842 "Testing industrial cells is a very long term process (~2 years). . .")). When C&D began testing HD for use in motive batteries, Daramic understood that it would take two years to qualify the separator at C&D. (PX0806 at 003). Daramic expected customer qualification of HD for use in deep-cycle batteries to take 18 months of testing or longer. (PX0262 at 003). When Trojan was adding another deep-cycle battery plant, Pierre Hauswald wrote Bob Toth, [REDACTED] [REDACTED] } (PX2248 at 001, *in camera*). Less than one year later, Daramic put together an { [REDACTED] [REDACTED] }. (PX0263 at 008, *in camera*).

Customers provided testimony that testing takes at least two years. Motive battery separators undergo cycle testing for a period of 2.5 years at EnerSys. (Gagge, Tr. 2490). Exide expects testing of motive power and stationary separators to take a minimum of two years. (Gillespie, Tr. 2973-2974; RX00013 at 009; PX1090 at 004 (Exide timeline indicating a 26

month timeframe for industrial product validation and testing). Testing and qualification of deep-cycle battery separators typically takes between 18 and 24 months. (Gillespie, Tr. 2934). Exide's testing of MPLP's PE SLI separators was scheduled to take 18-24 months to complete. (Gillespie, Tr. 2973; RX00013 at 009 (test sequence for automotive separators "expected to take 9 months for life cycle and 1 year for field test"); PX1090). If a North American battery manufacturer decided to begin testing Amer-Sil's PVC separators for use in North America, the separators would not be in use for at least two years time as testing and qualification of Amer-Sil's PVC separators typically takes two years or longer. (PX0916 (Dauwe, Dep. at 163-164)). If { } obtains the appropriate calendar roll, it would take { } before EnerSys could begin ordering product from them. (Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). ). If { } could actually supply EnerSys with product. (Burkert, Tr. 2360, *in camera*; see also Gagge, Tr. 2500, *in camera*). It is not possible to accelerate the testing. (Gagge, Tr. 2508-2509, *in camera*).

1077. { } (RX01137, *in camera*; RX01139; RX01140; RX01141, *in camera*; RX01142; RX01144, *in camera*; RX01145, *in camera*; RX01146; RX01147, *in camera*; RX01148 at 2 { }, *in camera*; RX01149 at 2 { }, *in camera*; RX01150 at 3 { }, *in camera*; RX01151 ("testing will take 6 months"); RX01153; RX01155 at 2, *in camera*; RX01156 ("BMW's requirement is 12 weeks on tests"). (Whear, Tr. 4788-4789). Customers can { }. (Gagge, Tr. 2507, *in camera*; Gillespie, Tr. 2975-2976; RX00321). { }. (Gagge, Tr. 2508, *in camera*). For example, life cycle testing and production testing { }. (Gagge, Tr. 2507-08, *in camera*).

**Response to Finding No. 1077:**

Respondent's finding is not supported by the evidence cited. (See CCRF 1076 stating that for most applications testing alone takes over two years.). None of the documents were testified to at trial. Moreover, the documents cited do not support Respondent's contention that

customers' testing needs can be shortened depending upon the customer. A number of the documents talk of testing by non-North American customers of product produced outside of North America. (See e.g., RX01137; RX01139; RX01140; RX01141; RX01142; RX01149; RX01155; RX1156). Moreover, it is not clear from most of the documents whether the testing that is being discussed is the only testing that is being conducted, or whether the testing is part of an ongoing effort to qualify the product. (RX01137 (Document discusses oxidation resistance testing, but does not state whether this is the first test, last test or only test). With regard to customers qualifying HD from Piney Flats (e.g., RX01147; RX01148 at 002), or qualifying CellForce from Feistritz, (e.g., RX01144; RX01145) in less time than normally required for testing these products in deep-cycle or industrial applications, such examples do not provide evidence that customer qualification of a new supplier could be done in less than two years. (See CCRF 1076; CCFOF 881-908).

The testimony cited in this finding also does not support Respondent's contention that customers can substantially affect testing times. Mr. Whear testified that testing of the separator does not take as long as the battery, but then conceded that customers test the separators in a battery to see how it works before they actually approve it. (Whear, Tr. 4788-4789). Likewise, Mr. Gagge does not support Respondent's position. [REDACTED] [REDACTED] (Gagge, Tr. 2508-2509, *in camera*). Finally, the chart concerning which Mr. Gillespie testified also does not support this finding. (Gillespie, Tr. 2975-2976).

1078. Battery manufacturers can also send batteries to outside firms for testing, often resulting in shorter testing times. (RX00007). For instance, Exide determined that complete life cycle testing would take less than six and a half months if the testing was conducted by an outside firm. (RX00007).

**Response to Finding No. 1078:**

The finding is contradicted by its own citation. In RX00007, an Exide email chain, John Miller very explicitly states, "since day 1 we have been speaking to the 2 year approval process for industrial that takes us into 2010." (RX00007 at 002). Later in the chain third party testing is discussed, and there Mr. Miller says that they will do testing in August of the same year, *eight* months later, not that the testing will be fully completed then. (RX00007 at 001).

1079. Testing of a separator product can take as little as a couple of months. (Gilchrist, Tr. 567). In fact, testing the basic functionality of a separator can be accomplished in a few weeks. (Gilchrist, Tr. 567-68). The testing process for an automotive separator typically lasts less than a year. (Gilchrist, Tr. 567; RX00014 at 001). Complete testing and final acceptance of a new separator by a customer typically takes less than one to two years. (PX2300 (Heglie, IHT at 127); RX00243-007; RX00014 at 001). A battery should last at least 700 cycles. (Qureshi, Tr. 2031).

**Response to Finding No. 1079:**

This finding is contradicted by the evidence already referenced and cited in Response to Finding No. 1076. ( *See* Response to Finding No. 1076).

1080. In a complaint filed by EnerSys against Daramic in October 2006, which was verified by Larry Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year:

Moreover, even if EnerSys was able to purchase replacement battery separators from other vendors, such products could not immediately be used by EnerSys *and satisfy industry standards for battery performance and life testing*. Rather, significant engineering, testing, and manufacturing hurdles would be encountered to ensure that the replacement battery separators *would satisfy these specifications. These engineering, testing and manufacturing hurdles can take as long as one year to overcome.*

(RX00243 at 007, emphasis added).

**Response to Finding No. 1080:**

The citation is not supportive of the finding. Mr. Axt is not an engineer and furthermore, did not draft this document. Mr. Gagge, on the other hand, *is* an engineer and *did* testify to this question in court before Your Honor; and there, Mr. Gagge emphatically stated, "it's about a *two-and-a-half-year process* to ensure to ourselves and

to be able to show objective data to our customers that we can, you know, fulfill our warranties and that we have a product that does what we say it does.” (Gagge, Tr. 2491, emphasis added).

1081. Axt’s admission comports with what was summarized in a Microporous call report with him in October 2006. (RX01162-02)(“6-12 months period for qualification/acceptance of new product.”).

**Response to Finding No. 1081:**

The citation does not support the proposition in the finding. It is unclear what this document stands for at all. Any reference to testing is shrouded in uncertainty since we do not know what application is referred to, what type of testing, or whether testing is being referred to at all. Moreover the document is a MPLP call report which cannot pass a minimal hearsay analysis and purports to record the musings of Mr. Axt, rather than an engineer or someone involved with, and expert in, the qualification process. When a person from EnerSys who fits that description was questioned at trial, the answer was clear as to the required length of testing required for qualification: two and a half years. (See Response to Finding No. 1080).

1082. Nawaz Qureshi, the Vice President of Engineering and Technology at U.S. Battery, testified that a separator can be qualified after 750 cycles. (Qureshi, Tr. 2068). During testing, a battery can be cycled 2-4 times per day. (Qureshi, Tr. 2067-68). Thus, a separator can be fully qualified for commercial use in less than one year. (Qureshi, Tr. 2067-68).

**Response to Finding No. 1082:**

This finding is contradicted by Mr. Qureshi’s actual experience. U.S. Battery began working with Daramic on its Daramic DC separator in the late 1990’s. (Qureshi, Tr. 2014-15). The product was commercialized in about 2002. (Qureshi, Tr. 2021). U.S. Battery began purchasing Daramic DC in approximately 2003. (Qureshi, Tr. 2021). Moreover, Mr. Qureshi also testified that the “qualification process” entails cycle testing batteries to death, which for U.S. Battery’s products was 1200 to 1300 cycles. (Qureshi, Tr. 2032).

1083. Trojan Battery completed testing and qualified Daramic's HD product in a total of nine months. (Godber, Tr. 170-71).

**Response to Finding No. 1083:**

Complaint counsel has no specific response.

1084. { [REDACTED] }. (Weerts, Tr. 4496-97, *in camera*). { [REDACTED] }. (Weerts, Tr. 4497, *in camera*).

**Response to Finding No. 1084:**

It is the battery manufacturer not the separator manufacturer that would have to undergo testing when necessary. Here it may not have been necessary due to the fact that Entek was already qualified and the material was the same. When a line is added the only testing that would be required would be a runnability test since the material is the same the battery manufacturer would already be familiar with the performance of the material. (Gillespie, Tr. 2936; *see also* Gagge, Tr. 2488). Moreover, Entek is a manufacturer of SLI separator exclusively and SLI separators have much less stringent testing requirements than industrial or deep-cycle battery separators. (RX00013 at 009).

1085. In 2006, { [REDACTED] }. (RX00342-030, *in camera*). Furthermore, { [REDACTED] } in 2006. (RX00342-020, *in camera*).

**Response to Finding No. 1085:**

Even a cursory reading of RX00342-030 reveals that the one customer referred to in this finding is an Asian customer, and little else is known of it. What is clear is that in North America, testing for industrial and deep-cycle batteries takes two to two and a half years to complete. (*See* Response to Findings Nos. 1076 and 1080).

1086. The Technical Requirements outlined in Exide's Global PE Separator RFQ state that the testing and validation process will take up to 1 year and 9 months for transportation (SLI

separators and up to 2 years for industrial separators. (RX00013 at 009). According to Exide, these validation times include both life cycle and field testing. (RX00013 at 009).

**Response to Finding No. 1086:**

Complaint counsel has no specific response. However, the actual document states: "This test sequence is expected to take up to 9 months for life cycle and 1 year for field test for Transportation [SLI] product." (RX00013 at 009).

1087. { [REDACTED] }, (Hall, Tr. 2814, *in camera*; RX1161 ("According to Dr. Johns the qualification process will take 6 months from time of receipt of samples")), and { [REDACTED] } (RX00076, *in camera*; RX00043 at 03, *in camera*).

**Response to Finding No. 1087:**

This finding is not supported by the testimony cited. { [REDACTED] }  
[REDACTED]

[REDACTED] } (Hall, Tr. 2814, *in camera*). { [REDACTED] } (Hall, Tr. 2815). { [REDACTED] }  
*in camera*

[REDACTED] } (Hall, Tr. 2815). With regard to the document referencing Dr. Johns, it is a Microporous document relaying hearsay. Moreover, it is unclear what product is being discussed. No witness provided testimony regarding this document. { [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED] } (RX00076 at 001, *in camera*).

1088. Based on the above findings, the Court finds that the introduction of a competitive product can be accomplished in a timely fashion (i.e., less than two years).

**Response to Finding No. 1088:**

This finding states a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings above that are incorrect and/or invalid, as detailed in CCRF 1061-1087.

B. Sufficiency

1089. Today, Entek has { [REDACTED] }. (Weerts, Tr. 4459-60, *in camera*). Thus, Entek currently has a { [REDACTED] }. (Weerts, Tr. 4459-60, *in camera*).

Response to Finding No. 1089:

{ [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED] }  
[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*). Moreover, the acquisition of Microporous eliminated a competitor that was shaking things up in the SLI market. (See PX0428 at 002, { [REDACTED] } in camera)  
[REDACTED]  
[REDACTED]).  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3024-3025, *in camera*; Simpson, Tr. 3442, *in camera*). { [REDACTED] }

[REDACTED] } (Simpson, Tr. 3197, *in camera*). As a matter of economic theory, most-favored nation clauses tend to make firms less competitive by preventing them from making selective price cuts. (Simpson, Tr. 3197-3198).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3224, *in camera, see generally* 3209-3224, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3201-3202, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*; Gagge, Tr. 2522, *in camera*; Simpson, Tr. 3195-3196, *in camera*). { [REDACTED]

[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand; see also CCRF 938). { [REDACTED]

[REDACTED]

[REDACTED]

(PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3130, 3134-3135, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] (PX1902 at 001, *in camera* [REDACTED]

[REDACTED]); Weerts, Tr. 4509, *in camera*;

Gillespie, Tr. 3040, *in camera* [REDACTED]

[REDACTED]; PX1823 at 001, *in camera*

[REDACTED]

[REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3038-3039, *in*

*camera*; Gagge, Tr. 2522, *in camera*; Simpson, Tr. 3195-3196, 3408, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] (PX1515 at 002, *in camera* [REDACTED]

[REDACTED]

[REDACTED]; (Godber, Tr. 288-290) (Trojan worked with Entek in 1990's on deep cycle separator that did not perform adequately, and Trojan does not believe that Entek has any new technology for this application); (Gilchrist, Tr. 363, 365, 389-390) (Entek unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996, and Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

(Simpson, Tr. 3408, *in camera*).

1090. { [REDACTED] }. (PX0174-102, *in camera*). { [REDACTED] }. (Weerts, Tr. 4459-60, *in camera*).

**Response to finding No.1090:**

{ [REDACTED]  
[REDACTED]  
[REDACTED]

} At the time of the acquisition, in addition to the one PE/CellForce line in Piney Flats, Microporous already had in place two more PE/CellForce lines installed and in pre-operational phase in its Austria facility.

(Gilchrist, Tr. 334-335). { [REDACTED]

[REDACTED] } (PX0081 at 018, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. (PX0081 at 018, *in camera*; Gilchrist, Tr. 374-375, *in camera*; PX0920 (Gilchrist IHT. at 58-59, *in camera*; PX0957 at 007, *in camera* { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Gilchrist, Tr. 374-375; PX0920 (Gilchrist IHT at 58-59, *in camera*).

{ [REDACTED]

[REDACTED] } (Gilchrist, Tr. 446-

447; Gillespie, Tr. 2968-2969, 2976; PX1080; PX0081 at 018, *in camera*).

{ [REDACTED]

[REDACTED] } (Weerts, Tr. 4459-4460, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00114 at 024-077, *in camera*; see also CCRF

933).

1091. In addition to producing SLI separators, Entek manufactures [REDACTED]

[REDACTED]. (Weerts, Tr. 4492-93, *in camera*). Customers who purchase separators from

Entek { [REDACTED] }. (Weerts, Tr. 4492-93, *in camera*).

**Response to finding No.1091:**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil

Investigative Demand); see also PX1833 at 008, *in camera* { [REDACTED]

[REDACTED]. { [REDACTED]

[REDACTED]

[REDACTED] } (RX00114 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (PX1806 at 001, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4503-4504, *in camera*; RX00114 at 008, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] }

(Weerts, Tr. 4504, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (RX00014 at 008, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4515-4516, *in camera*).

{ [REDACTED]

[REDACTED] } (Weerts, Tr. 4515-

4516, *in camera*; see also RX00114 at 008, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4516, *in camera*). ([REDACTED] [REDACTED] } (Weerts, Tr. 4516, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4492-4493, *in camera*) (PX1833 at 004, *in camera* { [REDACTED] [REDACTED] }.  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1830 at 011, *in camera*).

1092. Entek { [REDACTED] }. (Weerts, Tr. 4493, *in camera*). { [REDACTED] }. (Weerts, Tr. 4493-94, *in camera*).

**Response to finding No.1092:**

[REDACTED]  
[REDACTED]  
[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand); see also PX1833 at 008, *in camera* { [REDACTED] [REDACTED] }.  
[REDACTED] }  
(PX1806 at 001, *in camera*). { [REDACTED]

[REDACTED] (RX00114 at 008,  
*in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera* { [REDACTED]  
[REDACTED] }; Gillespie, Tr. 3126-3127, *in camera*; Weerts, Tr. 4488, *in camera*; RFOF 512 (Exide is either the largest or second largest battery manufacturer in the world)). { [REDACTED]

[REDACTED]  
[REDACTED] } (Weerts, Tr. 4503-4504, 4526-4527, *in camera*) (b) { [REDACTED]  
[REDACTED] } (Gillespie, Tr. 3126-  
3127, *in camera*), { [REDACTED] } (Gillespie, Tr.  
3137-3138, *in camera*). { [REDACTED]

[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3137-3138, *in camera*). For instance, Microporous had no fewer than ten separate calendar rolls (or tools) for the manufacture of CellForce separators (Gaugl, Tr. 4618), while Daramic has over 100 different tolls that it utilizes in the production of separators. (Whear 4778-4779).

{ [REDACTED]  
[REDACTED] } (Weerts, Tr. 4493-4494, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4515, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (RX00014 at 008, *in camera*; see also Weerts, Tr. 4515-

4516, *in camera* { [REDACTED]

[REDACTED]

[REDACTED]; RX00114 at 008, *in camera* { [REDACTED]

[REDACTED]

[REDACTED] }).

1093. As long as a separator manufacturer has calender rolls on hand, it takes only a few hours to switch production from SLI to industrial, or vice versa. (Gilchrist, Tr. 558-59). Calender rolls cost around \$20,000, regardless of whether they are used to make SLI or industrial product. (Gilchrist, Tr. 559).

**Response to finding No. 1093:**

Respondent's assertion that Entek could switch to production of industrial separators in only a few hours is contradicted by testimony at trial. (See CCRF 1092). The assertion that it would cost only \$20,000 for Entek to acquire a calendar roll is contradicted by testimony at trial. (See CCRF 1092).

1094. Based on the findings listed above, the Court finds that the introduction of additional production is sufficient to counteract any competition which could potentially be lost due to the acquisition.

**Response to finding No. 1094:**

This bare assertion is unsupported by any evidence and is contradicted by a great deal of evidence. (See CCRF 1089-1093).

C. Likelihood

a. Costs of Constructing a PE Separator Line

1095. A PE line with a production capacity of 3 to 5 million square meters can be constructed for approximately { [REDACTED] }. (Hauswald, Tr. 881, *in camera*).

**Response to Finding No. 1095:**

The proposition is contradicted by the record evidence. The industry standard for the cost of a PE production line is about { } per square meter, which means if a company wants to build a { } production line it will cost { } (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 20 (Polypore CID Response)). For example, it cost { } (PX0907 (Kung, Dep. 34-35, *in camera*)). { } (PX0907 (Kung, Dep. 61-62, *in camera*)).

1096. The { } square meter line installed by Microporous in Piney Flats cost { }. (Hauswald, Tr. 882, *in camera*).

**Response to Finding No. 1096:**

The proposition is contradicted by the record evidence. The industry standard for the cost of a PE production line is about { } per square meter, which means if a company wants to build a { } production line it will cost { } (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 20 (Polypore CID Response)). For example, it cost { } (PX0907 (Kung, Dep. 34-35, *in camera*)). { } (PX0907 (Kung, Dep. 61-62, *in camera*)).

Moreover, the line installed at Microporous's Piney Flats was { } (Gilchrist, Tr. 320-321, *in camera*).

1097. It costs approximately \$9 million to build a PE line with a capacity to produce 11 million square meters per year. (Gaugl, Tr. 4547).

**Response to Finding No. 1097:**

The proposition is contradicted by the record evidence. The industry standard for the cost of a PE production line is about { } per square meter, which means if a company wants to build a { } production line it will cost { } (PX0907

(Kung, Dep. 34, *in camera*); PX0949 at 20 (Polypore CID Response)). For example, it cost

{ [REDACTED] } (PX0907 (Kung, Dep. 34-35, *in camera*)). { [REDACTED] } (PX0907 (Kung, Dep. 61-62, *in camera*)).

Moreover, Respondent's own document states that building a PE line with a { [REDACTED] } (RX01050 at 005, *in camera*)

1098. Calender rolls, which allow a producer to switch between automotive and industrial separators, cost between \$20,000 and \$50,000. (Gaugl, Tr. 4553; Weerts, Tr. 4488-89).

**Response to Finding No. 1098:**

The proposition is contradicted by the record evidence. Respondent contradicts itself in RFOF 588, which states { [REDACTED]

{ [REDACTED] } (Gillespie, Tr. 3137-3138, *in camera*).

Furthermore, a battery separator manufacturer needs { [REDACTED] } (Gillespie, Tr. 3138, *in camera*). For instance,

Microporous had no fewer than ten separate calender rolls (or tools) for the manufacture of CellForce separators (Gaugl, Tr. 4618), while Daramic has over 100 different tolls that it utilizes in the production of separators. (Whear, Tr. 4778-4779).

1099. Daramic installed a production line with a capacity of 15 million square meters in Prachinburi, Thailand for a cost of \$11.5 million. (Hauswald, Tr. 1112). This construction was a greenfield operation. (Hauswald, Tr. 1111).

**Response to Finding No. 1099:**

The proposition is contradicted by the record evidence. The industry standard for the cost of a PE production line is about { [REDACTED] } per square meter, which means if a company wants to build a { [REDACTED] } production line it will cost { [REDACTED] } (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 20 (Polypore CID Response)). For example, it cost { [REDACTED] } (PX0907 (Kung,

Dep. 34-35, *in camera*)). [REDACTED]

[REDACTED] (PX0907 (Kung, Dep. 61-62, *in camera*)).

1100. Daramic also considered installing a greenfield operation in Brazil with a capacity of 10 million square meters. (Hauswald, Tr. 1113). Although this production facility was not ultimately constructed, Daramic's analysis showed that the total cost of building the plant would be approximately \$6.9 million. (Hauswald, Tr. 1113-14; RX00654).

**Response to Finding No. 1100:**

The proposition is contradicted by the record evidence. The estimated cost for Daramic to build a greenfield facility in Brazil is lower than the industry standard for two reasons. First, according to Respondent's documents, [REDACTED] offered to sell Daramic [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX00694

at 001, *in camera*). Respondent figure of \$6.9 million to build a line in Brazil is only an estimate; the actual cost to build the plant could be significantly higher because PE separators are

[REDACTED] (PX0907 (Kung, Dep. at 39-40, *in camera*); Hauswald, Tr. 1114).

The industry standard for the cost of a PE production line is about [REDACTED] per square meter, which means if a company wants to build a [REDACTED] production line it will cost [REDACTED] (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 020 (Polypore CID

Response)). For example, it cost [REDACTED]

[REDACTED] (PX0907 (Kung, Dep. 34-35, *in camera*)). [REDACTED]

[REDACTED] (PX0907

(Kung, Dep. 61-62, *in camera*)).

1101. Daramic's cost estimate for installing a 30 million square meter production line in Prachinburi totaled [REDACTED]. (RX01050 at 005, *in camera*; RX01050 at 017, *in camera*).

**Response to Finding No. 1101:**

The proposition is contradicted by the record evidence. Respondent's document states that the [REDACTED] million square meter expansion will cost [REDACTED] (RX01050 at 002, *in camera*). The industry standard for the cost of a PE production line is about [REDACTED] per square meter, which means if a company wants to build a [REDACTED] production line it will cost [REDACTED] (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 020 (Polypore CID Response)). For example, it cost [REDACTED] [REDACTED] (PX0907 (Kung, Dep. 34-35, *in camera*)). [REDACTED] [REDACTED] (PX0907 (Kung, Dep. 61-62, *in camera*)).

1102. James Kung [REDACTED] [REDACTED] (PX0907 (Kung, Dep. at 27, 34-35), *in camera*).

**Response to Finding No. 1102:**

Complaint Counsel has no specific response.

1103. Additionally, Kung [REDACTED] [REDACTED] (PX0907 (Kung, Dep. at 54, 61), *in camera*).

**Response to Finding No. 1103:**

Complaint Counsel has no specific response.

1104. [REDACTED] [REDACTED] (RX1570, *in camera*).

**Response to Finding No. 1104:**

The proposition is contradicted by the record evidence. The industry standard for the cost of a PE production line is about [REDACTED] per square meter, which means if a company wants to build a [REDACTED] production line it will cost [REDACTED] (PX0907 (Kung, Dep. 34, *in camera*); PX0949 at 020 (Polypore CID Response)). For example, it cost [REDACTED] [REDACTED] (PX0907 (Kung,

Dep. 34-35, *in camera*). { [REDACTED] }  
{ [REDACTED] } (PX0907 (Kung, Dep. 61-62, *in camera*)).

Moreover, the line installed at Microporous's Piney Flats was developed and installed by Jungfer. Jungfer was purchased by Daramic and then shutdown. (Gilchrist, Tr. 320-321, *in camera*).

b. Asian Competitors

1105. Daramic's primary competitors in Asia include NSG (33 million square meter capacity), BFR (30 million square meter capacity), Anpei (22 million square meter capacity), Separindo (17 million square meter capacity), Sebang (15 million square meter capacity) and Epoch (6 million square meters capacity). (Thuet, Tr. 4330-32). Daramic's competitors in Asia are very aggressive. (Thuet, Tr. 4330).

**Response to Finding No. 1105:**

The proposition is contradicted by the record evidence. Mr. Thuet does not work for any of these Asian separator producers and therefore does not have first hand knowledge about their actual capacity. Any of the volumes he stated are merely speculation on his part about the size of a competitor. (Thuet, Tr. 4385-4386). For example testimony at trial from a BFR Board member showed that BFR had only a capacity of { [REDACTED] } million square meters after the addition of { [REDACTED] } square meters that Mr. Thuet stated. (Hall, Tr. 2769, *in camera*; PX0672 at 001, *in camera*).

When Mr. Thuet testified that Daramic's competitors are very aggressive, he was specifically referring to Daramic's competitors' behavior in Asia. Mr. Thuet stated "... we have much more competition in Asia compared to other regions in the world." (Thuet, Tr. 4330).

{ [REDACTED] }  
{ [REDACTED] } (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382; *see generally* CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers

selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380).

The testimony of several of Daramic's management and its Economic expert contradict the above finding. According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). Dr. Kahwaty confirmed that { [REDACTED] }  
{ [REDACTED] }  
(Kahwaty, Tr. 5343, *in camera*).

Lastly, North American battery separator manufacturers have never lowered prices due to Asian battery separator producers' presence. Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*).

1106. The Asian PE separator industry is expanding rapidly. (Thuet, Tr. 4333). Since 2006, BFR added two additional production lines which doubled its capacity. (Thuet, Tr. 4333). In addition, Separindo and Anpei each recently added a production line. (Thuet, Tr. 4333).

**Response to Finding No. 1106:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (RX01050 at 3, *in camera*;

PX0907 (Kung, Dep. 142, *in camera*)). { [REDACTED]

[REDACTED] } (RX01050 at 5, *in camera*). The local PE separator producers – does include

Daramic production facilities in Asia - do not have sufficient capacity to support the demand of

the Asian battery manufacturers. (PX0907 (Kung, Dep. 146, *in camera*)). Asian is a net

purchaser of PE separators. (PX0907 (Kung, Dep. 147, *in camera*)).

Moreover, it was not difficult to [REDACTED]

[REDACTED] (PX0907 (Kung, Dep. at 54, 61, *in camera*)).

1107. Daramic tested PE separators produced by its Asian competitors and found no differences between its separators and those manufactured by the competitors. (Thuet, Tr. 4335-36; Gaugl, Tr. 4541-42). The test results showed that the competitors' separators are comparable to Daramic's separators from a materials and performance standpoint. (Thuet, Tr. 4335-36; Gaugl, Tr. 4541-42).

**Response to Finding No. 1107:**

The proposition that Asian battery separator manufacturers are comparable to Daramic separators is contradicted by the record evidence. (*See* CCRFOF 1002, 1008-1009, 1011, 1020,

1022-1025, 1028, 1030, 1033, 1040-1041, 1044-1045, 1049, 1051, 1053). Daramic's Strategy

Audit listed { [REDACTED] } as "Worst in Industry" for { [REDACTED]

[REDACTED]

{ [REDACTED] } where as it considered itself "Best in Industry" in those categories. (PX0265 at 16, *in*

*camera*). { [REDACTED] } were also included as the "Worst In

Industry" in Daramic's Strategy Audit in the same categories as { [REDACTED] } in addition to these

two categories – { [REDACTED] } (PX0265 at 16, *in camera*).

1108. Currently, there are 50 million square meters per year of excess PE separator production capacity in Asia. (Thuet, Tr. 4329-30). Daramic has 10-15 million square meters of excess capacity in Asia. (Thuet, Tr. 4338).

**Response to Finding No. 1108:**

The propositions in this finding are contradicted by the record evidence. Mr. Thuet does not work for any of these Asian separator producers and therefore does not have first hand knowledge about their actual capacity. Any of the volumes he stated are merely speculation on his part about the size of a competitor. (Thuet, Tr. 4385-4386). For example testimony at trial from a BFR Board member showed that BFR had only a capacity of { [REDACTED] } million square meters after the addition of { [REDACTED] } not the wildly higher { [REDACTED] } square meters that Mr. Thuet stated. (Hall, Tr. 2769, *in camera*; PX0672 at 001, *in camera*). Moreover, BFR has not lost any business due to the recession. (Hall, Tr. 2853, *in camera*).

Lastly, regardless of the excess capacity in Asia, Asian battery separator manufacturers have no impact on pricing in North America. Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*).

1109. Due to the excess capacity in Asia, separator manufacturers located in Asia are exporting products to other parts of the world. (Thuet, Tr. 4339-40). For example, Daramic is exporting separators to Europe, the Middle East and South America. (Thuet, Tr. 4339). NSG, Anpei and Epoch are also exporting to Europe and South America. (Thuet, Tr. 4339-40).

**Response to Finding No. 1109:**

The proposition is contradicted by the record evidence. { [REDACTED] } (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382; *see generally* CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380).

The testimony of several of Daramic's management and its Economic expert contradict the above finding. According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). Dr. Kahwaty confirmed that { [REDACTED] } (Kahwaty, Tr. 5343, *in camera*).

Moreover, North American battery separator manufacturers have never lowered prices due to Asian battery separator producers' presence. Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED] }

[REDACTED]

[REDACTED] (Weerts, Tr. 4502-4503, *in camera*).

Lastly, Dr. Simpson testified that the [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr.

3195, *in camera*).

1110. The costs of shipping from Asia [REDACTED]. (Thuet, Tr. 4351-52, *in camera*). [REDACTED]. (Thuet, Tr. 4352, *in camera*). [REDACTED]. (Thuet, Tr. 4352, *in camera*). However, [REDACTED]. (Thuet, Tr. 4352-53, *in camera*). For

example,

[REDACTED] (Hall, Tr. 2846-47, *in camera*).

**Response to Finding No. 1110:**

Respondent's assertions that there are no additional taxes or duties in Thailand is directly contradicted by its own document. Specifically, Respondent's document states one [REDACTED]

[REDACTED] (RX01435 at 3, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2880, *in camera*

[REDACTED]).

[REDACTED]

[REDACTED] (Hall, Tr. 2846-2847, 2879, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0903 (Thuet Dep. at 29, *in camera* { [REDACTED] })).

Lastly, Dr. Kung stated that it costs [REDACTED] to ship from North America to China. (PX0907 (Kung, Dep. 154-155, *in camera*)).

1111. The cost of manufacturing separators in Asia [REDACTED] [REDACTED]. (Thuet, Tr. 4357-58, *in camera*). It costs [REDACTED] [REDACTED] a typical SLI separator in Asia compared to Europe. (Thuet, Tr. 4357, *in camera*). Likewise, the cost of manufacturing separators in the U.S. [REDACTED] the cost of producing in Asia. (Thuet, Tr. 4357-58, *in camera*).

**Response to Finding No. 1111:**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*; see also CCFOF 207-246). [REDACTED]  
[REDACTED] } (Hall, Tr. 2727, *in camera*; PX1522 at 005, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }  
(PX1522 at 005, *in camera*; Hall, Tr. 2727, 2734-2735, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2735-2736, 2764, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 172-173, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1522 at 005, *in camera*; see also CCFOF 234-242).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2745, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in*

*camera* { [REDACTED]

[REDACTED] } ). { [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3024-3025, *in*

*camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (RX01497 at 001-002, *in camera*; see also Toth, Tr. 1404 (the Asian separator manufacturers are not selling separators in North America because the margins are not high enough).

{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Roe, Tr. 1812-1813; Weerts, Tr. 4501, 4512, *in camera*; see also Weerts, Tr. 4502-4503, *in camera* [REDACTED]

[REDACTED]  
[REDACTED] ).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (See CCRF 995).

c. Entek Excess Capacity

1112. In order to { [REDACTED]  
[REDACTED] }. (Weerts, Tr. 4495, *in camera*). { [REDACTED] }  
(Weerts, Tr. 4495, *in camera*).

**Response to Finding No. 1112:**

The assertions in this finding are contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3442, *in camera*; *see also* Gillespie, Tr.

3024-3025, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3197, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3197-3198, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3224, *in camera*; *see*

*generally* Simpson, Tr. 3209-3224, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*).

{ [REDACTED]

[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand); *see also* CCRF 938). { [REDACTED]

[REDACTED]

[REDACTED] } (PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Gillespie, Tr. 3130, 3134-3135, *in camera*).

{ [REDACTED]

[REDACTED] } (PX1515 at 002, *in camera* { [REDACTED]

[REDACTED] }; Godber, Tr. 288-

290 (Trojan worked with Entek in the 1990's on deep cycle separator that did not perform adequately, and Trojan does not believe that Entek has any new technology for this application); Gilchrist, Tr. 363, 365, 389-390 (Entek unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996, and Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process)).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera* [REDACTED]  
[REDACTED]); Weerts, Tr. 4509, *in camera*; Gillespie, Tr.  
3040, *in camera* { [REDACTED]  
[REDACTED] }; PX1823 at 001, *in camera* [REDACTED]  
[REDACTED]  
[REDACTED] }).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3038-3039, *in*  
*camera*; Gagge, Tr. 2522, *in camera*; Simpson, Tr. 3195-3196, 3408, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*).  
{ [REDACTED]  
[REDACTED] } (Weerts, Tr. 4500-4503, *in*  
*camera*).

1113. Entek { [REDACTED] } (Weerts, Tr. 4495, *in camera*). [REDACTED] (Weerts, Tr. 4495-96, *in camera*).

**Response to Finding No. 1113:**

The assertions in this finding are contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4501, 4512, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Weerts, Tr. 4502-4503, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3442, *in camera*; *see also* Gillespie, Tr.

3024-3025, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3197, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3197-3198, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3198-3199, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3224, *in camera*, see generally Simpson, Tr. 3209-3224, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3195, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*).

{ [REDACTED]  
[REDACTED] } (RX00114 at 008, *in camera* (Entek's response to FTC Civil Investigative Demand); see also CCRF 938). { [REDACTED]

[REDACTED] } (PX1902 at 001, *in camera*; Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera*). { [REDACTED]

[REDACTED] } (Gillespie, Tr. 3130, 3134-3135, *in camera*).

{ [REDACTED]  
[REDACTED] } (PX1515 at 002, *in camera* { [REDACTED]

[REDACTED]; Godber, Tr. 288-290 (Trojan worked with Entek in the 1990's on deep cycle separator that did not perform adequately, and Trojan does not believe that Entek has any new technology for this application); Gilchrist, Tr. 363, 365, 389-390 (Entek unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996, and Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process)).

{ [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera* { [REDACTED]  
[REDACTED] }); Weerts, Tr. 4509, *in camera*; Gillespie, Tr. 3040, *in camera* { [REDACTED]  
[REDACTED] }; PX1823 at 001, *in camera* { [REDACTED]  
[REDACTED]  
[REDACTED] })).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3038-3039, *in camera*; Gagge, Tr. 2522, *in camera*; Simpson, Tr. 3195-3196, 3408, *in camera*).

d. Sponsored Entry/Vertical Integration

1114. One example of sponsored entry is { [REDACTED]  
[REDACTED] }. (Weerts, Tr. 4480, *in camera*). { [REDACTED]

[REDACTED]}. (Hall, Tr. 2820, *in camera*). [REDACTED]}. (Hall, Tr. 2749, 2825, *in camera*). [REDACTED]}. (Hall, Tr. 2749, 2825, *in camera*).

**Response to Finding No. 1114:**

The assertions in this finding are contradicted by the record evidence. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]}. (Hall, Tr. 2749, *in camera*).

1115. [REDACTED]}. (RX00073; Hall, Tr. 2826-28, *in camera*).

**Response to Finding No. 1115:**

Complaint Counsel has no specific response.

1116. Another example is [REDACTED]}. (PX0907 (Kung, Dep. at 59), *in camera*). [REDACTED]}. (PX0907 (Kung, Dep. at 59), *in camera*). BFR was founded in 2000 through a joint venture agreement between Fengfan Group and Rising Group. (RX00050-04). [REDACTED]}. (RX00053, *in camera*; RX00052, *in camera*; Hall, Tr. 2715-16). The resulting three-party joint venture continued to be called BFR. (Hall, Tr. 2716). [REDACTED]}. (RX00032, *in camera*).

**Response to Finding No. 1116:**

The assertion that [REDACTED]

[REDACTED]}. (RX00050 at 004, *in camera*). BFR started producing PE separators in 2002, long before JCI became a member of the joint venture. (PX0907 (Kung, Dep. 54-55); RX00053, *in camera*; RX00052, *in camera*; Hall, Tr. 2715-2716).

1117. BFR supplies separators on a global basis, including into South America. (RX00050 at 11). When the supply agreement with BFR was signed, JCI intended to “make [BFR] a world class separator supplier to JCI and other battery manufacturers.” (RX00055).

**Response to Finding No. 1117:**

The assertions in this finding are contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2856, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2745-2746, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2878, *in camera*; PX1509

at 009, *in camera*). [REDACTED]

[REDACTED] (PX0907 (Kung Dep. at

186-187, *in camera*)).

1118. Through comments to JCI and BFR, [REDACTED] [REDACTED] (RX00062,

*in camera*). As a result, [REDACTED]

[REDACTED] (RX00061, *in camera*).

**Response to Finding No. 1118:**

The assertions in this finding are contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (See generally CCFOF 947-950, 966-967, 969, 972-974,

983-986). [REDACTED]

[REDACTED] (Hall, Tr. 2881, *in camera*). [REDACTED]

[REDACTED] (Axt, Tr. 2218, *in camera*; see also Gagge, Tr.

2499, *in camera*) [REDACTED]

[REDACTED] } (Hall, Tr. 2881, *in camera*);

[REDACTED]  
[REDACTED] } (PX0907

(Kung, Dep. at 262, *in camera*); Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). [REDACTED]

[REDACTED] } (Hall, Tr. 2881-2882, *in camera*; PX0907 (Kung, Dep. at 291, *in camera*)). [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2881-2882, *in camera*).

[REDACTED]  
[REDACTED] } (Axt, Tr. 2219, *in camera*). [REDACTED]

[REDACTED] } (Axt, Tr. 2220, *in camera*).

[REDACTED]  
[REDACTED] }  
(PX0907 (Kung, Dep. at 283, *in camera*)). [REDACTED]

[REDACTED] } (Hall, Tr. 2880-2881, *in camera*). Furthermore, neither of the documents cited in this finding were shown to the JCI witness at trial.

1119. [REDACTED] }. (Hall, Tr. 2820-21, *in camera*; RX950, *in camera*).

**Response to Finding No. 1119:**

The proposition is contradicted by the record evidence. [REDACTED]

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

1120. One of Daramic's customers, [REDACTED]  
[REDACTED] (Thuet, Tr. 4361-65, *in camera*). The two companies are negotiating the

terms of a joint venture whereby Daramic would install a PE line in a location owned by [REDACTED] (Thuett, Tr. 4361-65, *in camera*).

**Response to Finding No. 1120:**

The assertions in this finding are contradicted by the record evidence. { [REDACTED]

[REDACTED] }  
(Thuett, Tr. 4421, *in camera*). To the extent that Respondent's are suggesting that battery manufacturers are pursuing joint ventures with battery separator manufactures to fulfill their separator needs, the record clearly indicates this is not correct. (Godber, Tr. 230 (Trojan would not vertically integrate because of the cost and required resources); Liester, Tr. 4038 (East Penn has no plans to vertically integrate); Benjamin, Tr. 3527-3529 (Bulldog Battery will not vertically integrate because it does not possess the know-how needed to manufacture separators); Craig, Tr. 2644, *in camera*; Burkert, Tr. 2363, 2365, *in camera* { [REDACTED]

[REDACTED] }; Hall, Tr. 2703 (JCI has not considered building its own PE separator manufacturing lines to manufacture separators for internal use)).

1121. { [REDACTED] } (Seibert, Tr. 4263-65, *in camera*). { [REDACTED] } (Seibert, Tr. 4264-65, *in camera*).

**Response to Finding No. 1121:**

The proposition that { [REDACTED] } is contradicted by the record evidence. Approximately { [REDACTED] } of Sebang's PE separators are consumed internally and the remaining { [REDACTED] } are purchased by { [REDACTED] } customers. (RX01084, *in camera*; Seibert, Tr. 4264-4265, *in camera*).

1122. Based on the above findings, the Court finds that entry into the separator industry would be profitable. The Court further finds that entry is likely by Entek, numerous Asian suppliers, and/or sponsored entry/vertical integration by battery manufacturers.

**Response to Finding No. 1122:**

This is a legal conclusion, not a factual assertion. Moreover, it is based on Respondent's proposed findings 1061-1122 that are incorrect and/or invalid, as detailed in CCRF for 1061-1122. (See CCRF 1061-1122).

### VIII. The H&V Agreement

#### A. The Cross Agency Agreement Between H&V and Daramic was a Legitimate Sales Joint Venture Between the Companies

1123. Pursuant to the 2001 Cross Agency Agreement ("Agreement"), { [REDACTED] [REDACTED] [REDACTED] }. (RX00688, *in camera*). The companies also planned potential sharing of technologies and development of new products at the outset of the Agreement. (Roe, Tr. 1746-47).

#### Response to Finding No. 1123:

Complaint Counsel has no specific response to the first sentence of this proposed finding.

The second sentence is factually incorrect. The cited testimony of Mr. Roe does not mention or refer to any "planning" by the companies, nor does it represent any statement by, or position of H&V. The testimony relates solely to perceived benefits to Daramic from entering the Agreement. (Roe, Tr. 1746-1747). Moreover, the "potential" activities noted in the second sentence of the proposed finding were outside the scope of the Agreement (CCFOF 1193-1194; RX00374 at 001), and none of these "potential" activities { [REDACTED] }. (PX0925 (Porter, Dep. at 106-107, 156-157, 167-168), *in camera*; see also PX0200 at 004 (press release of the companies to announce their collaboration states "In the future there may be potential for joint R&D and engineering initiatives ..."))).

1124. Importantly, Daramic makes PE separators; H&V did not, and does not. (Whear, Tr. 4679-80; PX0094; PX0200). { [REDACTED] [REDACTED] } (PX0925 (Porter, Dep. at 15-16), *in camera*; PX0917 (Cullen, Dep. at 5-6), *in camera*; Whear, Tr. 4738, *in camera*). Daramic had and has no plans to produce AGM separators, and H&V had and has no plans to produce PE separators. (PX0925 (Porter, Dep. at 39), *in camera*; PX0200). In fact, one of the benefits of the Agreement to Daramic was having an AGM product in its portfolio. (Roe, Tr. 1746). Accordingly, Daramic and H&V were not actual or potential competitors. (PX0011; PX0200; Hauswald, Tr. 645).

#### Response to Finding No. 1124:

Daramic and H&V were potential competitors, but for their agreement not to compete. This proposed finding combines falsehood with fact in an attempt to obscure that reality.

The first two sentences of this proposed finding are accurate, as is the fourth sentence. The third is false. The evidence cited by Respondent does not support this statement; rather, it directly contradicts it. "Elimination of [a] potential competitor" is the primary benefit of the Daramic/H&V Agreement for the companies, as noted by the exhibit on which Respondent relies. (PX0200 at 005). And Mr. Porter testified that H&V is **"always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators**. (PX0925 at 016 (Porter, Dep. at 37)). The weight of the evidence proves that **H&V had plans to enter the production and sale of PE separators prior to** its agreement not to compete with Daramic. (CCFOF 1168-1181). In addition, contemporaneous evidence proves that { [REDACTED] } the Agreement. (RX00366, *in camera* ({ [REDACTED] })).

The fifth sentence of this proposed finding is false for the same reasons. Because of their agreement not to compete, { [REDACTED] } as PX0011 reflects. (PX0011, *in camera*; see also CCFOF 1187). The second exhibit cited by Respondent states that a key benefit to the companies of their agreement not to compete was the "[e]limination of potential competitor[s]." (PX0200 at 005). Finally, the testimony of Mr. Hauswald shows that Daramic planned and attempted to manufacture AGM separators and/or separators made of other materials to replace AGM separators in sealed lead acid batteries prior to the Agreement. (Hauswald, Tr. 645-646 (Daramic "made a lot of samples" for customers

from 1994 through 2000 "to go in the AGM business."); *see also* PX0923 (Hauswald, IHT at 287, *in camera*)).

1125. One of the primary motivations for the Agreement was to allow Daramic and H&V to compete with a similar joint venture between Entek and Dumas, an AGM producer. (Roe, Tr. 1745; RX151). { [REDACTED] } (PX0925 (Porter, Dep. at 110), *in camera*). { [REDACTED] } (PX0925 (Porter, Dep. at 110), *in camera*). Likewise, Daramic felt that it needed an alliance with H&V in order to effectively compete against Entek/Dumas. (Roe, Tr. 1745).

**Response to Finding No. 1125:**

Complaint Counsel has no specific response, except to note that the Entek/Dumas relationship { [REDACTED] }, and there is no evidence it was renewed after its initial term ended on August 31, 2002. (PX0917 (Porter, Dep. at 154-155, *in camera*); RX00151 at 005).

1126. As part of the Agreement, H&V and Daramic engaged in joint activities including significant joint marketing, promotional efforts and joint exhibits at trade shows and conventions - activities which have been "very successful." (PX0925 (Porter, Dep. at 126-28), *in camera*; Roe, Tr. 1746-47; RX373). In addition, Daramic and H&V participated in joint customer appreciation events. (Roe, Tr. 1746-47; RX1102; RX1103; RX1104; RX1105). These efforts were successful in opening doors in regions of the world where Daramic or H&V had little or no presence. (Roe, Tr. 1746-47; PX0925 (Porter, Dep. at 126-27), *in camera*; RX1101; RX363; RX1106). { [REDACTED] } (Roe, Tr. 1747-48; RX363; RX364; RX365; RX381; RX1100, *in camera*; RX1108, *in camera*; RX1109, *in camera*; RX1110, *in camera*; RX1111, *in camera*; RX1112, *in camera*; RX1113, *in camera*; RX1114, *in camera*; RX1115, *in camera*; RX1116, *in camera*; RX1117, *in camera*; RX1118).

**Response to Finding No. 1126:**

This proposed finding mischaracterizes the cited evidence. Mr. Porter testified that the companies hosted joint "hospitality event[s]" for customers at industry conventions, and he "thought they were very successful in attracting a large part of the convention." (PX0925 (Porter, Dep. at 127-128 )). He did not testify that Daramic and H&V engaged in any "significant joint marketing" or other promotional efforts "[i]n addition" to the annual customer appreciation events, as Respondent's proposed finding asserts. The proposed finding is further contradicted by the testimony of Mr. Hauswald, who stated that { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]}. (PX0923 (Hauswald IHT at 280, 282, *in camera*); see also CCFOF 1186). The testimony of Mr. Roe also contradicts this proposed finding. He admitted that the Agreement was not necessary for the companies to conduct their joint customer appreciation events. (CCFOF 1192).

To the extent that the proposed finding implies that the Agreement led to increased sales of Daramic PE separators anywhere in the world, or that it led to increased sales of AGM separators made by H&V in any country other than Brazil or India, it is contradicted by the facts. (CCFOF 1186, 1196; see also Roe, Tr. 1747-1748, 1810; PX0923 (Hauswald, IHT at 281-282, *in camera*)).

1127. Because they produced products using different technologies, H&V and Daramic looked at joint research and development opportunities for new products. (Roe, Tr. 1747; PX0917 (Cullen, Dep. at 119-23), *in camera*). [REDACTED] (PX0917 (Cullen, Dep. at 119-23), *in camera*).

**Response to Finding No. 1127:**

This proposed finding is irrelevant, because any joint R&D activity undertaken would have been outside the scope of the Agreement. (CCFOF 1194). To the extent such activity was “looked at” by the companies, [REDACTED] (CCRF 1123; PX0925 (Porter, Dep. at 156-157, 167-168); PX0917 (Cullen, Dep. at 120-121, *in camera*); Roe, Tr. 1809; see also CCFOF 1193).

1128. [REDACTED] (PX0917 (Cullen, Dep. at 114-15), *in camera*). Daramic represented H&V primarily in India and Brazil. (Roe, Tr. 1747-48). [REDACTED] (PX0917 (Cullen, Dep. at 314-15), *in camera*).

**Response to Finding No. 1128:**

See CCRF 1123, 1126. See also CCFOF 1184-1187.

1129. [REDACTED]  
[REDACTED] (RX00381, *in camera*). [REDACTED]  
[REDACTED] (PX0917 (Cullen, Dep. at 14), *in camera*). [REDACTED]  
[REDACTED] (PX0917 (Cullen, Dep. at 68-69), *in camera*).

**Response to Finding No. 1129:**

Complaint Counsel has no specific response beyond the facts previously identified in

CCRF 1126 and CCFOF 1182-1187 and 1192-1196.

1130. The joint activity by the two companies explains the necessity for the non-compete clause in the Agreement. (PX0925 (Porter, Dep. at 65-66) ). As part of the joint activity the two companies shared a great deal of confidential product, marketing and customer information. (PX0925 (Porter, Dep. at 65-66) ). These exchanges promoted and facilitated the venture's activities. (PX0925 (Porter, Dep. at 126-28), *in camera*; Roe, Tr. 1746-47). But they could not and would not have occurred without some provision preventing their improper use. (PX0925 (Porter, Dep. at 65-66) ).

**Response to Finding No. 1130:**

This proposed finding is contradicted by the fact that Daramic and H&V agreed upon measures to protect fully their respective confidential and/or competitively sensitive information that had nothing to do with [REDACTED] (PX0200 at 006 (informing customers that Daramic and H&V "have Confidentiality Agreements with each other and [they] will respect customer [confidentiality] agreements . . ."); RX00367 at 001 ("A Confidentiality Agreement exists between [the] companies and each of its employees."); CCFOF 1194-1195). No evidence in the record supports a finding of "necessity" for [REDACTED] [REDACTED] (CCFOF 1184-1186, 1192-1196). Stated differently, the evidence does not support a finding that, but for [REDACTED] [REDACTED] the parties' respective confidential information would have been at risk of improper use while they conducted joint activities.

1131. [REDACTED]  
[REDACTED] (PX0925 (Porter, Dep. at 65-66), *in camera*). [REDACTED]  
[REDACTED] (PX0925 (Porter, Dep. at 65-66, 131), *in camera*).

**Response to Finding No. 1131:**

This proposed finding is contradicted by the fact that, when it executed the Cross Agency Agreement, { [REDACTED] } because H&V had “threatened” to enter the PE business. (PX0094 at 002, 012, *in camera*; PX0169 at 001; PX0035 at 005-006; *see also* CCFOF 1171-1185). In addition, the evidence does not support any finding in which the Agreement is characterized as a “joint venture.” There was no integration of the companies’ sales forces, technical staff, production facilities, R&D operations, intellectual property, or other productive assets during the life of the Agreement, and Respondent has offered no evidence that any such integration took place. Daramic’s documents and the testimony of its management prove that no real “joint venture” was created. (RX00370 at 002 (“To date, the only real activities that are on-going are [Daramic’s AGM sales efforts] in Brazil and the co-hosting of the BCI evening event. The BCI event can be co-hosted without an agreement.”); CCFOF 1184-1186, 1190, 1192-1194, 1196; CCRF 1126-1129).

1132. Based on the above findings, the Agreement between Daramic and H&V was a legitimate and productive cooperative venture which (1) had no effect of limiting or restraining competition between the two companies and/or (2) was reasonably ancillary because it promoted the success of this more extensive cooperation.

**Response to Finding No. 1132:**

This proposed finding is a legal conclusion, not a factual assertion. Moreover, it is contradicted by the weight of the evidence. (*See* CCRF 1123-1131; CCFOF 1167-1196). The Agreement never rose to the level of a legitimate joint venture that warranted { [REDACTED] }

**IX. Remedy**

A. There is no Basis for any Required Divestiture of the Feistritz Plant

1133. The FTC seeks divestiture of the former Microporous plant in Austria (the "FeistritzPlant"). For the reasons set forth herein, no relief is necessary, but even if it were, divestiture of the Feistritz Plant is unwarranted, inappropriate under the facts and, significantly, outside of the jurisdiction of the FTC.

**Response to Finding No. 1133:**

This is a legal conclusion, not a factual assertion.

1134. First, the FeistritzPlant was not a part of the acquisition as an operating facility since it was not in operation as of February 29, 2008.

**Response to Finding No. 1134:**

This finding does not contain any citations to the record. { [REDACTED]

[REDACTED]

[REDACTED] } (PX0078 at 012, *in camera*; PX0162 at 019, *in camera*). { [REDACTED]

[REDACTED] } PX0078 at 025, *in camera*; Gilchrist, Tr. 309, 334-35; Gaugl, Tr. 4601-4602, 4626-4627.

1135. Second, the FeistritzPlant is not located within North America, the relevant geographic market alleged by the FTC.

**Response to Finding No. 1135:**

Complaint Counsel has no specific response.

1136. { [REDACTED] } (Trevathan, Tr. 3571-72; RX01227 at 002, 039,063-066, *in camera*; RX01228, *in camera*; RX01229 at 047, *in camera*; RX01572; RX1042, *in camera*; RX546, *in camera*).

**Response to Finding No. 1136:**

Respondent's assertion is not supported by the citations provided. The Feistritz Plant was owned by Microporous GmbH and Microporous GmbH was owned by Microporous L.P. (PX0611 at 003).

1137. Fourth, inclusion of the Feistritzplant with U.S.-based assets that could be subject to a divestiture order is not necessary in order for those assets to be "viable." In fact, Gilchrist admitted during the hearing that the FeistritzPlant 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. 511, *in camera*; Gilchrist, Tr. 540-41).

**Response to Finding No. 1137:**

The Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and giving the acquirer a second source of supply in case problems arose at one plant. (Gaugl, Tr. 4602; *see* CCFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216).

1138. Fifth, the Feistritz Plant, which came online in March - June 2008, does not sell products to customers located in North America or the United States. (Gaugl, Tr. at 4643).

**Response to Finding No. 1138:**

The cited testimony does not support the assertion that the Feistritz Plant came online in March - June 2008. Evidence in the record states that { [REDACTED] } PX0078 at 025, *in camera*; Gilchrist, Tr. 309, 334-35; Gaugl, Tr. 4601-4602, 4626-4627.

1139. Sixth, the FTC has not shown that operation of the Feistritz plant enhanced North American (or United States) competitive conditions, the United States being the jurisdiction for which the FTC has authority to act regarding maintenance of competitive conditions. More specifically, there is no evidence that opening of the Feistritz Plant had the effect of enabling the plant in Piney Flats, Tennessee, to sell products either in the United States or North America that it otherwise would not have been able to sell.

**Response to Finding No. 1139:**

This finding does not contain any citations to the record. The Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and provide the acquirer a second source of supply in case problems arose at one plant. (Gaugl, Tr. 4602; *see* CCFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216). **Gilchrist testified that Microporous had more offers for business than it was going to be able to handle. (Gilchrist, Tr. 344). Trevathan testified that opening of the Feistritz Plant freed up capacity at Piney Flats. (Trevathan, Tr. 3721).**

1140. There is no dispute that the plant was not in operation as of February 29, 2008. The Feistritz Plant did not commence operation until March 2008 and did not become fully operational until June 2008. (Gaugl, Tr. 4603; Gilchrist, Tr. 374-75). Thus, when Daramic acquired Microporous on February 29, 2008, as a part of that transaction it did not acquire an operating plant in Feistritz, Austria. Divestiture should not be required of a business that was simply not part of the acquisition.

**Response to Finding No. 1140:**

Respondent's assertion that the Feinstitz Plant did not commence operation until March 2008 and did not become fully operational until June 2008 is not supported by the citation to Gilchrist's testimony provided. The Feistritz Plant was owned by Microporous and acquired by Respondent as part of the acquisition of Microporous. (PX0078 at 012, *in camera*; PX0162 at 019, *in camera*). The last sentence is a legal conclusion, not a factual assertion.

1141. {

[REDACTED]

} (Kahwaty, Tr. 5519, *in camera*). {

} (Kahwaty, Tr. 5519, *in camera*). Even if Respondent's global geographic market is accepted, the "competitive effects story," does not support any required divestiture of the Feistritz Plant.

**Response to Finding No. 1141:**

The Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and giving the acquirer a second source of supply in case problems arose at one plant. (Gaugl, Tr. 4602; *see* CCFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216). The last sentence is a legal conclusion, not a factual assertion and does not contain any citations to the record.

1142. {

[REDACTED]

} (Gilchrist, Tr. 528-31, *in camera*).

**Response to Finding No. 1142:**

Respondent's assertion that {

[REDACTED] } is not supported by the citation provided.

1143. {

[REDACTED]

} (Gilchrist, Tr. 502, *in camera*). The Microporous Board was concerned about Microporous' financial

situation given this exposure and questioned Gilchrist's financial acumen. (PX2301 (Heglie Dep. at 91-93, 149-153)). As of December 31, 2007, Microporous had tremendous debt of approximately \$46,139,000. (PX0078 at 021; Gilchrist, Tr. 549). This debt included monies expended in 2007 for the Feistritz expansion. (PX0078 at 021, Gilchrist, Tr. 550).

**Response to Finding No. 1143:**

There is no citation to the record for the first sentence. Respondent's assertion that "the Microporous Board was concerned about Microporous' financial situation given this exposure and questioned Gilchrist's financial acumen" is not supported by the citation provided.

1144. Whatever may have been the circumstances as of February 2008, it is quite clear today that adding Feistritz to a divestiture package would only create serious viability issues for the "newco" and would add to the difficulty of accomplishing divestiture. Feistritz is now operating at approximately 70% capacity and 2009 forecasts were that, considered as a free-standing entity, [REDACTED]. (Gaugl, Tr. 4569, 4571-73; Riney, Tr. 4962, 4969, *in camera*; Hauswald, Tr. 922, *in camera*). Moreover, without the addition of the transferred Potenza orders, the capacity level at Feistritz would only be about 35-40%. (Gaugl, Tr. 4572-73). This is the level at which Feistritz would be operating had the merger not occurred. Including Feistritz operating at 35-40% of capacity with a projected net income deficit of approximately \$4 million would create an extremely unattractive divestiture package. [REDACTED]

[REDACTED] (RX1603, *in camera*). (Riney, Tr. 5020-22, *in camera*; RX1603, *in camera*).

**Response to Finding No. 1144:**

The first sentence is a legal conclusion, not a factual assertion. Respondent's assertion that "Feistritz is now operating at approximately 70% capacity" is not supported by the citations provided. The last three sentences are legal conclusions, not factual assertions.

1145. Nor is there evidence to support any claim that the Feistritz plant has indirectly added to output or otherwise promoted competitive conditions in the U.S. or North America. While the CellForce line at Piney Flats was apparently operating at or near full capacity in 2005, there was discussion of expanding that capacity (Trevathan, Tr. 3582) and an expansion plan was momentarily implemented. That plan, however, was terminated in 2007, never revived and the Piney Flats CellForce line is now operating at 35-40% capacity. (Trevathan, Tr. 3647).

**Response to Finding No. 1145:**

Respondent's assertion that "an expansion plan was momentarily implemented. That plan, however, was terminated in 2007, never revived" is not supported by the citation provided.

1146. At the time of the acquisition, apparently some 60% of the PE line at Piney Flats was being exported to Europe and sold to EnerSys. (Trevathan, Tr. 3774; Gaugl, Tr. 4555). The plan, which was implemented, was for the EnerSys product to be produced at the Feistritz plant when it came online. These numbers show that the CellForce line at Piney Flats did not add to its customer base after the transfer of 60% of its production to Feistritz. The transfer to Feistritz theoretically enabled Piney Flats to produce more product for U.S. and North America sales, but that production did not occur and that has never been the reality.

**Response to Finding No. 1146:**

There are no citations in the record for the last three sentences. The last two sentences are legal conclusions, not factual assertions.

1147. Different plans had been considered regarding the addition of production facilities in Europe and at Piney Flats. The facility at Feistritz was to be used primarily to supply EnerSys in Europe. But conversations with JCI and Exide in the U.S. led to consideration of adding a line in Piney Flats. In fact, certain assets for this "third line" (at Piney Flats) were purchased. However, both JCI and Exide terminated their interests in purchasing product from Microporous and the equipment purchase was put "on hold" in May 2007. The equipment that had already been purchased was put in boxes and, as of June 2009, it was sitting in those boxes located in Feistritz and Piney Flats. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615).

**Response to Finding No. 1147:**

Complaint Counsel has no specific response.

1148: Trevathan testified that producing the EnerSys products at Feistritz freed up capacity at Piney Flats (Trevathan, Tr. 3721) and "helped Microporous expand its business in the United States." Trevathan, Tr. 3773. He said that "we would be able to go out to customers and bring in incremental volume." (Trevathan, Tr. 3774). But he was never asked and never testified that Microporous actually obtained new business in the U.S. that made use of the freed-up capacity.

{ [REDACTED] } (Gilchrist, Tr. 503, *in camera*).

**Response to Finding No. 1148:**

Respondent's assertion that { [REDACTED]

[REDACTED] } is not supported by the citation provided.

1149. In short, there is no credible evidence that the capacity at Piney Flats that became available as a result of the Feistritz plant was actually put to use producing product for U.S. or North American customers. And there is certainly no credible evidence that that capacity was necessary to enable Piney Flats to supply all of its customers.

**Response to Finding No. 1149:**

This is a legal conclusion, not a factual assertion.

1150. Accordingly, there is no basis for any requirement that the Feistritz plant be divested.

**Response to Finding No. 1150:**

This is a legal conclusion, not a factual assertion.

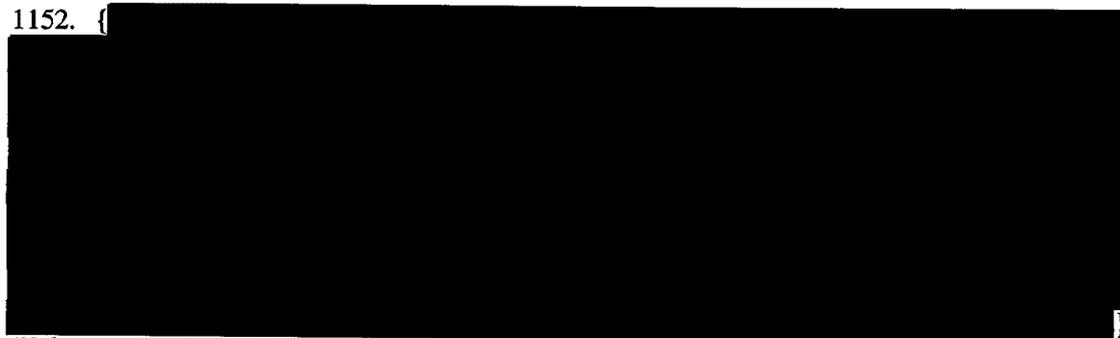
B. Any Competitive Harm From the Merger Could Be Addressed Through Divestiture of Microporous' PE Line in Piney Flats

1151. No evidence has been presented to this Court that Daramic's acquisition of the ACE-SIL® product line from Microporous has had any anticompetitive effect. Accordingly, there is no basis for its request that the ACE-SIL® production line be divested.

**Response to Finding No. 1151:**

ACE-SIL is used as an input in the production of CellForce. (Gilchrist, Tr. 312; Hauswald, Tr. 672). The two buildings at the Piney Flats Plant, which contain the ACE-SIL production line (along with the Flex-sil production line) and the CellForce production line, have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager and the administrative office for both buildings are contained in the building housing the ACE-SIL production line. (Gilchrist, Tr. 311, 539).

1152. {



(Kahwaty, Tr. 5238-40, *in camera*).

**Response to Finding No. 1152:**

This is a legal conclusion, not a factual assertion. {

} (PX0078 at 008; Gilchrist, Tr. 305, 343; *see also* CCFOF 260-263.) At the time of the acquisition, Daramic's profit margins on HD were { } than the profit margins on CellForce and Flex-Sil (Gilchrist, Tr. 467, *in camera*).

1153. Witnesses from U.S. Battery and Exide testified that they are interested in increasing the amount of HD they purchase. If there were a separate company producing Daramic HD, that would be in conformity with the plans of these companies. A divestiture of Daramic HD would be easier to accomplish than a divestiture of a CellForce production facility, as there would be no lingering issue of obtaining the ACE-SIL® dust. Divestiture of the PE line with the ability to make Daramic HD would produce the same competitive effect and avoid the issue of obtaining the ACE-SIL® dust by the acquiring company that it would need to make CellForce.

**Response to Finding No. 1153:**

The first sentence does not contain any citations to the record. The last three sentences are legal conclusions, not factual assertions. At the time of the acquisition, Daramic's profit margins on HD were { [REDACTED] } than the profit margins on CellForce and Flex-Sil (Gilchrist, Tr. 467, *in camera*).

1154. If there were some competitive concern about the alleged motive market segment, such concern could be adequately addressed by divestiture of the PE line in Piney Flats designed to produce straight PE separators and also having the ability to produce either CellForce or HD. That capacity would replicate the capacity of Microporous PE line pre-merger.

**Response to Finding No. 1154:**

This is a legal conclusion, not a factual assertion.

1155. Evidence has been presented to this Court that a divestiture of the PE line at Piney Flats is feasible. The Piney Flats facility is actually comprised of two plants: a rubber plant and a PE plant. The rubber and PE plants are housed in separate facilities and have separate entrances and loading bays. (Gilchrist, Tr. 311-14, 539; Hauswald, Tr. 999-1000).

**Response to Finding No. 1155:**

ACE-SIL is used as an input in the production of CellForce. (Gilchrist Tr. 312; Hauswald, Tr. 672). The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager and same administrative office. (Gilchrist, Tr. 311, 539).

1156. { [REDACTED] } (Kahwaty, Tr. 5546-49, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5547-48, *in camera*). Moreover, even if two nearby factories were producing competitive products, there would be no competitive

problem as this is a common circumstance in other industries, such as computers software or steel production.

**Response to Finding No. 1156:**

Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (See CCFOF 1197-1198). The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager and same administrative office. (Gilchrist, Tr. 311, 539). The last sentence is a legal conclusion, not a factual assertion and does not contain any citations to the record.

C. Conduct Remedy

1157. This Court has reviewed the record and finds no basis for any remedy pertinent to the H&V Cross-Agency Agreement as there is no evidence that that agreement in any way harmed competition. The FTC has wholly failed to introduce any evidence that H&V has given any serious consideration to ever getting into the PE separator industry. In fact, the evidence is to the contrary.

**Response to Finding No. 1157:**

This is a legal conclusion, not a factual assertion. [REDACTED]

[REDACTED] } (CCFOF 1168-1178). Daramic was concerned that H&V would enter the PE separator industry. (CCFOF 1179, 1181).

1158. Similarly, the Court has reviewed the record and finds no basis for any relief relating to Daramic's contracts. These contracts did not restrict entry and the principal contracts at issue (Exide, EnerSys and JCI) either have expired or are about to expire. As to the remaining North America contracts, East Penn, Douglas and Crown have only expressed great satisfaction with their contracts and dealings with Daramic and Trojan actually wishes to contract with Daramic for a ten year period.

**Response to Finding No. 1158:**

This is a legal conclusion, not a factual assertion.

X. Expert Testimony

A. Dr. John Simpson

1159. Complaint Counsel has proffered the testimony of Dr. John Simpson ("Simpson") as an expert in antitrust economics and industrial organization. This Court ruled that it would consider such opinions offered by Simpson if they meet the proper legal standard. (Simpson, Tr. 3164).

**Response to Finding No. 1159:**

Complaint Counsel has no specific response.

1160. This Court has considered the opinions offered by Simpson in this matter. In general, the Court finds that Simpson, while qualified to offer opinions as an expert in antitrust economics and industrial organization, failed to undertake any serious analysis of the issues in this matter. Instead, Simpson in many respects ignored the Merger Guidelines and its commentary and undertook a cursory review of testimony and exhibits, many of which were assembled by Complaint Counsel or FTC staff attorneys. Simpson's work fell far short of the standard required of the FTC here.

**Response to Finding No. 1160:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. First, the claim that { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0033, *in camera*; PX2251, *in camera*).

Second, the claim that Dr. Simpson ignored the Merger Guidelines and its commentary is contradicted by the Dr. Simpson's testimony. (Simpson, Tr. 3166, 3494).

a. **Simpson Is Biased in Arriving at His Opinions**

1161. While not by itself disqualifying, this Court notes that Dr. Simpson is biased in his work in this matter.

**Response to Finding No. 1161:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. Respondent's proposed finding is contradicted by the absence of anything in the record suggesting that Dr. Simpson was biased. (Simpson, Tr. 3161-3501). Respondent's attempt to discredit Dr. Simpson's credibility is entirely unsuccessful. Dr. Kahwaty also developed his antitrust expertise at a federal antitrust agency, but was only at the Department of Justice for a mere 4 years. (See RFOF 1304).

1162. First, Dr. Simpson has been employed by the FTC his entire career. (Simpson, Tr. 3268).

**Response to Finding No. 1162:**

Complaint Counsel has no specific response.

1163. Second, when Simpson began his review of this matter, he was provided a copy of four or five binders of documents assembled by Complaint Counsel or FTC staff attorneys for his review. (Simpson, Tr. 3269, 3271). Simpson used these binders in arriving at his opinions in this case. (Simpson, Tr. 3270). Simpson did not undertake a wholly independent review of the evidence in this matter.

**Response to Finding No. 1163:**

The proposition that Dr. Simpson did not undertake a wholly independent review of the evidence in this matter is contradicted by Dr. Simpson's trial testimony. At trial Dr. Simpson stated he had access to all documents, including paper and electronic databases. Additionally, Dr. Simpson stated that he looked at documents on his own. Documents that were given to Dr. Simpson by FTC attorneys were at his request. Dr. Simpson requested these documents because they were "either important documents to get up to speed on the case" or documents "related to particular issues." (Simpson, Tr. 3490-3491).

1164. Third, Simpson never visited a battery manufacturing facility or a battery separator manufacturing facility. (Simpson, Tr. 3285-86). Nor did Simpson personally look at a PE production line, or an extruder or extractor, as did Dr. Kahwaty. (Simpson, Tr. 3286). Simpson only looked a *single* separator at the time he gave his deposition, which was *after* he had arrived at his opinions in this matter. (Simpson, Tr. 3286-87). Simpson's failure to review the actual products and their manufacturing process here is troubling and certainly underscores the lack of any thorough analysis by Simpson. Instead, Simpson's review appears to have largely started and stopped with his consideration of documents and testimony provided to him by the FTC's counsel. (Simpson, Tr. 3270-71, 3273-74, 3278-79; Simpson, Tr. 3446, *in camera*; Simpson, Tr. 3499 ("I relied heavily on [some review of documents and some review of testimony] in forming my opinions"); RX01651).

**Response to Finding No. 1164:**

The proposition is contradicted by Dr. Simpson's testimony and by the Merger Guidelines. The assertion in the fourth sentence of the finding that Dr. Simpson's failure to review the actual products and their manufacturing process underscores the lack of any thorough analysis is contradicted by Dr. Simpson's testimony that "a lot of times, the information that one

gets from customers, the information one finds in documents, and everything else is sufficient to form an opinion.” (Simpson, Tr. 3498; Merger Guidelines Commentary at 17).

The assertion in the fifth sentence of the finding that Dr. Simpson’s review has started and stopped with his consideration of documents and testimony is contradicted by Dr. Simpson’s testimony that he independently examined transcripts from the trial, depositions, investigational hearings, Dr. Kahwaty’s expert report, and documents submitted by both Polypore and various third-parties. (Simpson, Tr. 3167-3168, 3490-3491).

1165. Fourth, Simpson obtained a copy of the Complaint and reviewed the product markets defined in that Complaint before he began his work in this matter. (Simpson, Tr. 3270). Simpson’s opinion that there are four product markets – the same product markets defined in the Complaint which he reviewed at the onset of this engagement – casts doubt on the independence of his work.

**Response to Finding No. 1165:**

The proposition is contradicted by the FTC’s Complaint and by Dr. Simpson’s testimony.

The FTC’s Complaint also defines a broader product market comprised of PE battery separators.

(RX01572 at 002). { [REDACTED] } (Simpson,

Tr. 3458-3459, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } Additionally, Dr. Simpson testified that at no time did

Complaint Counsel or Complaint Counsel’s staff tell him what market to find or how to write his report. (Simpson, Tr. 3458-3459, *in camera*).

1166. Fifth, Simpson did not review each relevant deposition transcript, or review all of the relevant testimony at trial, in arriving at his opinions in this matter. (Simpson, Tr. 3271, 3278-79; Simpson, Tr. 3391-92, *in camera*; Simpson, Tr. 3168; RX01651). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3327, 3329-30, 3473-74, 3478, 3481-82, *in camera*). Simpson did not test his theories or conclusions against the data available to him.

**Response to Finding No. 1166:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. The assertion in the first sentence of the finding that Dr. Simpson failed to review each relevant deposition transcript, or review all of the relevant testimony at trial, in arriving at his opinions in this matter is not true. Dr. Simpson reviewed most of the investigational hearings and depositions in this matter and read nearly all of the trial testimony that occurred prior to his testimony. (Simpson, Tr. 3167-3168).

The assertion in the second sentence of the finding that Dr. Simpson was remiss in not conducting an econometric analysis is misleading in that Respondent's own expert witness also did not present an econometric analysis. (Kahwaty, Tr. 5482-5483).

The assertion in the third sentence of the finding that Dr. Simpson failed to test his theories or conclusions against the data available to him is simply untrue. [REDACTED]

[REDACTED]  
[REDACTED] } (PX0033 at 40-42, 46-48, *in camera*). Dr. Simpson used data presented by [REDACTED]  
[REDACTED] } (Simpson, Tr. 3184-3187, 3215-3224, 3230, 3330, *in camera*).

1167. For example, Simpson did not review the testimony of John Craig, the CEO of EnerSys, and did not even know at his deposition, after he had prepared his report setting forth his opinions, who Craig was. (Simpson, Tr. 3271, 3273-74). Attorneys working with Complaint Counsel directed Simpson to deposition testimony to review. (Simpson, Tr. 3279). Simpson did not read the deposition testimony of Kevin Porter of H&V ("Porter") (Simpson, Tr. 3278-79, 3287; Simpson, Tr. 3391, *in camera*; RX01651), yet offered the opinion to this Court that the Cross Agency Agreement between Respondent and H&V was evidence of anticompetitive conduct. (PX0033, *in camera*; Simpson, Tr. 3264; Simpson, Tr. 3391-92, *in camera*). [REDACTED]  
[REDACTED] } (PX0925 (Porter, Dep. at 39), *in camera*). This Court believes that Porter's testimony is relevant and important to the consideration of the question of what weight, if any, should be given to the Cross Agency Agreement. Simpson's failure to consider this testimony undermines the validity of his opinions and demonstrates the lack of analysis that further undermines his opinions. This Court cannot credit Simpson's opinion with respect to the Cross Agency Agreement.

**Response to Finding No. 1167:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. The assertion in the second sentence of the finding that Complaint Counsel's attorneys directed Dr. Simpson to deposition testimony to review is wrong. Dr. Simpson independently choose what depositions and investigational hearings to read and how much to read of the selected depositions and investigational hearings. (Simpson, Tr. 3279). At trial Dr. Simpson went on to say, "[t]here might have been instances where a -- where one of the attorneys working with complaint counsel would say, 'Have you looked at this section of this transcript?' And I would look at it." (Simpson, Tr. 3279). Although, Dr. Simpson did not read Mr. Porter's Deposition, he did read the Deposition of H&V's Bob Cullen and looked at Daramic and H&V documents that discussed the cross-agency agreement. (RX01651).

Lastly, the citation provided does not support that **Porter testified that he was not aware of any evidence that H&V had considered getting into the PE separator business.** (PX0925 (Porter, Dep. at 39                   )). In fact, Mr. Porter had lots of knowledge that H&V considered getting into the PE separator business. Mr. Porter stated H&V is **"always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators.** (PX0925 (Porter, Dep. at 37,                   )). Additionally, **Mr. Porter stated that H&V "expressed through a letter of interest to the broker an interest in looking at the opportunity" to purchase Exide's Corydon PE facility in 1999.** (PX0925 (Porter, Dep. at 35                   )). However, Dr. Simpson did not have to read Mr. Porter's deposition to know about H&V's interest in getting into PE because he saw documents that demonstrated this. (PX1368). **Val Hollingsworth, President and CEO of H&V, asked Kevin Porter, then VP of the Battery Separator Business Unit at H&V, to prepare a valuation estimate of the Corydon assets.** (PX0925 (Porter, Dep. at 42-43                   )). **Mr.**

Porter prepared the valuation estimate based on information supplied by BHC. (PX0925 (Porter, Dep. at 35 )).

In response to a deposition question that asked "Was this the first time that H&V considered entering the polyethylene separator business?" Mr. Porter said "I don't know if this was the first." (PX0925 (Porter, Dep. at 36-37 )).

1168. Simpson also did not review the trial testimony of several other witnesses in this matter. "I've been following the transcript pretty much until the last couple of days when there was a day or so that I missed." (Simpson, Tr. 3168). { [REDACTED] } (Simpson, Tr. 3197, 3441-42, *in camera*). { [REDACTED] } (Simpson, Tr. 3446, *in camera*). { [REDACTED] } (Hall, Tr. 2825-26, *in camera*). Certainly, no evidence has been presented to this Court that { [REDACTED] } (Burkert, Tr. 2446-48, *in camera*). The Court finds this testimony of Mr. Hall to be particularly important to the Court's consideration of the issues here, and Simpson's failure to consider this testimony while still arriving at his opinion undermines the validity of the opinion offered and demonstrates the lack of careful and thorough consideration of the facts in this matter throughout Simpson's report. This Court does not credit Simpson's opinion regarding the significance of the Entek-JCI contract.

**Response to Finding No. 1168:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. As an expert witness, Dr. Simpson is entitled to use deposition testimony to form his opinion. In his deposition, { [REDACTED] } (PX0033, *in camera*).

{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3197, *in camera*). { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr.

3197-3198, *in camera*).

1169. Simpson provided drafts of his report to the FTC and modified his report to incorporate the FTC's suggested changes to it. (Simpson, Tr. 3280).

**Response to Finding No. 1169:**

The proposition is contradicted by Dr. Simpson's testimony. Periodic copies of Dr. Simpson's expert reports were given to attorneys working with Complaint Counsel to keep them up to date as to how Dr. Simpson was progressing. (Simpson, Tr. 3280). [REDACTED]

[REDACTED] } (Simpson, Tr. 3459, *in camera*). However, there were instances where he made minor changes to his expert reports based upon feedback from the attorneys. (Simpson, Tr. 3280).

1170. Simpson testified that his report contained all of his opinions and bases for his opinions. (Simpson, Tr. 3277). Simpson never supplemented his report beyond his initial rebuttal report. (Simpson, Tr. 3277). At the hearing, Simpson tried to offer additional testimony and bases for his opinions not reflected in his reports, including the use of a demonstrative that he provided in his testimony (PX4001; Simpson, Tr. 3278). This Court will not consider such testimony or exhibit from Dr. Simpson.

**Response to Finding No. 1170:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. PX4001 is a demonstrative that Dr. Simpson drew at Complaint Counsel's request to show how contracts that offer a buyer a discount if it buys 100 percent of its requirements exclusively from one supplier can be exclusionary. (Simpson, Tr. 3256-3261).

[REDACTED] }

(PX0033 at 26, *in camera*). { [REDACTED]  
[REDACTED] } (PX0033 at 29-30, *in camera*).

b. Simpson's Methodology Is Flawed

1171. This Court has considered Simpson's testimony regarding his methodology followed in arriving at his opinions. The Court believes that Simpson's methodology was fatally flawed, inconsistent with the teaching of the Horizontal Merger Guidelines ("Merger Guidelines"), and biased toward arriving at opinions on markets set out by Complaint Counsel in the Complaint. This Court cannot give any weight to Simpson's opinions in this matter.

**Response to Finding No. 1171:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. (*See* CCRF 1171-1302; *see also* PX0033, *in camera*; PX2251, *in camera*).

Respondent's proposed finding is contradicted by the absence of anything in the record suggesting that Dr. Simpson was biased. (Simpson, Tr. 3161-3501). Respondent's attempt to discredit Dr. Simpson's credibility is entirely unsuccessful. Dr. Kahwaty also developed his antitrust expertise at a federal antitrust agency, but was only at the Department of Justice for a mere 4 years. (*See* RFOF 1304).

c. Simpson Did Not Do Quantitative Analysis As Required by the Merger Guidelines and Commentary

1172. Simpson agrees that the Merger Guidelines are an appropriate methodology to use in considering this merger and that analysis is required under the Merger Guidelines. (Simpson, Tr. 3281-82).

**Response to Finding No. 1172:**

Complaint Counsel has no specific response.

1173. { [REDACTED]  
[REDACTED] } (PX0033 at 004 (emphasis added), *in camera*). At the hearing, evidently realizing the fundamental problem with his work, Simpson shifted his position, testifying his analysis followed the Merger Guidelines. (Simpson, Tr. 3166, 3282). However, a review of Simpson's work shows that Simpson fell far short of what is required under the Merger Guidelines or even "broadly following" the Merger Guidelines.

**Response to Finding No. 1173:**

The proposition is contradicted by the record evidence. (See CCRF 1171 -1302; *see also* PX0033, *in camera*; PX2251, *in camera*). Dr. Simpson stated his

“overall analysis followed the Merger Guidelines, so I would first define product and geographic markets, then identify market participants, calculate market shares and concentration. Then I would analyze competitive effects. Then I would analyze entry. And to the extent necessary, I would analyze efficiencies and failing firm.” (Simpson, Tr. 3166).

1174. The Commentary to the Merger Guidelines states:  
In evaluating the likely competitive effects of a proposed merger, the Agencies assess the full range of qualitative and quantitative evidence obtained from the merging parties, their competitors, their customers and a variety of other sources.”

(RX01652)

**Response to Finding No. 1174:**

Complaint Counsel has no specific response.

1175. Simpson surprisingly disagreed with this stated position of the FTC. (Simpson, Tr. 3282).

**Response to Finding No. 1175:**

The proposition is contradicted by the record evidence. The previous finding, RFOF 1174 cited the following statement in the Commentary to the Merger Guidelines, “[i]n evaluating the likely competitive effects of a proposed merger, the Agencies assess the full range of qualitative and quantitative evidence obtained from the merging parties, their competitors, their customers and a variety of other sources.” (See RFOF 1174). The Commentary on the Merger Guidelines also states in the same paragraph, “[t]his understanding draws heavily on the qualitative evidence from documents and first-hand observations of the industry by customers and other market participants. In *some* cases, this understanding is enhanced significantly by quantitative analysis of various sorts.” (emphasis added) (RX01652 at 017). Moreover, Dr. Simpson testified: “I think one needs to look at sufficient evidence to answer the problem. There

could be instances where the qualitative evidence is extremely strong and one would not feel compelled to look at quantitative evidence, and vice versa.” (Simpson, Tr. 3283).

1176. Simpson also surprisingly testified that he had never read the entirety of the Commentary to the Merger Guidelines. (Simpson, Tr. 3283-84).

**Response to Finding No. 1176:**

The proposition is contradicted by the record evidence. Dr Simpson stated “I’m not 100 percent certain that I read the whole thing.” (Simpson, Tr. 3284). Additionally, Dr Simpson stated “[q]uite recently, I read the section for market definition that was not the recounting of the specific cases, but more the text of that section. Dr. Simpson does not read the cases because he is not a lawyer. (Simpson, Tr. 3492).

1177. Simpson admitted repeatedly in his testimony that with the exception of his consideration of the HHI numbers, his opinions are based on qualitative, not quantitative evidence.

**Response to Finding No. 1177:**

The proposition is contradicted by the record evidence. The Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017). Dr. Simpson used numerical data that he compiled to support his conclusions about market shares, HHIs, price changes, and share of markets covered by exclusive contracts. (Simpson, Tr. 3190-3191). [REDACTED]

[REDACTED] } (Simpson, Tr. 3184-3187, 3215-3224 *in camera*, 3230 *in camera*, 3330 *in camera*).

1178. For example:

a. [REDACTED] } (Simpson, Tr. 3327, 3366, *in camera*);

**Response to Finding No. 1178, a:**

To the extent that Respondent has transcribed Dr. Simpson’s statement from the transcript, the statement is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. (Simpson, Tr. 5478-

5479). { [REDACTED] } (Kahwaty, 5482-5483, *in camera*).

Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

b. { [REDACTED] } (Simpson, Tr. 3327-28, *in camera*; Simpson, Tr. 3496-97);

**Response to Finding No. 1178, b:**

The proposition is contradicted by the record evidence. The statement in (b) that

[REDACTED] } is not

supported by the testimony Respondent cites. (Simpson, Tr. 3474, 3327-3328, *in camera*; Simpson, Tr. 3496-3497). Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

c. { [REDACTED] } (Simpson, Tr. 3475-76, *in camera*);

**Response to Finding No. 1178, c:**

To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statement is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. (Simpson, Tr. 5478-5479). Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do

not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

d. { [REDACTED] } (Simpson, Tr. 3332-34, *in camera*; Simpson, Tr. 3497-98);

**Response to Finding No. 1178, d:**

To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statement is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. (Simpson, Tr. 3498). Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

e. { [REDACTED] } (Simpson, Tr. 3345-46, *in camera*);

**Response to Finding No. 1178, e:**

To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statement is misleading. { [REDACTED] } (Simpson, Tr. 3346, *in camera*). Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

f. { [REDACTED] } (Simpson, Tr. 3414-15, *in camera*);

**Response to Finding No. 1178, f:**

The statement that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3415-3416, *in camera*). To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statements is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

g. [REDACTED] } (Simpson, Tr. 3481, *in camera*; see also Simpson, Tr. 3474, *in camera*) [REDACTED] } (Simpson, Tr. 3482, *in camera*); and

**Response to Finding No. 1178, g:**

To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statements is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

h. [REDACTED] } (Simpson, Tr. 3482, *in camera*).

**Response to Finding No. 1178, h:**

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3482, *in camera*). [REDACTED]

[REDACTED]

(PX0265 at 004, 011, *in camera*; CCFOF 1030-1036). To the extent that Respondent has transcribed Dr. Simpson's statement from the transcript, the statements is misleading. In this case a quantitative analysis either could not be performed or would have added nothing to the analysis. (*See, e.g.*, Simpson, Tr. 3346, *in camera*; Simpson, Tr. 3498; Kahwaty, Tr. 5364, 5478-5479, 5481-5483, *in camera*). Lastly, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (*See* CCRF 1175; RX01652 at 017).

1179. This Court finds that Dr. Simpson did not perform any serious quantitative analysis in this matter – rigorous or otherwise – which is contrary to the dictates of the Merger Guidelines and Commentary. As Simpson himself testified:

{ [REDACTED]

[REDACTED]

\*\*\*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]  
■ [REDACTED] }

(Simpson, Tr. 3327, *in camera*).

**Response to Finding No. 1179:**

This is an improper legal conclusion, not a factual assertion. The Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (*See* CCRF 1175, RX01652 at 017).

d. **Simpson Did Not Follow the Merger Guidelines in Defining His Four Product Markets**

1180. The Merger Guidelines require that in defining the product market that the analysis starts with each product of the merging companies "narrowly defined":

Specifically, the 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.

(RX01653 at 009).

**Response to Finding No. 1180:**

The proposition is contradicted by the record evidence. The Merger Guidelines state:

"Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. . . . Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger." (RX01653 at 1).

The Commentary on the Merger Guidelines state:

"At times, the Agencies may act conservatively and focus on a market definition that might not be the smallest possible relevant market. For example, the Agencies may focus initially on a bright line identifying a group of products or areas within which it is clear that a hypothetical monopolist would raise price significantly and seek to determine whether anticompetitive effects are--or are not--likely to result from the transaction in such a candidate market. If the answer for the broader market is likely to be the same as for any plausible smaller relevant market, there is no need to pinpoint the smallest market as the precise line drawn does not

affect the determination of whether a merger is anticompetitive.”  
(RX01652 at 013).

Thus, the Merger Guidelines do not require what Respondent claims. (RX01652 at 013).

1181. [REDACTED] } (Simpson, Tr. 3294, *in camera*). In fact, Simpson testified that he followed this approach. (Simpson, Tr. 3170; Simpson, Tr 3294-95, *in camera*).

**Response to Finding No. 1181:**

[REDACTED] } (Simpson, Tr. 3294 *in camera*).

1182. [REDACTED] } (Simpson, Tr. 3292, *in camera*).

**Response to Finding No. 1182:**

The proposition is contradicted by the record evidence. At least twice, Dr. Simpson explained in detail how he went about defining his four product markets.

Q. “Why didn’t you group those together, like deep-cycle and motive or UPS with deep-cycle or some other way of aggregating them together?”

A. The starting point -- based on my understanding of the record, the starting point for defining the product market would be to look at the particular separators that are sold and ask what are the substitutes for these. And from my understanding of the record, you have a battery manufacturer and they’re designing a battery for a particular use. The use that the battery would be put to then determines the performance characteristics of the battery. And then the performance characteristics of the battery ultimately determine what type of separator is going to be used in the battery. And then the types of separators in the battery would be limited to a small number as far as composition and as far as size and things like that. So if one were to do that, one ends up with a bunch of very small product markets and in some cases even specific to a particular manufacturer, a particular buyer. And then -- then that raises the question, well, are we going to analyze every single one of these product markets. And for me the answer was no, that for tractability it makes sense to aggregate these very narrow product markets up into broader ones where the market conditions are the same across them, market conditions being things like entry and who the market participants are. And --

Q. How does that fit with economic theory?

A. I mean, the reason to do it is for tractability. And for instance, if you had a merger of two shoe manufacturers, from the demand-side substitution, a size 7 shoe is not a substitute for a size 10 shoe, which is not a substitute for a size 13 shoe. But if you had such a merger, you wouldn't want to analyze -- we're going to analyze this effect on the size 7 and then we're going to move to the size 8 and the size 9. No. It makes sense to aggregate it up. And that's what I did, and that is consistent with what the FTC and the DOJ say in their merger -- in their commentary on the Merger Guidelines." (Simpson Tr. 3173-3175; *see also* RX01652 at 013-014; RX01653 §1.321, n. 14).

1183. { [REDACTED] } (PX0033 at 005 (emphasis added), *in camera*; Simpson, Tr. 3295, *in camera*).

**Response to Finding No. 1183:**

Complaint Counsel has no specific response.

1184. While Simpson testified that he followed the Merger Guidelines, it is apparent from his testimony that he did not. Simpson did not define his markets by starting with the products, narrowly defined, of the merging firms.

a. { [REDACTED] } (Simpson, Tr. 3296, 3297-98, 3299, 3300-01, 3302, 3470-71, *in camera*).

b. { [REDACTED] } (Simpson, Tr. 3301, 3295, *in camera*).

c. { [REDACTED] } (Simpson, Tr. 3296-97, *in camera*).

d. { [REDACTED] } (Simpson, Tr. 3301-02, *in camera*; PX0033 at 004 (fn. 3), *in camera*).

**Response to Finding No. 1184, a-d:**

The propositions a - d contradicted by the record evidence. (*See* CCRF 1181).

1185. { [REDACTED] } (PX0033 at 017, *in camera*). { [REDACTED] } (PX0033 at 003-04, *in camera*).  
{ [REDACTED] } (Simpson, Tr. 3302, *in camera*).

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC  
Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT

VOLUME 4

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August 7, 2009

**Response to Finding No. 1185:**

Complaint Counsel has no specific response.

1186. { [REDACTED] } (Simpson, Tr. 3354, 3376-77, *in camera*). Simpson's treatment of his UPS separator market highlights the inadequacy of his work.

**Response to Finding No. 1186:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson Tr. 3172-3173; PX0033 at 016-017, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0033 at 016-017, *in camera*; PX0078 at 028; PX0135 at 002, *in camera*; PX0140, *in camera*; PX0402 at 022, *in camera*). Specifically, these documents talk about taking sales away from Daramic in this market. Daramic had the { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3187; Simpson, Tr. 3193-3194, *in camera*).

1187. { [REDACTED] } (Simpson, Tr. 3299-3300, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(Simpson, Tr. 3300, *in camera*).

**Response to Finding No. 1187:**

The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED] (PX0033 016-017, *in camera*).

1188. [REDACTED]  
[REDACTED] (Simpson, Tr. 3300, *in camera*).

**Response to Finding No. 1188:**

Complaint Counsel has no specific response.

1189. Simpson's deep cycle product market is also flawed in that it fails to account for the use of PE only separators by battery manufacturers.

a. [REDACTED] (Simpson, Tr. 3308, *in camera*).

**Response to Finding No. 1189, a:**

Complaint Counsel has no specific response.

b. [REDACTED] (Simpson, Tr. 3309, *in camera*).

**Response to Finding No. 1189, b:**

The proposition is contradicted by the record evidence. (*See CCRF 1189, c*).

c. East Penn's witness testified that East Penn uses straight PE separators in some of its deep cycle batteries. Leister Tr. at 3978-80.

**Response to Finding No. 1189, c:**

The proposition is contradicted by the record evidence. Mr. Leister was asked the

following questions and gave the following answers on cross examination:

Q: And you're aware that the separators that East Penn uses in its golf carts contain a special formula to help reduce antimony transfer; correct?

A. Yes.

Q. And that's important in golf cart batteries; correct?

A. Correct.

Q. The reduction of antimony suppression is important in golf car batteries.

A. I have heard that. Yes.

Q. And the separator that East Penn is buying from Daramic for its golf car batteries has a special formula to do just that, to reduce antimony transfer; correct?

A. Yes.

Q. And that's the HD separator; correct?

A. Yes.

Q. And that's the same separator that you use in your floor scrubbers; correct?

A. Yes.

(Leister, Tr. 4038-4039).

Secondly, as Mr. Leister stated the reduction of antimony suppression is important in golf car batteries. (Leister, Tr. 4039). Thus, deep-cycle batteries are distinct from SLI batteries. SLI batteries are used to start an engine, whereas "deep-cycle batteries are designed to run at relatively lower current draw for a long period of time, such as driving a golf cart, scissor lifts, floor-sweeping machines." (Qureshi, Tr. 1994; *see also* CCFOF 68).

d. [REDACTED]  
[REDACTED] (Simpson, Tr. 3310-11, *in camera*).

**Response to Finding No. 1189, d:**

The proposition is contradicted by the record evidence. Deep-cycle batteries are distinct from SLI batteries. SLI batteries are used to start an engine, whereas "deep-cycle batteries are

designed to run at relatively lower current draw for a long period of time, such as driving a golf cart, scissor lifts, floor-sweeping machines.” (Qureshi, Tr. 1994). The components of deep-cycle batteries differ from an SLI battery. Deep-cycle batteries use a high-antimony lead alloy grid and use high-density active material that takes longer to fall apart. (Qureshi, Tr. 1995). The positive lead alloy grid at U.S. Battery has an antimony content of 5% and the negative grid has an antimony content of 2.75%. (Qureshi, Tr. 1998). The deep-cycle separator reduces antimony transfer which can cause antimony poison. (Godber, Tr. 139). The reduction of antimony transfer is important property for separators used in deep-cycle batteries. (Leister, Tr. 4039). SLI grids have much lower antimony content or none at all. (Qureshi, Tr. 1996). Also the grid for a deep-cycle battery is generally thicker than that of an SLI battery. (Qureshi, Tr. 1997).

1190. [REDACTED]

[REDACTED] } (Simpson, Tr. at 3308, *in camera*). Yet, Simpson did not account for this “dual usage” of separators in analyzing his product markets.

**Response to Finding No. 1190:**

The citation for Respondent’s finding does not support the proposition asserted.

Moreover, the assertion in the last sentence does not have a citation.

1191. [REDACTED]

[REDACTED] } (Simpson, Tr. 3302-03, *in camera*).

**Response to Finding No. 1191:**

The citation for Respondent’s finding does not support the proposition asserted. Dr.

Simpson stated { [REDACTED]

[REDACTED] } (Simpson, Tr. 3303, *in camera*). To the extent that Respondent’s are asserting that there are no backweb thickness differences between a CellForce separator used in deep-cycle applications verse a CellForce separator used in motive applications, the record evidence does not support this position. (Whear, Tr. 4690, 4691-92, 4697, 4968).

1192. Simpson also acknowledges that there is overlap of the use of separators from one of his product market to another:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Simpson, Tr. 3308, *in camera*).

**Response to Finding No. 1192:**

The proposition is contradicted by the record evidence. First, the Merger Guidelines do not require that markets be distinct and separate. (See RX01652 at 15 (“Integrated Analysis Takes into Account the Defined Market Boundaries are Not Necessarily Precise or Rigid.”)).

Second, [REDACTED]

[REDACTED] (Simpson, Tr. 3306-3308, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3306-3308, *in camera*).

1193. [REDACTED] (Simpson, Tr. 3306-08, *in camera*).

**Response to Finding No. 1193:**

The proposition is contradicted by the record evidence. First, the Merger Guidelines do not require that markets be distinct and separate. (See RX01652 at 15 (“Integrated Analysis Takes into Account the Defined Market Boundaries are Not Necessarily Precise or Rigid.”)).

Second; [REDACTED]

[REDACTED] (Simpson, Tr. 3306-3308, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3306-3308, *in camera*).

1194. This Court cannot give any weight to Simpson's opinions with respect to product markets and his opinions in this regard are not accepted.

**Response to Finding No. 1194:**

This is an improper legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. (*See CCRF 1180-1193*).

e. Simpson Ignored the All PE Separator Market in Arriving at His Opinions

1195. [REDACTED] } (Simpson, Tr. 3322, *in camera*).

**Response to Finding No. 1195:**

The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3322, *in camera*; PX2251 at 003-005, *in camera*)

[REDACTED]

[REDACTED].}

1196. [REDACTED]

[REDACTED] } (Simpson, Tr. 3323, *in camera*).

**Response to Finding No. 1196:**

[REDACTED]

[REDACTED] } (Simpson, Tr. 3322, *in camera*).

1197. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Simpson, Tr. 3324, *in camera*).

**Response to Finding No. 1197:**

Complaint Counsel has no specific response.

f. **Simpson Does Not Account for AceSil at All in His Product Markets**

1198. [REDACTED]  
} (Simpson, Tr. 3320-21, *in camera*). {  
[REDACTED]  
} (PX2251 at 001, *in camera*) {  
[REDACTED] } {  
[REDACTED] } (Simpson, Tr. 3321, *in camera*). {  
[REDACTED] } (Simpson, Tr. 3321, *in camera*).

**Response to Finding No. 1198:**

The proposition is contradicted by the record evidence. Dr. Simpson noted that he “had seen evidence, either documents or statements by market participants, saying that a lot of people saw Ace-Sil as a separate product.” (Simpson, Tr. 3320-3321):

1199. Again, Simpson’s failure to account for the AceSil product in his product markets demonstrates that Simpson’s four markets are not properly drawn and Simpson has defined his product markets to meet the allegations of the Complaint. Simpson offers no opinion with respect to AceSil. This Court finds that the merger has had no effect on any market served by AceSil.

**Response to Finding No. 1199:**

This is an improper legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. If the merger has had no effect on any market served by Ace-Sil - on which both Dr. Simpson and Dr. Kahwaty agree (*See* RFOF 1198). - then Dr. Simpson was justified in not analyzing it as part of his overall analysis of the competitive effects of this acquisition. Thus, the statement that “Simpson’s failure to account for the Ace-Sil product in his product markets demonstrates that Simpson’s four markets are not properly drawn” is nonsensical.

g. Simpson's Opinion on FlexSil is Contrary to the Facts and Not Supported by Analysis

1200. { [REDACTED] } (Simpson, Tr. 3320, *in camera*). In arriving at this opinion, however, Simpson ignores that FlexSil is made of rubber and the overwhelming evidence in the case that Flex-Sil is considered the industry standard separator for deep cycle batteries (RX01643; Gilchrist, Tr. 535; Godber Tr. 271, 277; Wallace, Tr. 1964-1965; Quereshi Tr. 2072; McDonald, Tr. 3818), is demanded by battery customers due to its superior performance and product life (Gilchrist Tr. 536; McDonald Tr. 3787; Godber Tr. 271, 277; Wallace Tr. 1964-1965), and as such, bears a premium price (Wallace, Tr. 1967-72; Quereshi, Tr. 2065 (FlexSil is sold in U.S. Battery's premium line, FlexSil constituted approximately 95% of U.S. Battery's purchase of separators in 2007 and is twice as expensive as Daramic HD); McDonald Tr. 3820). From the evidence presented in this hearing, FlexSil is the only battery separator actually advertised by battery companies. (Godber, Tr. 277; Wallace, Tr. 1963-1965; RX01643). Moreover, despite FlexSil constituting over 95% of its separator purchases and being twice as expensive as Daramic HD, U.S. Battery did not move its purchases to Daramic HD. (Quereshi, Tr. 2067; Wallace, Tr. 1972). This fact alone demonstrates the premium nature of the FlexSil product. Simpson ignores all of this evidence and finds, instead, that FlexSil, Daramic HD and CellForce constitute his deep cycle battery separator market.

**Response to Finding No. 1200:**

The proposition is contradicted by the record evidence. Dr. Simpson testified that "Flex-Sil has some unique properties that make it a bit different than some of the other separators, and because it's somewhat differentiated, the owner of Flex-Sil has market power." (Simpson, Tr. 3176). Dr. Simpson then testified that "[given this market power] the owner of Flex-Sil would increase the price until something is a close competitor, and then the record tells us that close competitor is Daramic HD." (Simpson Tr. 3180).

1201. Moreover, Simpson asserts that Daramic HD is the closest competitor, the closest substitute, to FlexSil. (Simpson, Tr. 3180-81). { [REDACTED] } (Simpson, Tr. 3322, *in camera*). He simply assumes this and did not estimate the cross-price elasticity between Flex-Sil and any other product, including Daramic HD.

**Response to Finding No. 1201:**

The proposition is contradicted by the record evidence. Dr. Simpson opined, { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson Tr. 3456-

3457, *in camera*).

h. Simpson Fails to Support His Geographic Market with Analysis

1202. Simpson offered his opinion that the relevant geographic market is North America. (PX0033 at 6-7, *in camera*; Simpson, Tr. 3182). The Court finds that Simpson's opinion regarding the relevant geographic market is not supported by any appropriate, quantitative analysis and is contradicted by substantial evidence in this case, which Simpson never addressed. Therefore, this Court does not give any weight to Simpson's opinion regarding the geographic market.

Response to Finding No. 1202:

This is an improper legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. (*See* CCFOF 161-257).

1203. First, in determining the geographic market, Simpson agrees that the relevant question is whether arbitrage can occur for products manufactured in North America:

[REDACTED]  
[REDACTED]  
[REDACTED] }

(Simpson, Tr. 3328, *in camera*; RX01653 at 10.

Response to Finding No. 1203:

Complaint Counsel has no specific response.

1204. [REDACTED] } (Simpson, Tr. 3329-30, *in camera*).

Response to Finding No. 1204:

The proposition is contradicted by the record evidence. (*See* CCRF 1205).

1205. Instead, Simpson relied solely on the testimony of battery separator customers as to whether they would arbitrage separators:

[REDACTED]

[REDACTED]

(Simpson, Tr. 3333, *in camera*).

**Response to Finding No. 1205:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3461, PX0033 at 006-007, *in camera*; PX2251 at 005, *in camera*).

1206. { [REDACTED]

[REDACTED] } (Simpson, Tr. 3326-27, *in camera*).

**Response to Finding No. 1206:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (Simpson, Tr. 3327, *in camera*).

1207. { [REDACTED] } (Simpson, Tr. 3327, *in camera*) { [REDACTED] } (Simpson, Tr. 3475-76, *in camera*).

**Response to Finding No. 1207:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

(Simpson Tr. 3475, *in camera*).

1208. { [REDACTED]

[REDACTED] } (PX0033 at 006-07, *in camera*), { [REDACTED] } (Simpson, Tr. 3333-34, *in camera*).

**Response to Finding No. 1208:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]



[REDACTED] (Simpson, Tr. 3423-3424, *in camera*).

However, record evidence shows that all plants are not created equal; in fact, plants located in different geographic areas have different quality, cost, and pricing. Daramic's

[REDACTED]

[REDACTED]

[REDACTED] where as it considered itself "Best in Industry" in those categories.

(PX0265 at 16, *in camera*). [REDACTED] were also included

as the "Worst In Industry" in Daramic's Strategy Audit in the same categories as [REDACTED] in

addition to these two categories - [REDACTED] (PX0265 at 16, *in*

*camera*). (See also CCRF 1002, 1008-1009, 1011, 1020, 1022-1025, 1028, 1030, 1033, 1040-

1041, 1044-1045, 1049, 1051, 1053).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2745, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in*

*camera* [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] } (Gillepsie, Tr. 3024-3025, *in camera*).

1210. In arriving at his opinion, though, Simpson ignored  
a. the testimony of Mr. Wallace of U.S. Battery, who testified about U.S. Battery obtaining Interstate Battery's Supplier of the Year Award for 7 years for on time shipments when it received all of its separator products for all of its facilities, in California and Georgia, from Microporous' facility in Piney Flats, Tennessee and Daramic's Owensboro, Kentucky facility (Wallace Tr. at 1936-37, 1957-60);

**Response to Finding No. 1210, a:**

The Respondent has not cited to any evidence in the record to support the assertion that Dr. Simpson ignored this piece of evidence. (*See* RFOF 1210, a).

b. the testimony of Larry Burkert of EnerSys who testified that having the ability to supply locally was not a necessary requirement to supply product to EnerSys, a company with manufacturing facilities around the globe (Burkert Tr. 2383; Simpson, Tr. 3336-37, *in camera* { [REDACTED] }; RX00224);

**Response to Finding No. 1210, b:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (RX00224);

Simpson, Tr. 3451, *in camera*).

c. the testimony of Douglas and other witnesses regarding the { [REDACTED] } (Douglas, Tr. 4066-67; Simpson, Tr. 3336, *in camera*; Hauswald, Tr. 1084-85); and

**Response to Finding No. 1210, c:**

The proposition is contradicted by the record evidence. Mr. Douglas's testimony occurred after Dr. Simpson testified. Thus, Dr. Simpson was not in a position to ignore it. Dr. Simpson's testimony ended at Tr. 3501, Mr. Douglas's testimony began at Tr. 4047. (Simpson, Tr. 3501; Douglas, Tr. 4047).

d. the fact that battery companies and battery separator suppliers, including BFR and JCI, enter into global supply agreements (Simpson, Tr. 3337-38, *in camera* { [REDACTED] }); RX01602, *in camera*; RX00162, *in camera*).

**Response to Finding No. 1210, d:**

Complaint Counsel has no specific response.

1211. { [REDACTED] } (Simpson, Tr. 3335, *in camera*). Simpson fails to explain or justify his opinion in the light of this evidence regarding the supply of separators.

**Response to Finding No. 1211:**

The proposition is contradicted by the record evidence. Dr. Simpson clearly explained that he concluded that “manufacturers of these products can set different prices for different geographic regions; in other words, they can price-discriminate based upon geography.” (Simpson, Tr. 3183). In such a case, shipments by Entek and Microporous to customers located outside of North America would not be relevant for determining whether a hypothetical monopoly seller of battery separators in North America could profitably increase price.

Moreover, { [REDACTED] } (Roe, Tr. 1233-1234; Thuet, Tr. 4357-4358, *in camera*). Daramic market document extols the benefits of local supply and technical centers. (PX0582 at 018, 020 (“Local Supply From a Global Company”)). The succeeding pages note the various plant locations and their intended geographic focus for supply e.g. “Selestat, France provides local supply. . . to Europe”. (PX0582 at 021).

Additionally, { [REDACTED] } Entek has a manufacturing plant in North America where North American battery manufacturers have a strong preference for local supply. (Leister, Tr. 4007-4009, 4020 (East Penn prefers local supply to reduce supply risk); Balcerzak, Tr. 4129-4130 (sourcing from overseas would interfere with efforts to maintain just in time delivery of separator supply); Douglas, Tr. 4080 (Douglas

has a preference for local supply in order to reduce distance, time, and travel, and to maintain just-in-time deliveries and facilitate quick response from separator suppliers); Axt, Tr. 2108 (EnerSys prefers to have local suppliers in North America to reduce shipping costs, inventory carrying costs, freight forward fees, lead times, timeliness of supply, and duties); Gillespie, Tr. 3034-3037, *in camera* { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] }

(RX00114 at 024-077, *in camera*). { [REDACTED]  
[REDACTED].”}

(RX00115 at 003, *in camera*).

Lastly, there is no factual support for the second sentences assertion. (RFOF 1211).

1212. { [REDACTED] } (Simpson, Tr. 3339-40, 3468-69, *in camera*; PX0522, *in camera*). Again, Simpson’s opinion in this regard is not supported by credible evidence and fails to account for substantial evidence demonstrating that local supply is not a significant factor in determining the relevant geographic market.

**Response to Finding No. 1212:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (Simpson, Tr. 3339-3340, *in camera*; PX0522, *in*

*camera*). However, { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3339-3340, *in camera*; 3449-3450, *in camera*;

PX0522, *in camera*). Lastly, there is no factual support for the third sentences assertion. (See RFOF 1212).

1213. [REDACTED] (Simpson, Tr. 3444-45, *in camera*).

**Response to Finding No. 1213:**

The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3352, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED] (See generally CCFOF 947-950, 966-967,

969, 972-974, 983-986). [REDACTED]

[REDACTED] (Hall, Tr. 2881, *in camera*). [REDACTED]

[REDACTED] (Axt, Tr. 2218, *in camera*; see

also Gagge, Tr. 2499, *in camera*) [REDACTED]

[REDACTED] (Hall, Tr. 2881, *in*

*camera*). [REDACTED]

[REDACTED]

(PX0907 (Kung, Dep. at 262, *in camera*); Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499,

*in camera*)). [REDACTED]

[REDACTED] (Hall, Tr. 2881-2882, *in*

*camera*; PX0907 (Kung, Dep. at 291, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hall, Tr. 2881-2882, *in camera*).

Thus, BFR will not be cost competitive in North America. (See CCRF 984).

Lastly, { [REDACTED] } (Axt, Tr. 2218, in camera). EnerSys is working to locate a source of { [REDACTED] } (Burkert, Tr. 2360, in camera). { [REDACTED] } (Axt, Tr. 2218, in camera). When { [REDACTED] } could actually supply EnerSys with product. (Burkert, Tr. 2360, in camera; see also Gagge, Tr. 2500, in camera).

1214. Simpson selectively refers to information outside his purported geographic market when it suits his purpose and he ignores it elsewhere. For example, { [REDACTED]

{ [REDACTED] } (Simpson, Tr. 3400-01, in camera) { [REDACTED]

{ [REDACTED] } (Simpson, Tr. 3399, in camera). { [REDACTED]

(Simpson, Tr. 3399-3400, in camera).

**Response to Finding No. 1214:**

The proposition is contradicted by the record evidence. { [REDACTED]

{ [REDACTED] } The only thing that respondents can cite is that { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3399-3400, *in camera*).

i. Simpson's Market Share and Concentration Analysis is Flawed

(a) Simpson Did Not Consider Uncommitted Entrants

1215. { [REDACTED] } (Simpson, Tr. 3341, *in camera*; RX01653 at 008, 014).

**Response to Finding No. 1215:**

Complaint Counsel has not specific response.

1216. { [REDACTED] } (RX01653 at 014; Simpson, Tr. 3342, 3347, *in camera*). { [REDACTED] } (Simpson, Tr. 3342-43, 3346-47, *in camera*).

{ [REDACTED] }

{ [REDACTED] }

(Simpson, Tr. 3347, *in camera*).

**Response to Finding No. 1216:**

The proposition is contradicted by the record evidence. Dr. Simpson testified: { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3342-3343, *in camera*). Thus, Dr. Simpson did not offer a standard that was inconsistent with the Merger Guidelines. Moreover, Dr. Simpson did not fail to recall the Merger Guideline's requirement regarding sunk costs. Dr. Simpson is correct that the Merger Guidelines do not necessarily require that one look at sunk costs. The Merger Guidelines require that uncommitted entry both occur within one year and not require significant sunk costs. (RX01653 at 014). Consequently, if the evidence showed that uncommitted entry

could not occur within one year, it would not be necessary to estimate sunk costs. (RX01653 at 014).

1217. [REDACTED]  
[REDACTED] (Simpson, Tr. 3346-48, *in camera*).

**Response to Finding No. 1217:**

The proposition is contradicted by the record evidence. (See CCRF 1216).

1218. [REDACTED]  
[REDACTED] (Simpson, Tr. 3461, *in camera*). Simpson is incorrect.

**Response to Finding No. 1218:**

The proposition is contradicted by the record evidence. (See CCRF 1219).

1219. The Merger Guidelines do not require that an uncommitted entrant have an effect pre-merger. Rather, the Merger Guidelines simply state that a firm will be considered as an uncommitted entrant if it can enter in less than a year as such a firm, making such a quick entry, would have likely influenced the market pre-merger and post-merger:

Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times.

(RX01653 at 008).

**Response to Finding No. 1219:**

The proposition is contradicted by the record evidence. The Merger Guidelines do not require that an uncommitted entrant have an effect pre-merger. Rather, the Merger Guidelines simply state that a firm will be considered as an uncommitted entrant if it can enter in less than a year as such a firm, making such a quick entry, would have likely influenced the market pre-merger and post-merger:

Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times.

(RX01653 at 008).

A careful reading of the passage they cite from the Merger Guidelines indicates that the reason the Merger Guidelines would consider a firm that could make such quick and

uncommitted supply responses as a market participant is because that firm likely influenced the market pre-merger and would influence it post-merger. (RX01653 at 008).

1220. { [REDACTED] } (Simpson, Tr. 3343, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3344, *in camera*). { [REDACTED] }  
(Simpson, Tr. 3344, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3344, *in camera*). { [REDACTED] } (Simpson, Tr. 3445, *in camera*), { [REDACTED] } (Simpson, Tr. 3478, *in camera*).

**Response to Finding No. 1220:**

The proposition is contradicted by the record evidence. { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3195-3196 *in camera*; see also CCFOF 307). { [REDACTED] }  
{ [REDACTED] } Dr. Simpson noted: { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3195-3196, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3196, *in camera*). Additionally, { [REDACTED] }  
{ [REDACTED] } (Kahwaty, Tr. 5389, 5391-5392, *in camera*; Simpson, Tr. 3348, *in camera*).

1221. { [REDACTED] }  
{ [REDACTED] }

[REDACTED]

(Simpson, Tr. 3348-50, *in camera*).

**Response to Finding No. 1221:**

The proposition is contradicted by the record evidence. (See CCRF 1222).

1222. { [REDACTED]



[REDACTED]  
[REDACTED]  
[REDACTED] (See CCFOF 501-507). [REDACTED]  
[REDACTED] (See CCFOF  
508-519). [REDACTED] (See CCFOF  
520).

In contrast, identifying [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (See CCFOF 311-319). And, [REDACTED]  
[REDACTED]  
[REDACTED] (See CCFOF 919-932; CCFOF 311-319). Similarly, identifying  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(See CCFOF 260-267, 283-286, 933-986).

1223. [REDACTED]  
[REDACTED] (Burkert, Tr. 2407-08, *in camera*; Axt, Tr. 2145, *in camera*).

**Response to Finding No. 1223:**

The proposition is contradicted by the record evidence. (See CCRF 1222).

1224. [REDACTED]  
[REDACTED]  
[REDACTED] (Simpson, Tr. 3352, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3352, *in camera*).

**Response to Finding No. 1224:**

The proposition is contradicted by the record evidence. (See CCRF 1222). Additionally,

[REDACTED]

[REDACTED]

[REDACTED] } (See generally CCFOF 947-950, 966-967,

969, 972-974, 983-986). [REDACTED]

[REDACTED] } (Hall, Tr. 2881, *in camera*). [REDACTED]

[REDACTED] } (Axt, Tr. 2218, *in camera*; see

also Gagge, Tr. 2499, *in camera*) [REDACTED]

[REDACTED] } (Hall, Tr. 2881, *in*

*camera*); [REDACTED]

[REDACTED]

(PX0907 (Kung, Dep. at 262), *in camera*; Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499,

*in camera*)). [REDACTED]

[REDACTED] } (Hall, Tr. 2881-2882, *in*

*camera*; PX0907 (Kung, Dep. at 291, *in camera*)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2881-2882, *in camera*).

Thus, BFR will not be cost competitive in North America. (CCRF 984).

1225. Simpson's disparate treatment of Entek and Microporous undermines any credibility in his opinions in this matter. This Court simply cannot give any weight to Simpson's opinions because of his shoddy methodology and complete disregard of Entek as an uncommitted entrant.

**Response to Finding No. 1225:**

This is an improper legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by any evidence in the record and does not have a citation supporting it. The proposition is contradicted by the record evidence. (See CCRF 1222).

j. Simpson's HHI Analysis is Incorrect

1226. Complaint Counsel argues that the HHI numbers are a bar to the merger of Daramic and Microporous. This Court finds that Complaint Counsel cannot rely on the HHI numbers here, as Simpson's numbers are inaccurate.

Response to Finding No. 1226:

This is an improper legal conclusion, not a factual assertion. Respondent's assertion is not supported by any evidence in the record and does not have a citation supporting it. The proposition is contradicted by the record evidence. (See CCRF 1229, 1230, 1231, 1233).

1227. [REDACTED] } (Simpson, Tr. 3355-56, *in camera*).  
[REDACTED] } (Simpson, Tr. 3356, *in camera*). Simpson's view here is in accord with Kahwaty's view and the previous position of the FTC.

The Horizontal Merger Guidelines promulgated by the U.S. Department of Justice and the Federal Trade Commission state that 'market shares and concentration data provide only the **starting point** analyzing the competitive impact of a merger.' Nevertheless, the market share and concentration levels at which the Agencies have challenged mergers are significant. **Although large market shares and high concentration by themselves are an insufficient basis for challenging a merger, low market shares and concentration are a sufficient basis for not challenging a merger.**

(*Merger Challenges Data, Fiscal Years 1999-2003*, Issued by the Federal Trade Commission and the U.S. Department of Justice, December 18, 2003 (emphasis added); see also Kahwaty Tr. 5580-83, *in camera*.)

Response to Finding No. 1227:

Complaint Counsel has no specific response.

1228. Beyond this basic point, though, the Court finds several significant deficiencies with Simpson's HHI calculations.

Response to Finding No. 1228:

This is an improper legal conclusion, not a factual assertion. Respondent's assertion is not supported by any evidence in the record and does not have a citation supporting it. The proposition is contradicted by the record evidence. (See CCRF 1229, 1230, 1231, 1233).

1229. { [REDACTED] } (Simpson, Tr. 3348-50). { [REDACTED] } (Simpson, Tr. 3341, *in camera*; RX01653 at 007-08, 014-20; Kahwaty, Tr. 5381, 5566-68, *in camera*). Under the Merger Guidelines, uncommitted entrants are to be assigned market shares.

**Response to Finding No. 1229:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (See CCFOF 311-319, 919-932). Moreover, { [REDACTED] } (Kahwaty, Tr. 5389, 5391-5392, *in camera*; see also CCRF 1220).

1230. { [REDACTED] } (Simpson, Tr. 3439, *in camera*). { [REDACTED] } (Riney, Tr. 4959-61, *in camera*). { [REDACTED] } (Gilchrist, Tr. 470-72). Reviewing Mr. Gilchrist's testimony with that of Mr. Heglie and other witnesses, it is apparent that Mr. Gilchrist was prone to exaggeration about Microporous' prospects. (Gilchrist, Tr. 498-99) { [REDACTED] }, 507-09, *in camera*; PX2301 (Heglie, Dep. at 8); Trevathan Tr. 3705-08; RX00401). Simpson gave no apparent consideration to this significant defect with his methodology.

**Response to Finding No. 1230:**

The proposition is contradicted by the record evidence. The Merger Guidelines instruct that market shares (and thus HHIs) should be calculated using the best indicator of firms' future competitive significance. (RX01653 at 016-017). { [REDACTED] } (PX0033 at 41, *in camera*). However, MPLP was positioned to make sales in the near future. (Gillespie, Tr. 2976 ("We [Exide] had full intention that we were

going to be buying Microporous [SLI] separators in 2010"). Thus, using MPLP's 2007 market share would not be the best indicator of its future significance. Noting this, Dr. Simpson observed that { [REDACTED] } (CCFOF 301-302). { [REDACTED] } [REDACTED] [REDACTED] } (Simpson, Tr. 3439, *in camera*). A Daramic document { [REDACTED] } [REDACTED] } (CCFOF 303).

Lastly, Mr. Heglie testified that the mandates were not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65)). Nor did the mandate mean the Microporous should stop the work that was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66)). There is nothing in the mandate that eliminated the possibility of Microporous moving forward in its desire to compete in the automotive separator market. (PX2301 (Heglie, Dep. at 67)). In fact, Mr. Heglie testified that he does not recall the Microporous Board ever communicating that Microporous could not compete in the automotive market. (PX2301 (Heglie, Dep. at 68)). Mr. Heglie further agreed that the mandate was not the last word on possible expansion for Microporous. (PX2301 (Heglie, Dep. at 69); RX00401 at 002; PX2300 (Heglie, IH at 197)). For a more detailed discussion see CCFOF 687-691.

1231. { [REDACTED] } (Simpson, Tr. 3358-59, *in camera*).

{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }  
(Simpson, Tr. 3359, *in camera*).

**Response to Finding No. 1231:**

The proposition is contradicted by the record evidence. { [REDACTED] }  
[REDACTED]

[REDACTED] } (See PX0033 at 041, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0033 at 041, *in camera*; Simpson, Tr. 3189-3190).

1232. [REDACTED] } (Simpson, Tr. 3391, *in camera*). The loss of JCI as a customer resulted in Daramic losing \$55 million in annual sales and the closing of one plant in Italy (Potenza) in its entirety and a significant reduction in the production at its Owensboro facility. (Hauswald, Tr. 908, 1119). Obviously, the loss of JCI's business was significant to Daramic and reduced its share of Simpson's SLI market. Yet, Simpson did not consider this in his calculations. This is a fatal error.

**Response to Finding No. 1232:**

Respondent's assertion in the second sentence that a significant reduction at its Owensboro facility is not supported by the citation provided. Respondent's self-serving assertions in the third and fourth sentences in this finding does not have a citation supporting it.

[REDACTED]

[REDACTED]

(See PX0033 at 041, *in camera*).

1233. [REDACTED] } (PX0033 at 040-42, *in camera*). [REDACTED]

[REDACTED] } (Simpson, Tr. 3354, 3376, *in camera*). Again, this demonstrates the complete lack of any credible analysis by Simpson of the issues and undermines the credibility of his opinions.

**Response to Finding No. 1233:**

The proposition is contradicted by the record evidence. Respondent's correctly note that Dr. Simpson did not present HHI calculations for the UPS market. However, Dr. Simpson did describe the competitive environment for that market. (Simpson, Tr. 3187). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3376, *in camera*). Respondent then ignores all of Dr. Simpson's other testimony along with his two expert reports to assert that "this demonstrates the complete lack of any credible analysis by Simpson of issues and undermines the credibility of his opinions."

Respondent leaves unexplained exactly how these two things could undermine all of Dr.

Simpson's testimony.

Moreover, this is a legal conclusion, not a factual assertion. Respondent's self-serving assertions in the third sentence in this finding is not supported by any evidence in the record and does not have a citation supporting it.

1234. This Court gives no weight to Simpson's market share or market concentration analysis.

**Response to Finding No. 1234:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in this finding is not supported by any evidence in the record and does not have a citation supporting it. The proposition is contradicted by the record evidence. (See CCRF 1229-1233).

- k. Simpson's opinion regarding competitive effects is flawed and cannot be considered.

1235. { [REDACTED] } (PX0033 at 019-20, *in camera*; Simpson, Tr. 3201-02, *in camera*). Simpson's opinions, again, are flawed and cannot be given any credit by this Court.

**Response to Finding No. 1235:**

The proposition is contradicted by the record evidence. (See CCRF 1236).

1236. { [REDACTED] } (Simpson, Tr. 3363, *in camera*). The FTC has shown neither here and Simpson has not expressed a credible opinion on either.

**Response to Finding No. 1236:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in the second sentence in this finding is not supported by evidence in the record and does not have a citation supporting it. The proposition is contradicted by the record evidence. For a more detailed explanation see CCFOF 324-665.

1237. { [REDACTED] } (Simpson, Tr. 3363, *in camera*), { [REDACTED] } (Simpson, Tr. 3348, 3364, *in camera*).

**Response to Finding No. 1237:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3196, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3196-3197, *in camera*).

Moreover, Entek is not a market participant in either the deep-cycle or the motive separator markets. [REDACTED]

[REDACTED] (See CCFOF 311-319). And, { [REDACTED]

[REDACTED]

[REDACTED] } (See CCFOF 311-319, 919-932). Specifically, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3195-3196 *in camera*).

{ [REDACTED]

[REDACTED] } (Kahwaty, Tr.

5389, 5391-5392, *in camera*; Simpson, Tr. 3348, *in camera*). { [REDACTED]

[REDACTED] }

(Kahwaty, Tr. 5392, *in camera*). { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5394, *in*

*camera*). { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5393, *in camera*).

1238. {

} (PX0033 at 019, *in camera*). {

} (Simpson, Tr. 3478, *in camera*; Weerts, Tr. 4459. *in camera*).

**Response to Finding No. 1238:**

The proposition is contradicted by the record evidence. {

[REDACTED]

[REDACTED]}

(PX0033 at 019, *in camera*). {

[REDACTED]

} (PX0033 at 019,

*in camera*). {

[REDACTED]

} (See, e.g. PX2251 at

007-008, *in camera*). {

[REDACTED]

[REDACTED]

} (Simpson, Tr. 3195-3199, *in camera*; PX0033 at 19,

*in camera*; PX2251 at 007-008, *in camera*).

{ [REDACTED]

} (Gillespie, Tr. 2966,

2976-2978, 3022, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

. (PX1902 at 001, *in camera* [REDACTED]

[REDACTED]

}; Weerts, Tr. 4515-4516, *in camera*; {

[REDACTED]

[REDACTED]

}; PX1806 at 001, *in camera* {

[REDACTED]

[REDACTED]

[REDACTED]}

[REDACTED]  
[REDACTED]  
[REDACTED] } (PX1902 at 001, *in camera*;  
Gillespie, Tr. 3129, *in camera* { [REDACTED]  
[REDACTED] }; Gillespie, Tr. 3130, 3134-3135, *in camera* { [REDACTED]  
[REDACTED]  
[REDACTED] }; PX1902 at 001, *in camera*; Gillespie, Tr. 3040, *in*  
*camera* { [REDACTED] };  
Gillespie, Tr. 3038-3039, *in camera* { [REDACTED] { [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3040, *in camera*; *see also* CCRF 964).

1239. { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3389-91, *in camera*; Simpson, Tr. 3278-79, 3287; Simpson,  
Tr. 3391, *in camera*; RX01651).

**Response to Finding No. 1239:**

The proposition is contradicted by the record evidence. Dr. Simpson reviewed the  
Deposition of H&V's Bob Cullen and looked at Daramic and H&V documents that discussed the  
cross-agency agreement. (RX01651). Dr. Simpson based his belief that coordinated effects  
could occur in this market on much more than the { [REDACTED] }  
(RX00668; PX0033 at 020-021, *in camera*; PX2251 at 008-010, *in camera*; Simpson, Tr. 3199-  
3202, *in camera*). For instance, { [REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3200, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
(Simpson, Tr. 3200, *in camera*).

1240. { [REDACTED] } (Simpson, Tr. 3389, *in camera*;  
RX1653 at 021).

**Response to Finding No. 1240:**

Complaint Counsel has no specific response.

1241. { [REDACTED] } (Simpson, Tr. 3393, *in camera*).

**Response to Finding No. 1241:**

Respondent's first assertions in this finding are not supported by the citation.

Respondent's second assertion in this finding is not supported by the citation. Specifically, the cite that it uses does not reference any loss of business by { [REDACTED] } to { [REDACTED] }. The proposition is contradicted by the record evidence. While { [REDACTED] } did shift some of its battery separator purchases from { [REDACTED] } to { [REDACTED] }, the record suggests that Daramic may not have been hurt by this. (PX0471, *in camera* { [REDACTED] } [REDACTED] ); Toth, Tr. 1603-1605, *in camera*).

I. **Simpson's Opinion on Ease of Entry is Not Supported**

1242. { [REDACTED] } (Simpson, Tr. 3205, *in camera*). In arriving at this opinion, though, Simpson demonstrates a lack of analysis, a great exaggeration of certain facts and a complete disregard for others, all in an effort to support his opinion that entry cannot occur in less than two years.

**Response to Finding No. 1242:**

Respondent's self-serving assertion in the second sentence is not supported by a citation.

The proposition is contradicted by the record evidence. (*See* CCRF 1243).

1243. { [REDACTED] } (Simpson, Tr. 3205-07, *in camera*).

**Response to Finding No. 1243:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in this finding is not supported by evidence in the record. The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (Simpson, Tr. 3205-3207, *in camera*).

Second, the record overwhelmingly shows that entry would not be timely. (See CCFOF 817-1043). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] }

(Simpson, Tr. 3206-3207, *in camera*).

Past instances of entry by Microporous with its CellForce separator and Daramic's with its deep-cycle separator was illustrative that entry cannot occur in a timely period. Daramic's own development of its deep-cycle separator { [REDACTED] } (PX0950 at 064, *in camera*; PX0433 at 001; PX0319-003; *see also* CCFOF 336, 339-340, 355). Daramic began testing different additives for its new deep-cycle separator as early as 1999. (Whear, Tr. 4777-4778). But it was not until 2005 that Daramic made its first commercial sales. (Whear, Tr. 4778). The development of Microporous's CellForce separator took many years. (Gilchrist, Tr. 323). CellForce was initially developed by Microporous in 1995-1996 and beginning in early 2001, MPLP began producing CellForce on a production line at its Piney Flats facility. (Gilchrist, Tr. 316-317, 321-322; *see also* CCFOF 847-860).

1244. { [REDACTED] } (Simpson, Tr. 3206, *in camera*). { [REDACTED] } (Simpson, Tr. 3393, *in camera*).

**Response to Finding No. 1244:**

Complaint Counsel has no specific response.

1245. { [REDACTED] } (Simpson, Tr. 3206, *in camera*). { [REDACTED] } (Simpson, Tr. 3393-94, *in camera*).

**Response to Finding No. 1245:**

The proposition is contradicted by the record evidence. Pre-acquisition, Microporous was profitable and was a competitive threat. (Trevathan, Tr. 3652; Roe, Tr. 1281; PX0482 at 002; *see also* CCFOF 326, 346, 425, 465-466, 472-490, 501-507, 526-527, 529, 1044).

1246. { [REDACTED] } (Simpson, Tr. 3396-97, *in camera*; RX01649).

**Response to Finding No. 1246:**

The proposition is contradicted by the record evidence. { [REDACTED] } (Simpson, Tr. 3396-3397, *in camera*; RX01649). { [REDACTED] } (Simpson, Tr. 3397, *in camera*).

1247. { [REDACTED] } (Simpson, Tr. 3398, *in camera*). { [REDACTED] } (Hall, Tr. 2892-94, *in camera*). { [REDACTED] } (Simpson, Tr. 3398-99, *in camera*).

**Response to Finding No. 1247:**

The proposition is contradicted by the record evidence. Respondent's assertion that Dr. Simpson did not recall that { [REDACTED] } is not supported by the cite provided.

(Simpson, Tr. 3398-3399, *in camera*). In fact, Dr. Simpson stated that { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3398-3399, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3399, *in camera*).

1248. { [REDACTED] } (Simpson, Tr. 3401-02, *in camera*). The evidence in this case is that it took Microporous only 16-20 months to purchase, install and begin producing industrial separators off of the Jungfer line. (Gaugl Tr. 4543-44; RX01029, *in camera*; RX01045, { [REDACTED] }, *in camera*; RX1046, *in camera*). This Court finds Simpson's failure to consider this evidence, as to his own geographic market, fatal to his opinion regarding entry.

**Response to Finding No. 1248:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in the last sentence of this finding is not supported by a citation. The proposition is contradicted by the record evidence. Respondent argues that { [REDACTED] } was able to add a line to its { [REDACTED] } facility in { [REDACTED] }, which does not include the time spent planning the expansion.

In fact, according to Mr. Gaugl, { [REDACTED]

[REDACTED]

[REDACTED] } (PX0590 (Gaugl,

Arb. Dep. at 52-53), *in camera*). Moreover, Respondent's use of RX0145, for the proposition

that { [REDACTED]

[REDACTED] } (RX0145, *in*

*camera*). Respondent then argues that Dr. Simpson's entire testimony regarding entry is flawed because he did not focus on this piece of evidence. Dr. Simpson stated that building a new plant would take { [REDACTED] } (PX0033 at 010, *in camera*).

1249. { [REDACTED]

[REDACTED] } (Simpson, Tr. 3402-03, *in camera*).

**Response to Finding No. 1249:**

The proposition is contradicted by the record evidence. Respondent's assertion that Dr. Simpson did not factor testimony from { [REDACTED] } of [REDACTED] regarding testing times into his opinion is not supported by the citation. (Simpson, Tr. 3402-3403, *in camera*). Moreover, Dr. Simpson clearly did consider testimony from [REDACTED] in forming his opinion. (PX0033 at 011, *in camera* { [REDACTED] }.)

1250. This Court also acknowledges the evidence in this case that separator manufacturers in Asia have, in less than two years, added new capacity of equal or greater capacity than that of Microporous' Piney Flats single PE line and that these companies (Anpei, BFR, Separindo, Sebang) have greater PE capacity than Microporous. (Thuet, Tr. 4330-32; Hauswald, Tr. 1036; PX1073 at 015; Seibert, Tr. 4160; PX0922 (Roe, IHT at 337), *in camera*.)

**Response to Finding No. 1250:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Horizontal Merger Guidelines §3.0; Simpson, Tr. 3204-3205, *in camera*).

Secondly, { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (RX1084 at, *in camera*; Gaugl, Tr. 4533; Gilchrist, Tr. 312-313, 300 (Microporous's Austrian expansion was still ongoing at the time it was acquired by Daramic)). This total does not even include the 11 million square meter line in a box that Microporous had paid for, but not installed yet. (Gaugl, Tr. 4560, 4565; *see also* CCFOF 666-668, 698).

1251. Based on the evidence that a new PE line of the same size as Microporous' single PE line in Piney Flats can be built and placed into operation in less than 18 months, as evidenced by Microporous, BFR and Entek, and testing can occur in less than 6 months, this Court simply

does not find Simpson's opinion that entry cannot occur in less than two years to be credible. Simpson has discussed the timelines of entry only and has ignored the questions of sufficiency and likelihood of entry.

**Response to Finding No. 1251:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by a citation. The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Horizontal Merger Guidelines § 3.0;

Simpson, Tr. 3204-3205, *in camera*).

- m. Daramic's Post Acquisition Price Increases Do Not Support the FTC's Position

1252. [REDACTED]  
[REDACTED] }  
(Simpson, Tr. 3220, *in camera*).

**Response to Finding No. 1252:**

Complaint Counsel has no specific response.

1253. [REDACTED]  
[REDACTED] } {PX33 at 023-024, *in camera*; Simpson, Tr. 3368, 3369, *in camera*}. This Court cannot accept Simpson's opinion here in that it is beyond what was expressed in his report, and at best, demonstrates an ever-changing opinion that Simpson attempts to bolster as he meets criticism of his work.

**Response to Finding No. 1253:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in the last sentence is not supported by a citation. The proposition is contradicted by the record evidence. Dr. Simpson testified that he believed [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3224, *in camera*). [REDACTED]

[REDACTED].} (Simpson, Tr. 3209-3224, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3214, *in camera*; CCFOF 773-774, 803-805, 816).

1254. Even if one moves past Simpson's ever-changing opinion, his opinion at the hearing regarding Daramic's price increases is flawed and cannot be given any weight.

**Response to Finding No. 1254:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by a citation. The proposition is contradicted by the record evidence. (*See CCRF 1255*).

1255. { [REDACTED] } (Simpson, Tr. 3369-70, *in camera*). { [REDACTED] } (Simpson, Tr. 3370, *in camera*). { [REDACTED] } {Simpson, Tr. 3218, *in camera*). Moreover, Simpson had available to him data derived from Daramic's Advanced Forecast System that was produced to the FTC repeatedly, but did not use such data. (RX00631, *in camera*; RX00677, *in camera*; RX01119, *in camera*; RX01323, *in camera*; RX01604, *in camera*; RX01605, *in camera*; and PX01450, *in camera*).

**Response to Finding No. 1255:**

The proposition is contradicted by the record evidence. Dr. Simpson did not testify he had data on [REDACTED] actual input costs. (Simpson, Tr. 3216, *in camera*). Rather, Dr. Simpson testified that [REDACTED] never provided that information even though it was specifically requested in Complaint Counsel's first set of interrogatories. (Simpson, Tr. 3216, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3218, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3370, *in camera*). Respondent incorrectly claims that it provided Complaint

Counsel with access to Daramic's AFS because the AFS is an Access database. What Respondent has provided Complaint Counsel has been data selected by Respondent from the

AFS and placed into Excel Pivot Table worksheets. { [REDACTED] } (Simpson, Tr. 3370-3371, *in camera*; Seibert, Tr. 4270, *in camera*).

1256. { [REDACTED] } (Simpson, Tr. 3218-19, *in camera*). At best, Simpson's testimony begs the question as he did no analysis here to show that is the case. Moreover, Simpson's testimony regarding Daramic's cost data demonstrates Simpson's lack of appreciation of the manner in which Daramic sets its pricing.

**Response to Finding No. 1256:**

The proposition is contradicted by the record evidence. This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion in the second and third sentence is not supported by a citation. In the testimony respondent cites, Dr. Simpson testified that { [REDACTED]

[REDACTED] } (Simpson, Tr. 3219, *in camera*). Respondent's claim that "Simpson's testimony regarding Daramic's cost data demonstrates Simpson's lack of appreciation of the manner in which Daramic sets its pricing" is also contradicted by the record. (See CCRF 1258).

1257. { [REDACTED] } (Simpson, Tr. 3218, *in camera*; PX0033 at 024, *in camera*) { ([REDACTED] )}.

**Response to Finding No. 1257:**

Complaint Counsel has no specific response.

1258. { [REDACTED] } (Seibert, Tr. 4189-91, *in camera*). {And in setting that pricing, Daramic looks at its actual costs for the prior year.} (Seibert, Tr. 4190-91, *in camera*). Following this approach, a drop in petroleum after August 2008 would have no bearing and would be irrelevant to the question of whether pricing sought in August of 2008 was cost justified. { [REDACTED] } (Kahwaty, Tr. 5203-08, *in camera*). Simpson's consideration of general costs following the relevant period when pricing was set demonstrates again that Simpson's

methodology is flawed and that Simpson is attempting to find facts to buttress his opinion rather than basing his opinion on the relevant facts.

**Response to Finding No. 1258:**

Respondent's self-serving assertion in the last sentence is not supported by a citation.

The proposition is contradicted by the record evidence. First, Respondent's statement that

{ [REDACTED]

[REDACTED] } is not accurate. { [REDACTED]

[REDACTED] }. (Godber, Tr. 235-236, *in camera*). Moreover, in

Respondent's response to Complaint Counsel's first interrogatory, respondent { [REDACTED]

[REDACTED] } (PX0950 at

004-016, *in camera*). Indeed, Respondent's RFOF 1280 acknowledges that Daramic negotiated

the price increases that it announced in 2008 with its customers. (See CCRF 1280). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Riney, Tr. 4995, *in camera*; PX0033 at 045, *in camera*).

Secondly, Respondent's statement that Simpson's methodology is flawed and that Simpson is attempting to find facts to buttress his opinion rather than basing his opinion on the relevant facts" is contradicted by the record. Daramic's raw material and energy inputs are based on crude oil. (PX2068 at 001). Daramic instructed customers who were dubious about its claim that its input costs had increased to check general price indices based on crude oil. (PX2068 at 001).

1259. { [REDACTED]  
[REDACTED] } (PX0789, *in camera*; Simpson, Tr. 3373, *in camera*). { [REDACTED]  
[REDACTED] } (Kahwaty,  
Tr. 5205-07, *in camera*). { [REDACTED]  
[REDACTED] } (Kahwaty, Tr.  
5207, *in camera*).

**Response to Finding No. 1259:**

{The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3214-3219, *in camera*). [REDACTED]

[REDACTED] (Simpson, Tr. 3215-3216, *in camera*). Daramic had

previously told its customers that examining such a price index was precisely what they should do to verify changes in Daramic's input costs. (PX2068 at 001).

1260. This Court finds Simpson's opinion regarding Daramic's price increase to be unreliable and therefore, it will be given no weight.

**Response to Finding No. 1260:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1258-1259).

1261. [REDACTED]

[REDACTED] (Simpson, Tr. 3221, *in camera*). [REDACTED]

[REDACTED] (Simpson, Tr. 3224, *in camera*).

**Response to Finding No. 1261:**

{The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3214, *in camera*; see also CCFOF

790-803).

1262. This Court has considered Simpson's testimony concerning his difference-in-difference analysis and finds that it is fundamentally flawed. This Court gives no weight to his opinion based on this analysis.

**Response to Finding No. 1262:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1263-1269).

1263. { [REDACTED] } (Simpson, Tr. 3380-81, *in camera*). As Simpson testified:

{ [REDACTED] }

- [REDACTED]

(Simpson, Tr. 3380-81, *in camera*).

**Response to Finding No. 1263:**

Complaint Counsel has no specific response.

1264. Yet, Simpson's control group, which consists of three customers that entered into contracts with Daramic in late 2007 or early 2008, in no way accounts for the extraordinary cost shocks experienced in 2008.

**Response to Finding No. 1264:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3221-3222, *in camera*). Dr. Simpson

stated that { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3221-3222, *in camera*; PX0033 at 025, *in camera*).

Dr. Simpson noted that { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

(Simpson, Tr. 3465-3466, *in camera*). Dr. Simpson also noted that { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3464, *in camera*). Dr. Simpson  
explained that { [REDACTED] }  
[REDACTED] }

(Simpson, Tr. 3464, *in camera*; PX0033 at 024, *in camera*). For a more detailed analysis of Dr.  
Simpson's DID, see CCFOF 797-802.

1265. { [REDACTED] }  
[REDACTED] } (Simpson, Tr.  
3383-84, *in camera*).

**Response to Finding No. 1265:**  
Complaint Counsel has no specific response.

1266. { [REDACTED] } (Simpson, Tr. 3382, *in camera*). Based on this fact alone, it is  
apparent that Simpson violated the very requirement that he testified must be followed of  
accounting for cost shocks.

**Response to Finding No. 1266:**  
The proposition is contradicted by the record evidence. { [REDACTED] }  
[REDACTED]

[REDACTED] } (CCFOF 726; PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, 1350-1354, *in camera*). Thus, the contracts accounted for cost shocks - they only did so by assuming that Daramic would absorb such cost shocks. Had the acquisition not occurred, other customers could have received similar favorable treatment. (See CCFOF 799-802).

1267. As there is no way that a contract with price adjustments set to 0% for 2009 could in any way account for and tell us anything about how pricing would have changed in 2009 had the acquisition not occurred, Simpson's opinion based on his DID analysis is without any merit and will not be considered by this Court.

**Response to Finding No. 1267:**

This is a legal conclusion, not a factual assertion. Respondent's assertion is not supported by a citation. The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (CCFOF 726; PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, 1350-1354, *in camera*). Thus, the contracts accounted for cost shocks - they only did so by assuming that Daramic would absorb such cost shocks. Had the acquisition not occurred, other customers could have received similar favorable treatment. (See CCFOF 799-802).

1268. { [REDACTED] } (Simpson, Tr. 3378-79, *in camera*). { [REDACTED] } (Simpson, Tr. 3379-80, 3387-88, *in camera*). { [REDACTED] } (Simpson, Tr. 3388, *in camera*). { [REDACTED] } (Simpson, Tr. 3388, *in camera*).

**Response to Finding No. 1268:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. Dr. Simpson explained { [REDACTED]

[REDACTED] } (CCFOF 799). Daramic was

concerned that Crown Battery, Douglas Battery, and East Penn Battery would shift their purchases to Microporous. (Roe, Tr. 1287-1289; PX0258 at 002). To prevent this, in the Fall of 2007, Daramic offered these firms long-term contracts under its [REDACTED] that limited their price increases in 2009. (Roe, Tr. 1293; PX0258 at 001; CCFOF 800). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] }

(CCFOF 802).

Regardless of the specific comparison one wants to make, the customers that Daramic offered favorable pricing in response to MPLP's expansion received lower price increases than other firms. (CCFOF 802). Other firms, which were not offered long-term contracts under the { [REDACTED] }, received much larger price increases. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (RX00945 at 091, *in camera*; PX0950 at 015, 071-072, *in camera*). { [REDACTED]

[REDACTED] } (RX00945 at 091, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Gillespie, Tr. 3000, *in camera*).

Trojan, which had a contract with Microporous, { [REDACTED]  
[REDACTED] } (Godber, Tr. 236-38, *in camera*; PX0950 at 014, *in camera*).

1269. { [REDACTED]  
[REDACTED] } (Simpson, Tr. 3473, *in camera*).

**Response to Finding No. 1269:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3473, *in camera*).

1270. Simply put, this Court can draw no conclusions from Simpson's DID approach and will give it no weight here.

**Response to Finding No. 1270:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1263-1269).

n. Simpson's Opinion Regarding Monopolization is Flawed

1271. { [REDACTED]  
[REDACTED] } See e.g. (Simpson, Tr. 3229, *in camera*). This Court has considered Simpson's testimony and finds it unpersuasive for a number of reasons and will not give it weight.

**Response to Finding No. 1271:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving statement is not supported by a citation. The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3224-3236, *in camera*; PX0241, *in camera*). { [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3225-3236, *in camera*).

1272. First, Simpson fails to acknowledge that many of Daramic's contracts were not exclusive and in fact, permitted the customer to buy from other suppliers. (RX00983 (EnerSys contract), *in camera*; RX01519 (East Penn Contract), *in camera*).

**Response to Finding No. 1272:**

The proposition is contradicted by the record evidence. Dr. Simpson acknowledged that some of { [REDACTED] } contracts were { [REDACTED] }. (PX0033 at 047, *in camera*).

{ [REDACTED] }  
[REDACTED] } (PX0033 at 047, *in camera*).

1273. [REDACTED]  
[REDACTED] (Douglas, Tr. 4067, *in camera*; Balcerzak, Tr. 4106-07, *in camera*). In fact, Jim Douglas testified that Douglas Battery had not seen anyone from Microporous for years prior to the merger. (Douglas, Tr. 4062-63).

**Response to Finding No. 1273:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] }

(Douglas, Tr. 4067, *in camera*). And, { [REDACTED]  
[REDACTED] } (Balcerzak, Tr. 4106-4107, *in camera*; Balcerzak, Tr.

4120-4121). { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (PX0255, *in camera*; PX0257, *in camera*; PX0258).

1274. { [REDACTED]  
[REDACTED] } (PX0265, *in camera*; PX0295, *in camera*; PX0536, *in camera*).

**Response to Finding No. 1274:**

First, the proposition is contradicted by the record evidence. According to { [REDACTED]

[REDACTED]  
[REDACTED] } (PX2251 at 003-005, *in camera*).

Second, Complaint Counsel used its best efforts to verify the { } and { } figures but could not, due to the lack of pinpoint citation by the Respondent. Thus, Complaint Counsel believes these figures are not factually supported.

1275. { } (RX927 at 71-72, *in camera*).

|     |     |     |     |
|-----|-----|-----|-----|
| { } | { } | { } | { } |
| { } | { } | { } | { } |
| { } | { } | { } | { } |
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| { } | { } | { } | { } |
| { } | { } | { } | { } |
| { } | { } | { } | { } |
| { } | { } | { } | { } |

**Response to Finding No. 1275:**

The proposition is contradicted by the record evidence. Dr. Simpson accounted for the fact that { } { } (PX0033 at 047, *in camera*; Simpson, Tr. 3236, *in camera*).

1276. Accordingly, at any given point, volume was available to be provided to a new supplier. In this case, customers could have begun to discuss buying from Microporous and Microporous could have entertained expansion based on those discussions at any given point.

**Response to Finding No. 1276:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (Simpson, Tr. 3230, *in camera*; PX0033 at 047, *in camera*).

1277. Significantly, Simpson fails to acknowledge that even though JCI was not under a contract with Entek or Daramic for its supply in the United States for years, JCI still did not buy separators from Microporous. (Hall, Tr. 2802-03). This fact undermines Simpson's premise that exclusive contracts impeded entry or buying from Daramic's rivals.

**Response to Finding No. 1277:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED] } (Simpson, Tr. 3209, *in camera*; PX0033 at 030, *in camera*).  
{ [REDACTED]  
[REDACTED] }  
(PX0033 at 025, 030, *in camera*). This delay imposed costs on Microporous. (PX1215).

Michael Gilchrist, Microporous's President at the time, later wrote Mr. Axt: "We [Microporous] are taking a significant hit with the altered dates as our initial profitability and return on our capital is thrown off by almost a year later due to Daramic." (PX1215).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (PX0092 at 002).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3230, *in camera*;  
PX0033 at 046, *in camera*).

1278. Fourth, to the extent that Simpson's views here are based on his views regarding entry, the Court, as stated above, does not credit his opinion on entry barriers. { [REDACTED] } (Hall, Tr. 2765, 2827, *in camera*, Weerts, Tr. 4458, *in camera*; Seibert, Tr. 4165, 4175-76, *in camera*; Thuet, Tr. 4340; RX00062, *in camera*). And Simpson has offered no credible basis to believe that Daramic could somehow prevent the expansion or entry into North America by such firms.

**Response to Finding No. 1278:**

This is a legal conclusion, not a factual assertion. Respondent's self-serving statements in the first and fourth sentences are not supported by a citation. The proposition is contradicted by the record evidence. Respondent's claim that entry is easy is manifestly wrong. (*See generally*, CCFOF 817-1043). { [REDACTED]

[REDACTED]  
[REDACTED] } (Simpson, Tr. 3224-3236, *in camera*).

{ [REDACTED] } (Seibert, Tr. 4165, 4266-4267, *in camera*, Thuet, Tr. 4381-4382). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). { [REDACTED]

[REDACTED]  
[REDACTED] } (RX01084, *in camera*; RX01085, *in camera*). Even with the expanded capacity in the marketplace, these manufacturers are not likely to begin aggressive efforts to sell separators in North America. (CCRF 1002, 1009-1010, 1013-1014, 1020-1021, 1023, 1025-1031, 1035, 1048-1051, 1053-1057).

According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America. (Toth, Tr. 1404). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237). { [REDACTED] }  
{ [REDACTED] }  
(Kahwaty, Tr. 5343, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Weerts, Tr. 4500-4502, *in camera*).

Microporous did not consider the regional Asian suppliers as potential competitors for its separator business in North America. (Gilchrist, Tr. 308). Mr. Gilchrist explained, aside from Daramic and Entek, there { [REDACTED] }  
{ [REDACTED] } (Gilchrist, Tr. 423-424).

Daramic has never had to make price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 1813). { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (Weerts, Tr. 4500-4503, *in camera*). { [REDACTED] }  
{ [REDACTED] }  
{ [REDACTED] } (Weerts, Tr. 4502-4503, *in camera*). { [REDACTED] }

[REDACTED]  
[REDACTED] }  
(Weerts, Tr. 4501, 4512, *in camera*).

Additionally, the { [REDACTED] } from a manufacturing operations perspective. It has been Mr. Gillespie's experience that the { [REDACTED] } than US separator manufacturers. (Gillespie, Tr. 3031-3032, *in camera*). According to Mr. Gillespie, the majority of separators manufactured in Asia are manufactured for the Chinese market, [REDACTED]

[REDACTED] } (Gillespie, Tr. 3032, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Burkert, Tr. 2366-2367, *in camera*).

Asian firms do not compare favorably to the former Microporous. { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2221, *in camera*). Because { [REDACTED] } are located in { [REDACTED] }, technical visits are more difficult and time consuming, as well as additional transportation costs and times, duties, and extra inventory. (Axt, Tr. 2223, *in camera*). { [REDACTED] }  
[REDACTED] } (Axt, Tr. 2223-2224, *in camera*; see generally CCFOF 971-982).

1279. Fifth, to the extent that Simpson bases his opinion here on Daramic's dealings with EnerSys in 2006 during the force majeure, this Court rejects Simpson's opinion, as, for the reasons stated previously, this Court finds the force majeure experienced by Daramic in 2006 was real and not fake as the FTC and Simpson assert.

**Response to Finding No. 1279:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (PX0694 at 001; PX1211 at 001, *in camera*; PX0456 at 001; *see generally* CCRF 636-659).

1280. Sixth, Simpson's opinion, based in part on Daramic's price increase announced in 2008, fails to account for the substantial evidence that Daramic negotiates price with its customers and that { [REDACTED] }. (Axt Tr. 2213, 2249 *in camera*; Gillespie Tr. 3044-3045, *in camera*; Seibert Tr. 4194-4213, *in camera*; Godber Tr. 201-202).

**Response to Finding No. 1280:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3222-3223, *in camera*). Moreover, { [REDACTED]  
[REDACTED]  
[REDACTED] } (PX1224, *in camera*; PX2054, *in camera*; RX00968, *in camera*; PX0439, *in camera*; PX0950 at 004, 014, *in camera*).

Additionally, just prior to Daramic's acquisition of Microporous, Trojan was in discussions with Microporous on a contract extension and had agreed to most major terms including contract length and the pricing formula. (Godber Tr. 215-217). Notwithstanding Daramic's pledge to { [REDACTED] } before the acquisition, { [REDACTED] } (Godber, Tr. 239, *in camera*; *see also* CCFOF 435). Those changes included the { [REDACTED]

[REDACTED]  
[REDACTED] }

(Godber, Tr. 239-240, *in camera*). { [REDACTED]

[REDACTED] } (Godber, Tr. 240, *in camera*). { [REDACTED]

[REDACTED] } (Godber, Tr. 241, *in camera*).

1281. { [REDACTED] } (Simpson Tr. 3230-31, *in camera*); it is evident that Simpson did not consider all of the relevant facts and testimony. Daramic witnesses testified about the benefits to customers and Daramic in having contracts that set certain percentages to be supplied. (Hauswald, Tr. 1037-41, 1094-96; Roe, Tr. 1728-29). Daramic's contracts help provide certainty of supply to a customer and help Daramic plan to maintain its factories and production lines. Without adequate assurances of demand, Daramic cannot maintain its production lines throughout the world. These contracts amount to a sharing of risk between customer and Daramic. (Hauswald, Tr. at 1096).

**Response to Finding No. 1281:**

The proposition is contradicted by the record evidence. { [REDACTED]

[REDACTED] } (Simpson, Tr. 3230-3231, *in camera*). Respondent claims in this proposed finding that without adequate assurances of demand, Daramic cannot maintain its production lines throughout the world. However, in RFOF 1277, respondent notes that "JCI was not under contract with Entek or Daramic for its supply in the United States for years." { [REDACTED]

[REDACTED] } (Hauswald, Tr.

909, *in camera*; RFOF 1277). In fact, the record indicates that firms can maintain their production lines without resorting to exclusive contracts. (See CCFOF 1104-1107). Most MPLP customers did not have actual supply contracts with MPLP. (Trevathan, Tr. 3773). Some customers in fact "contributed over one million dollars in sales without contracts." (Trevathan, Tr. 3775). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3232, *in camera*).

1282. Moreover, Daramic cannot keep its lines operating without assurances from its customers that there will be enough demand to justify the plant's continued operation. It is for this reason that obtaining an assurance of demand of 10% or 50% may not be sufficient to make it economic to continue operating the plant if Daramic cannot fill the remaining capacity. This fact was evidenced by the impact on Daramic's business that resulted from its loss of the JCI business at the end of 2008. Based on that loss of commitment, Daramic closed one plant in Italy and reduced significantly its lines in Owensboro, Kentucky. (Hauswald, Tr. 918, *in camera*; Riney, Tr. 4930-31, *in camera*; Hall, Tr. at 2791-92). Simpson ignored the loss of the JCI business here, as he did in his HHI calculations.

**Response to Finding No. 1282:**

The proposition is contradicted by the record evidence. (See CCRF 1281).

1283. [REDACTED]  
[REDACTED] (Simpson, Tr. 3229, *in camera*). [REDACTED]  
[REDACTED] (Simpson, Tr. 3482, *in camera*).

**Response to Finding No. 1283:**

The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

(Simpson, Tr. 3482, *in camera*). This information included Daramic documents that describe

[REDACTED]. (PX0265 at 004, 011, *in camera*; CCFOF 1030-

1036). Dr. Simpson reviewed a Daramic document [REDACTED]

[REDACTED] (PX0194, *in*

*camera*). The Daramic group concluded that “[REDACTED]

[REDACTED]

[REDACTED]” (Hauswald, Tr.

802, *in camera*; PX0194 at 018, *in camera*). For scale-based benefits, Mr. Hauswald agreed that

the [REDACTED]

(Hauswald, Tr. 804-805, *in camera*; PX0194 at 025, *in camera*). At the time of the corporate

strategy workshop, Mr. Hauswald acknowledged that { [REDACTED] } (Hauswald, Tr. 934, *in camera*).

1284. { [REDACTED] } (Simpson, Tr. 3404, *in camera*). In addition, the Complaint alleges that Daramic maintained “monopoly power”, not “market power.” (RX01572 at 008).

**Response to Finding No. 1284:**

The proposition is contradicted by the record evidence. Respondent misquotes Dr. Simpson’s testimony. (Simpson Tr. 3404, *in camera*). There is nothing on Tr. 3404 of the Simpson transcript that says { [REDACTED] } (Simpson, Tr. 3404, *in camera*).

1285. { [REDACTED] } (Simpson, Tr. 3406, *in camera*).

**Response to Finding No. 1285:**

The proposition is contradicted by the record evidence. Dr. Simpson stated { [REDACTED] } (Simpson, Tr. 3406, *in camera*).

However, there is legal precedent that supports his theory that monopoly power can exist with less than 50 percent of the market. A market share of less than 50 percent, combined with other relevant factors, may demonstrate monopoly power. *See Hayden Publ'g. Co., Inc. v. Cox Broad. Corp.*, 730 F.2d 64, 69 n.7 (2d Cir. 1984) (“a party may have monopoly power in a particular market, even though its market share is less than 50%”); *Broadway Delivery Corp. v. United Parcel Serv. of America*, 651 F.2d 122, 127-30 (2d Cir. 1981), *cert. denied*, 454 U.S. 968 (1982) (rejecting jury instruction that required 50% or greater market share to find monopoly power, concluding that, “when the evidence presents a fair jury issue of monopoly power, the jury should not be told that it must find monopoly power lacking below a specified share or existing above a specified share”); *Yoder Bros., Inc. v. Cal.-Fla. Plant Corp.*, 537 F.2d 1347,

1367 n.19 (5th Cir. 1976) (rejecting “a rigid rule requiring 50% of the market for a monopolization offense without regard to any other factors”); cf. *United States v. Dentsply*, 399 F.3d 181, 187 (3d Cir. 2005) (“[a] less than predominant share of the market combined with other relevant factors may suffice to demonstrate market power”).

1286. This Court also is not aware of, and the FTC has not brought to this Court’s attention, a case where monopoly power was found to exist with less than a 50% share of the market.

**Response to Finding No. 1286:**

This is a legal conclusion, not a factual assertion. Respondent’s assertion is not supported by a citation.

1287. { [REDACTED] }  
(Simpson, Tr. 3355-57, *in camera*; PX0033 at 041, *in camera*).

**Response to Finding No. 1287:**

Complaint Counsel has no specific response.

1288. Although the FTC alleges in the Complaint that Daramic maintained monopoly power in each of the FTC’s four product markets (deep cycle, motive, SLI, UPS) (Complaint ¶ 39), no evidence has been presented to this Court for which this Court to conclude that Daramic ever had a monopoly in any of those alleged markets, let along “maintaining” a monopoly in those markets. { [REDACTED]

[REDACTED] } (PX0033 at 040, *in camera*). { [REDACTED] }  
{ [REDACTED] } (PX0033 at 041, *in camera*).

**Response to Finding No. 1288:**

This is a legal conclusion, not a factual assertion. Respondent’s assertion is not supported by a citation. The proposition is contradicted by the record evidence. First, the record is clear that Daramic had market power in the four markets identified in the FTC’s complaint.

(See, e.g. CCFOF 1058-1088). Daramic’s market share of [REDACTED] in 2007 for motive separators and [REDACTED] in 2007 for UPS separators certainly was indicative of monopoly power. (PX0033 at 017, 42).  
in camera

Contrary to Respondent's finding, Daramic would be able to use monopoly power to maintain a monopoly in deep-cycle. Respondent's documents show that Microporous and Daramic are the only current sellers and the only market participants in the North American market for rubber and PE/rubber deep-cycle battery separators used in golf carts and scrubbers. (PX0131 at 035; PX1104 at 001; PX0395 at 027). Sales data from 2007 show that the change in HHI and the post-merger HHI for the deep-cycle market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-3185). { [REDACTED] } (Simpson, Tr. 3184-3185; PX0033 at 040, 042, *in camera*). Dr. Simpson noted that the { [REDACTED] } (Simpson, Tr. 3438, *in camera*).

Additionally, Daramic would be able to maintain its monopoly power that it would have lost, had it not acquired Microporous. Mr. Gilchrist informed the Microporous board that { [REDACTED] } (PX0080 at 058-059, *in camera*; see also Gilchrist Tr., 398-399). Sales data estimated by Microporous for 2010 show that the change in HHI (4872) and the post-merger HHI (10000) for the motive market exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3185-3186). Sales data from 2007 show that the change in HHI and the post-merger HHI for the motive market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-3185). Daramic's acquisition of Microporous increased the { [REDACTED] } in the motive market. (Simpson, Tr. 3185; PX0033 at 040, 042, *in camera*). As a result of the acquisition, Daramic has "complete control" or more than 97% of the industrial markets for motive power separators

world-wide. Amer-Sil in Luxembourg would be the remaining competitor. (PX0076 at 002, Gilchrist, Tr. 422).

Lastly, although Daramic had slightly less than 50% market share in SLI separators, it viewed itself as the "market leader" when it comes to pricing. (PX0235). Daramic was the first in the industry to announce a price increase for 2006. Soon after Daramic's announcement, Entek "followed our lead" and increased prices. (PX0235). Daramic was "excited" because Entek "had again shown that Daramic is the market leader." (PX0235). Daramic's VP of worldwide sales informed his sales team to "NOT BE AFRAID TO FORCE THE INCREASE." (PX0235, emphasis in original). Moreover, every quarter, Mr. Toth does an internal call for people inside the company, which is designed to be a motivational message to the organization. (Toth, Tr. 1439). A document from the March 2006 conference call with Mr. Toth's handwritten notes entitled "Bob Toth Talking Points - 4Q/Year-end 05 Internal Call," states: "Specifically, we will continue demonstrating pricing power in the market, not only to stay ahead of rising costs, but to capture the value we bring to our customers." (PX0938 at 002; Toth, Tr. 1439-1440; *see also* CCFOF 1079-1082).

1289. {

} (PX0033 at 031, *in camera*), yet offered no testimony as to this point at trial. {

} (PX0033 at 031, *in camera*)

**Response to Finding No. 1289:**

This is a legal conclusion, not a factual assertion. The proposition is contradicted by the record evidence. Respondent's assertion in the second sentence is not supported by the citation. Dr. Simpson discussed the { } in his expert report. (PX0033 at 031, *in camera*). Additionally, Dr. Simpson discussed the { } during his direct testimony and was cross-examined by Respondent. (Simpson, Tr. 3264; Simpson, Tr. 3391-

3392, *in camera*). A letter written to Bob Toth by Pierre Hauswald, described this agreement as follows: "Because H&V threatened us of going in the PE separator business, we made a strategic alliance with them. We will not produce AGM, and they will not produce PE separator.

Agreement started on April 1, 2001 and will expire on April 1, 2006. Then we have another 5-year non-compete." (PX0035 at 005-006). { [REDACTED]

[REDACTED] } (PX0033 at 031, *in camera*).

1290. { [REDACTED]  
[REDACTED] } (PX0925 (Porter, Dep. at 15-16), *in camera*; PX0917 (Cullen, Dep. at 5-6), *in camera*).

**Response to Finding No. 1290:**

Respondent's assertion is not supported by either the Porter or Cullen citation.

Moreover, Cullen, Dep. 6 is not designated in PX0917. The proposition is contradicted by the record evidence. (*See* CCFOF 1167-1181). H&V is **"always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators.** (PX0925 (Porter, Dep. at 37)). Mr. Porter stated that **H&V "expressed through a letter of interest to the broker an interest in looking at the opportunity" to purchase Exide's Corydon PE facility in 1999.** (PX0925 (Porter, Dep. at 35 ; *see also* PX0917 (Cullen, Dep. at 11, *in camera*)). Mr. Hollingsworth, the President of H&V, sent a non-binding offer of \$26 million to the investment banking firm trying to sell Exide's Corydon plant. (PX1368 at 001). In response to a deposition question that asked **"Was this the first time that H&V considered entering the polyethylene separator business?"** Mr. Porter said **"I don't know if this was the first."** (PX0925 (Porter, Dep. 36-37 ). Even after Daramic purchased the Corydon facility, Daramic remained concerned that H&V would pursue an alternative strategy for entering the PE separator market. (PX0169 at 001; PX0035 at 005). { [REDACTED]  
[REDACTED]

[REDACTED] (PX0169 at 001; PX2143 at 001, *in camera*). The core of this

{ [REDACTED] } (PX0169 at 001; PX0094 at 002-003, *in camera*; PX0035 at 005-006; PX2150 at 001, *in camera*; PX1356 at 001).

1291. Moreover, Simpson does not appear to have considered the substantial evidence regarding the joint marketing and cross selling that occurred as a result of this Agreement. (Roe, Tr. 1745-48; RX01100; RX01101; RX01102; RX01103; RX01104; RX01105; RX01107; RX01108; RX01109; RX01110; RX01111; RX01112; RX01113; RX01114; RX01115; RX01116; RX01117; RX01118; PX0117 (Cullen, Dep. at 11, 13, 18), *in camera*; PX0925 (Porter, Dep. at 17, 32), *in camera*). Nor did Simpson consider the evidence of the fact that the non-compete provision was utilized to protect the sharing of confidential business information between H&V and Daramic (PX0094, *in camera*; Roe, Tr. 1745-47).

**Response to Finding No. 1291:**

Respondent's assertion is not supported by either the Porter or Cullen citation. The proposition is contradicted by the record evidence. (See CCFOF 1182-1196). The parties contemplated that { [REDACTED]

[REDACTED] } (PX0094 at 002, 003, 013-022, *in camera*; PX0925 (Porter, Dep. at 126-127) ({ [REDACTED]

[REDACTED] }); Roe, Tr. at 1746, 1811 (Daramic contemplated sales opportunities in "new markets, new territories" such as Eastern Europe or Asia, where H&V "may have better representation.")). Thus, virtually all collaboration in the United States was excluded. (PX0094 at 013, *in camera* ({ [REDACTED]

[REDACTED] }); PX1325 at 001 (virtually all potential customers in the Americas had 100% supply relationships with Daramic and/or H&V at the time the Agreement was entered); PX0925 (Porter, Dep. at 95-97 ) ( **North America not a subject of parties'** discussions about "areas of geographic opportunity for either company." ) ).

The sales agency was { [REDACTED] } (PX0923 (Hauswald, IH at 280), *in camera* ( { [REDACTED] }))). The Agreement is not needed to put on customer appreciation events jointly. (Roe, Tr. 1811-1812; RX00370 at 002). An H&V employee stated, I don't see any benefit in co-sponsoring with Daramic." (PX0009 at 001). Daramic representatives have made a { [REDACTED] } (PX0014, *in camera*; PX2145 at 001-002). The Agreement is not needed to put on customer appreciation events jointly. (Roe, Tr. 1811-1812; RX00370 at 002). During the life of the cross-agency agreement between Daramic and H&V, Daramic never paid any commissions to H&V because H&V never made any sales of PE during the course of the agreement. (Roe, Tr. 1810).

At the time that the parties { [REDACTED] } (PX0923 (Hauswald, IH at 286, *in camera*)). In considering { [REDACTED] } (PX0923 (Hauswald, IH at 290, *in camera*)). That { [REDACTED] } (PX0923 (Hauswald, IH at 292, *in camera*)).

Joint technical collaboration { [REDACTED] } (PX1356 at 001 { [REDACTED] } Daramic and H&V did not **develop any new separator product for a battery application as a result of the Agreement.** (PX0925 (Porter, Dep. at 107-108 )).

To the extent that the parties to the Cross Agency Agreement ( [REDACTED]  
[REDACTED]  
[REDACTED] } (PX0094 at 007-  
008, *in camera*; PX1356 at 001 (noting “[a] Confidentiality Agreement exists between  
[H&V/Daramic] and each of its employees” that covers exchanges between the companies and  
communications with customers in connection with activities contemplated by the Agreement)).

1292. Finally, Simpson has offered no opinion, and no evidence has been presented by the FTC to this Court, that the Cross Agency Agreement has actually resulted in any competitive harm.

**Response to Finding No. 1292:**

The proposition is contradicted by the record evidence. Please see CCRF 1289 -1291 and CCFOF 1167-1196. An example of evidence presented by both Dr. Simpson and Complaint Counsel is a letter written to Bob Toth by Pierre Hauswald, described this agreement as follows: “Because H&V threatened us of going in the PE separator business, we made a strategic alliance with them. We will not produce AGM, and they will not produce PE separator. Agreement started on April 1, 2001 and will expire on April 1, 2006. Then we have another 5-year non-compete.” (PX0035 at 005-006). { [REDACTED] } (PX0033 at 031, *in camera*).

1293. This Court does not credit Simpson’s opinions regarding the FTC’s claims of monopolization.

**Response to Finding No. 1293:**

This is a legal conclusion, not a factual assertion. Respondent’s assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1271-1292). [REDACTED]  
[REDACTED]. (Simpson, Tr. 3226, *in camera*).

- o. Simpson’s Opinions Regarding Relief Are Overbroad and Unsupported by the Evidence

1294. Simpson's opinion regarding the appropriate remedy in this matter, should the Court find the need for some relief, is inconsistent at best, and in any event, clearly overstated.

**Response to Finding No. 1294:**

This is a legal conclusion, not a factual assertion. Respondent's assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1295-1301).

1295. { [REDACTED] } (PX0033 at 032, *in camera*).

**Response to Finding No. 1295:**

Respondent's assertion is not supported by a citation. The proposition is contradicted by the record evidence. Dr. Simpson testified:

{ [REDACTED] } (Simpson, Tr. 3409, *in camera*)

1296. { [REDACTED] } (Simpson, Tr. 3408-09; 3410-11, *in camera*).

**Response to Finding No. 1296:**

Respondent's assertion that Dr. Simpson stated that { [REDACTED] }  
[REDACTED]  
[REDACTED] } The proposition is contradicted by the record evidence. Dr. Simpson testified that the capacity of { [REDACTED] } was {"comparable to about a line of { [REDACTED] } square [meters]" of SLI separators. (Simpson, Tr. 3410, *in camera*).

1297. { [REDACTED] } (Simpson, Tr. 3359, 3410-12, *in camera*).

**Response to Finding No. 1297:**

The proposition is contradicted by the record evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Roe, Tr. 1233-1234; Thuet, Tr.

4357-4358, *in camera*). Daramic market document extols the benefits of local supply and technical centers. (PX0582 at 018, 020 (“Local Supply From a Global Company”) The succeeding pages note the various plant locations and their intended geographic focus for supply e.g. “Selestat, France provides local supply. . . to Europe”. (PX0582 at 021).

Additionally, [REDACTED]

[REDACTED].}

Entek has a manufacturing plant in North America where North American battery manufacturers have a strong preference for local supply. (Leister, Tr. 4007-4009, 4020 (East Penn prefers local supply to reduce supply risk); Balcerzak, Tr. 4129-4130 (sourcing from overseas would interfere with efforts to maintain just in time delivery of separator supply); Douglas, Tr. 4080 (Douglas has a preference for local supply in order to reduce distance, time, and travel, and to maintain just-in-time deliveries and facilitate quick response from separator suppliers); Axt, Tr. 2108 (EnerSys prefers to have local suppliers in North America to reduce shipping costs, inventory carrying costs, freight forward fees, lead times, timeliness of supply, and duties; Gillespie, Tr. 3034-3037, *in camera* { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

(RX00114 at 024-077, *in camera*). [REDACTED]

[REDACTED] }  
(RX00115 at 003, *in camera*).

1298. Accordingly, under Simpson's own view of restoring the level of competition at the time of the merger, in this geographic market, and with the only overlap of sales occurring in Simpson's motive market, competition could be adequately restored through a forced sale of Microporous' PE line in Piney Flats, Tennessee.

**Response to Finding No. 1298:**

Respondent's assertion is not supported by a citation. The proposition is contradicted by the record evidence. Dr. Simpson explained why a remedy would need to recreate a firm similar to the Microporous that would have existed but for the acquisition. (*See* CCFOF 1197-1198).

Dr. Simpson testified that to restore the competition lost through Daramic's acquisition of Microporous, a remedy would need to recreate a firm similar to the Microporous that would have existed but for the acquisition. (Simpson, Tr. 3262-3263). Dr. Simpson stated that, at a minimum, this would require recreating a firm with production facilities in both the United States and Europe, with intellectual property comparable to that of Microporous, a technical staff comparable to that of Microporous, a product mix comparable to that of Microporous, and intangible assets (knowledgeable and skilled workforce, industry reputation) comparable to that of Microporous. (Simpson, Tr. 3263). A divestiture needs to include the former MPLP facilities and the business associated with those facilities to provide the scale needed to compete.

[REDACTED]  
[REDACTED] }  
(Simpson, Tr. 3418, *in camera*). { [REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3418, *in camera*). Mr. Gilchrist testified that Microporous [REDACTED]  
[REDACTED]  
[REDACTED] }. (Gilchrist, Tr. 525, 593-601, *in camera*). [REDACTED]

[REDACTED]. (Simpson Tr. 3225-3226; 3229, 3233, *in camera*; Gillespie, Tr. 3053, *in camera*).

Sufficient entry would require an entrant to have two manufacturing facilities to replicate the redundancy and surety of supply provided by MPLP and Daramic. Daramic emphasizes the importance of maintaining multiple separator manufacturing plants when dealing with customers. (Roe, Tr. 1318-1319). Daramic believes that having manufacturing facilities in various parts of the world provides security of supply to customers. (Roe, Tr. 1318-1319). Daramic views [REDACTED] (Hauswald, Tr. 722, 726-727, 807, *in camera*). Daramic advertises to customers that it can give them local supply from a global company. (Hauswald, Tr. 711, 722; PX0582 at 018). As Mr. Axt noted, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Axt, Tr. 2143, *in camera*). It was critical for EnerSys that its suppliers have more than one plant. (Axt, Tr. 2129). The reason Microporous decided to open a second facility in Europe was twofold. A European facility would be close to EnerSys's European operations, and having a second facility in Austria provides backup for the United States if something were to happen at Piney Flats. (Gaugl, Tr. 4602).

There was more than an overlap in sales between Daramic and Microporous in UPS. Prior to the acquisition, Microporous participated in the North American UPS market with its CellForce product. (Gilchrist, Tr. 300-301).

An overlap existed between Daramic and Microporous in the SLI market. Prior to the acquisition, Microporous had manufactured and sold SLI separators in North America and considered itself a competitor in that market. (Gilchrist, Tr. 308, 311, 313, 341-342). Daramic

market share charts for SLI in North America give MPLP a 4 percent share of SLI sales, Entek 49 percent, and Daramic 47 percent, but nothing to any Asian producer. (PX0264 at 003).

Moreover, this SLI market share would increase because Microporous planned to produce polyethylene (PE) separators for automotive batteries on one of the two production lines at its recently built plant in Feistritz, Austria. (Gilchrist, Tr. 331-332). Dr. Simpson noted that a

{ [REDACTED] } (Simpson, Tr. 3439, *in camera*). { [REDACTED] }  
{ [REDACTED] } (Simpson, Tr. 3186; PX0033 at 041 (Simpson Report), *in camera*).

Another demonstration of Microporous's impact on the SLI market is the use of the { [REDACTED] }  
{ [REDACTED] } (PX0080 at 060, *in camera*).

Using these estimated sales, Microporous would have had { [REDACTED] }  
{ [REDACTED] } (PX0080 at 60, *in camera*). Additionally,  
several of Microporous's { [REDACTED] }  
{ [REDACTED] } (Gilchrist, Tr. 345-346; 440-443, *in camera*).

Moreover, Daramic offered lower prices for SLI battery separators in response to competition from Microporous. (PX0258).

Pre-acquisition, there was an overlap existed between Daramic and Microporous in the deep-cycle market. The only competitors in the world for the sale of battery separators for deep-cycle applications before the acquisition were Daramic and Microporous. (Godber, Tr. 153-54; Gilchrist, Tr. 305, 343; Wallace, Tr. 1931, 1943; Hauswald, Tr. 674-675; McDonald, Tr. 3948). Daramic and Microporous competed for the sale of separators that went into golf cart batteries

prior to the acquisition,. (Hauswald, Tr. 653-654). Post-acquisition, the only separators that are available for flooded lead acid deep-cycle batteries are Flex-Sil, HD, and CellForce, which all come from Daramic. (Godber, Tr. 151-152; *see also* Qureshi, Tr. 2004). Respondent's documents show that Microporous and Daramic are the only current sellers and the only market participants in the North American market for rubber and PE/rubber deep-cycle battery separators used in golf carts and scrubbers. (PX0131 at 035; PX1104 at 001; PX0395 at 027, *in camera*). Sales data from 2007 show that the change in HHI and the post-merger HHI for the deep-cycle market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-3185). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3184-3185; PX0033 at 040, 042, *in camera*).

Dr. Simpson noted that the { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3438, *in camera*).

1299. { [REDACTED] } (Simpson, Tr. 3412, *in camera*; PX0033 at 032, *in camera*). { [REDACTED] }  
(PX2251 at 016, *in camera*).

**Response to Finding No. 1299:**

The proposition is contradicted by the record evidence. Dr. Simpson did not change his opinion about the appropriate remedy between writing his initial report and writing his rebuttal report. In his initial report, Dr. Simpson wrote:

[REDACTED]

[REDACTED] (PX0033 at 032, *in camera*).

Dr. Simpson then wrote:



**Response to Finding No. 1301:**

Respondent's assertion that a { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3427, *in camera*).

The proposition is contradicted by the record evidence. Respondent argues that

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3426, *in camera*). Even if this were true, a likely reason for

{ [REDACTED] } lack of contracts was { [REDACTED] } to deprive

{ [REDACTED] } of sales. (E.g., PX0255, *in camera*; PX0257, *in camera*; PX0258). Thus,

respondent's proposed finding only underscores a possible need to place restrictions on

Daramic's { [REDACTED] }

p. Conclusion

1302. { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3483-86, *in camera*). Simpson's opinions fail to meet the required legal standard and are rejected.

**Response to Finding No. 1302:**

This is a legal conclusion, not a factual assertion. Respondent's assertion is not supported by a citation. The proposition is contradicted by the record evidence. (See CCRF 1159-1301).

B. Dr. Henry Kahwaty

a. Foundation for Economic Opinions

1303. Dr. Henry Kahwaty is now, and has been since 2001-02, a director with LECG, an economic consulting firm. LECG provides expert analysis relating to economics, finance and accounting. (Kahwaty, Tr. 5062). During the last three years of his employment at LECG, more than 90% of Dr. Kahwaty's time has been spent on antitrust-related matters. (Kahwaty, Tr. 5066).

**Response to Finding No. 1303:**

Complaint Counsel has no specific response.

1304. Dr. Kahwaty has an undergraduate degree, a masters in economics and a Ph.D in economics from the University of Pennsylvania. After obtaining his degrees from the University of Pennsylvania, from 1991 to 1995 he was employed by the Antitrust Division of the U.S. Department of Justice where he worked in the economic analysis group. That work involved both merger and monopolization matters and included preparing questions for industry executives, analyzing data, preparing civil investigative demands, drafting Hart-Scott-Rodino second requests, reviewing data and information obtained in connection with investigations and making recommendations either to close investigations or to bring enforcement actions. (Kahwaty, Tr. 5063).

**Response to Finding No. 1304:**

Complaint Counsel has no specific response.

1305. Dr. Kahwaty has authored papers on antitrust and industrial organization topics and, during his time at the University of Pennsylvania, he taught industrial organization and microeconomics. (Kahwaty, Tr. 5066). He has testified on antitrust-related issues in deposition, and has also testified at trial in the Southern District of New York. He testified at a hearing before the European Commission on an antitrust case. (Kahwaty, Tr. 5066-67; Kahwaty, Tr. 5252, *in camera*).

**Response to Finding No. 1305**

Complaint Counsel has no specific response.

1306. In this matter, Dr. Kahwaty was asked to review the allegations of the complaint as well as the expert report of Dr. John Simpson and to present his opinions regarding both. He prepared an expert report relating to these matters, which is RX00945. {

} (Kahwaty, Tr. 50705071 *in camera*).

**Response to Finding No. 1306:**

Complaint Counsel has no specific response.

1307. {

} (Kahwaty, Tr. 5081, *in camera*). {

} (Kahwaty, Tr. 5081-82, *in camera*). {

[REDACTED] (Kahwaty, Tr. 5083-84, *in camera*).

**Response to Finding No. 1307:**

Complaint Counsel has no specific response.

b. General Economic Opinions

1308. Dr. Kahwaty has offered a number of opinions as an expert in this matter, including that:

a. [REDACTED] (Kahwaty, Tr. 5071, *in camera*);

**Response to Finding No. 1308 a.:**

Flex-Sil is not its own antitrust product market. [REDACTED]

[REDACTED] (PX0904 (Seibert, Dep. at 59, *in camera*);

Godber, Tr. 152-153; Gillespie, Tr. 2933; Gilchrist, Tr. 467-468, *in camera*). Daramic HD was

specifically targeted as an alternative to Microporous's Flex-Sil for use in golf cart and floor

scrubber batteries. (PX0319 at 003). In February 2007, Mr. Roe, informed the individuals at

Daramic who were directly in charge of HD strategy that HD was meant for the same market as

MPLP's Flex-Sil separator. (PX0316 at 002; Roe, Tr. 1200-1201). Mr. Keith, a Daramic

salesman, described the competition between HD and Flex-Sil, stating that Daramic "must

continue to improve our service on HD or we stand a good chance of losing golf car business

back to Amerace Flex-Sil." (PX0413 at 5). In response to another email from Mr. Keith that

said "[w]e know we can price the product where we want to either get business or cause

Amerace to reduce theirs," Mr. Seibert asked "knowing that we're 'competitive' should we take

prices down 5% to 10% to get even more aggressive?" (PX0329 at 001). [REDACTED]

[REDACTED] targeted a complete conversion of Exide's deep-cycle

replacement batteries from Flex-Sil to HD. (PX0263 at 008, *in camera*). [REDACTED]

[REDACTED]

(PX0263 at 008, *in camera*). [REDACTED]

[REDACTED] } (PX0263 at 008, *in camera*).

{ [REDACTED] }  
(PX0904 (Seibert, Dep. at 106-107, *in camera*)). Daramic's February 2007 HD Product Strategy Presentation showed that { [REDACTED]  
[REDACTED]  
[REDACTED] }  
(PX0023 at 010, *in camera*).

Daramic HD was the closest independently-owned substitute for Flex-Sil. Thus, if the owner of Flex-Sil were to increase price a little more, some of the sales that would be lost would shift to Daramic HD. (Simpson, Tr. 3177-3178). If Flex-Sil and Daramic HD are owned by the same entity, then that joint owner recovers some of the profit on the lost Flex-Sil sales that shift to Daramic HD. (Simpson, Tr. 3178). “[I]n this way a price increase that would not make sense for an independently owned Flex-Sil (or Flex-Sil and CellForce) would make sense if they also owned Daramic HD.” (Simpson, Tr. 3178, PX2251 at 017, *in camera*; Kahwaty, Tr. 5514-5515, *in camera*). Dr. Simpson rejects Dr. Kahwaty’s argument that Flex-Sil’s pricing is constrained by a long-term contract with Trojan setting its price below the profit maximizing level because MPLP was recently willing to offer concessions to buyers of Flex-Sil; MPLP presumably would be unwilling to lower price further if it already thought that it had set too low a price. (Simpson, Tr. 3181-3182).

At Trojan, U.S. Battery and other customers, Flex-Sil competes against Daramic HD. For example, Trojan used HD to get a better price on its purchases of Flex-Sil. (Godber, Tr. 202-205, 214-215; PX1664 [REDACTED]; Gilchrist, Tr. 371-372, 379; PX1663; Gillespie, Tr. 2945-2953; Kahwaty, Tr. 5325, *in camera*, Simpson, Tr. 3176-3177, *in camera*). At U.S. Battery,

Microporous responded to Daramic's introduction of the DC separator by offering to lower the price of its Flex-Sil separator for use in the US 1800 battery to close to the price of the Daramic product. (Qureshi, Tr. 2023; PX1764 at 002; McDonald, Tr. 3947). U.S. Battery tested Daramic HD product and the Microporous Flex-Sil product side by side and determined the two "are very comparable." (Qureshi, Tr. 2033). The main advantage of HD is its cost advantage. (Qureshi, Tr. 2033).

b. { [REDACTED] } (Kahwaty, Tr. 5071, *in camera*);

**Response to Finding No. 1308 b.:**

Dr. Kahwaty's definition of an all PE product market requires that supply-side substitution occur within one year in order to include Entek, an SLI PE supplier, in the deep-cycle, motive, and UPS markets, which he asserts would permit him to aggregate these markets into a single all PE market. (Kahwaty, Tr. 5152-55, *in camera*). Dr. Kahwaty later denied using supply-side substitution in order to define an all PE market. (Kahwaty, Tr. 5306, *in camera*). Nevertheless, Dr. Kahwaty testified that supply side substitution must occur within one year to consider a supplier to be in a market. (Kahwaty, Tr. 5390, *in camera*). Dr. Kahwaty further testified that customer testing requirements of more than a year would preclude a supplier from being considered an uncommitted entrant in a market. (Kahwaty, Tr. 5391, *in camera*).

Supply side substitution is not observed either prior to or after the acquisition of Microporous by Daramic. (Kahwaty, Tr. 5529-5531). Easy supply side substitution is not observed because customers must test new separators before they put them in their batteries for a period of 18 months to 40 months depending on the market. (CCFOF 881-908). In addition, prior to the 18 months to 40 months of customer testing for a producer to supply an untested separator, depending on the market, entry by an existing supplier would require that the firm acquire an appropriate calender roll, which takes 12 weeks and costs up to \$60,000 (Benjamin, Tr. 3543; Whear, Tr. 4778).

Dr. Simpson noted that { } does not currently make deep-cycle or motive battery separators and thus would need { } before it could have a significant effect on these markets as a supplier. (Simpson, Tr. 3195-3196, *in camera*). { } does not currently manufacture motive power or stationary separators. (Gillespie, Tr. 3037, *in camera*).

Customer testing requirements in the motive market take two years or more. (Gillespie, Tr. 2973-74; Gagge, Tr. 2490, 2492; Whear, Tr. 4798, 4801; PX0568; PX0842; PX0806 at 003; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*).

UPS separator testing takes at least 40 months. (Gagge, Tr. 2491-2492). For the UPS market, a supplier would have to invent something that does not create black scum, however long that might take. (Gilchrist, Tr. 353-354).

Testing and qualification of deep-cycle battery separators typically takes between 18 and 24 months. (Gillespie, Tr. 2934). A field test for a deep-cycle separator generally is a two-year time frame to understand how the battery is going to perform in the field. (Godber, Tr. 163). Laboratory testing is typically performed before field testing to see if the laboratory numbers are good enough to merit the more expensive field testing. (Godber, Tr. 164). Daramic expected customer qualification of HD for use in deep-cycle batteries to take 18 months of testing or longer. (PX0262 at 003). For the deep-cycle market, a supplier would also have to invent something that suppresses antimony, however long that might take. (Godber, Tr. 137-140).

Exide's testing of PE SLI separators takes 18-24 months to complete. (Gillespie, Tr. 2973; *see also* RX00013 at 009 (test sequence for automotive separators "expected to take up to 9 months for life cycle and 1 year for field test"); PX1090).

Because of long customer testing times, neither Entek, nor any other pure SLI PE separator supplier can be considered an uncommitted entrant into the motive, UPS, or deep-cycle

markets. Accordingly, these markets all have different participants and dynamics, and Dr. Kahwaty's all PE market is not a valid antitrust market.

c. [REDACTED]  
(Kahwaty, Tr. 5072, *in camera*);

**Response to Finding No. 1308 c.:**

Dr. Simpson explained that North America is the relevant geographic market within which to analyze this transaction. (Simpson, Tr. 3182-3183). A hypothetical monopolist of all production facilities in North America can price discriminate to North American customers because suppliers ship directly to customers. (PX0920 (Gilchrist IHT at 64-65), *in camera*; see PX0033 at 005 FN5, *in camera*; PX2251 at 004, *in camera*).

[REDACTED]  
(Riney, Tr. 4958, *in camera*; Roe, Tr. 1317). [REDACTED]  
[REDACTED] (Roe, Tr. 1797, 1799, *in camera*). The average price of an SLI separators sold in North America is \$0.70 per square meter. (Roe, Tr. 1313). Whereas in Europe the average price of an SLI separator is \$1.00 per square meter at today's exchange rates. (Roe, Tr. 1313-1314).

Exide currently pays Daramic [REDACTED]  
[REDACTED] (Gillespie, Tr. 2998, *in camera*, 3060-3062, *in camera*).

Because manufacturers of deep-cycle, motive, UPS, and SLI battery separators can set different prices for different geographic regions they can price discriminate based on geography. (Simpson, Tr. 3183; PX1450).

Dr. Kahwaty admitted that he knows of no examples of the type of arbitrage on which his worldwide geographic market is based [REDACTED]  
[REDACTED]. (Kahwaty, Tr. 5364, *in camera*).

d. { [REDACTED] } (Kahwaty, Tr. 5072, *in camera*);

**Response to Finding No. 1308 d.:**

In three of four relevant markets - deep cycle, UPS, and motive - the merger resulted in a monopoly with impeded entry. Unilateral effects in these markets are a near certainty. (Simpson, Tr. 3172-3173, 3184; Simpson, Tr. 3192-3193, 3363, *in camera*). The acquisition enabled Daramic to increase price unilaterally. (Simpson, Tr. 3192-3194, *in camera*; CCFOF 394-529).

Daramic's acquisition of Microporous had two harmful unilateral effects in the SLI market. The first concerns sales to Exide. (Simpson, Tr. 3194, *in camera*). Although Microporous would not initially be in a position to supply all of the needs of Exide, Exide wanted to have Microporous as an independent supplier because they believed that they could obtain better pricing with an additional supplier competing for their business. (Simpson, Tr. 3194, *in camera*). The second effect concerns sales to smaller battery manufacturers. Dr. Simpson testified: "For smaller battery manufacturers, Microporous would be in a position to meet all of their demand. And Microporous could be their best supplier, in which case eliminating it would reduce competition. They [Microporous] could be their second best supplier, in which case they would be the constraint on the supplier who was the best. . . . [In that way], the acquisition would reduce competition." (Simpson, Tr. 3194-3195, *in camera*). In fact, Daramic had already lowered prices to some smaller battery manufacturers in response to Microporous's expansion of capacity. (PX0258). This is reflected in Daramic documents demonstrating that Daramic offered lower prices for SLI battery separators in response to competition from **Microporous** prior to the acquisition. (PX0258). Other Daramic documents generally reference { [REDACTED] } (PX0276 at 009, *in camera*; PX0174 at 003, *in camera*).

The acquisition will facilitate coordinated interaction. (Simpson, Tr. 3201, *in camera*). In SLI, the merger would eliminate one of three suppliers, enhancing the ability to monitor any explicit or implicit noncompetitive agreement. (Simpson, Tr. 3201, *in camera*). The acquisition also removed a maverick, the firm that was most aggressive about introducing new products and adding market share. (Simpson, Tr. 3202, *in camera*).

The SLI market lends itself to coordinated interaction because (1) there are a small number of firms; (2) there is repeated interactions among those firms; and (3) information is about competitor actions is readily available in the marketplace. (Simpson, Tr. 3290-3291, *in camera*). Daramic has [REDACTED] [REDACTED] (Simpson, Tr. 3390-3391, *in camera*).

[REDACTED] [REDACTED] } (PX0265 at 004, *in camera*). [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] } (PX0265 at 004, 008, *in camera*). In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: "I would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek." (PX0482 at 002; Roe, Tr. 1281). Finally, a Microporous document titled "Overview of Battery Separator Industry, September 2007" states: "Microporous Products, at the invitation of these [battery] manufacturers seeks to become a supplier to the domestic U.S. automotive industry and help the above manufacturers create a more competitive environment." (PX0088 at 001-002).

e. [REDACTED] [REDACTED] } (Kahwaty, Tr. 5072-5073, *in camera*);

**Response to Finding No. 1308 e.:**

Entry is not likely and would not be timely nor sufficient to offset the competitive harm caused by the merger. Entry would take at least several years. (Simpson, Tr. 3207-3208; Simpson, Tr. 3395, *in camera*). Other than Microporous and Daramic, no entrants into any relevant market in North America can be identified. (Kahwaty, Tr. 5378, 5417, 5344-45, *in camera*). No Asian PE battery separator manufacturer has ever competed in North America. (Thuet, Tr. 4379-4382; Seibert, Tr. 4266-4267, *in camera*; Seibert, Tr. 4165, *in camera*; RX01084, *in camera*; Toth, Tr. 1404; Gilchrist, Tr. 308; Weerts, Tr. 4500-4502, *in camera*).

Entry would have to occur in North America to offset the competitive harm of the merger, since expansions in Asia have never impacted prices in North America. (Kahwaty, Tr. 5373, *in camera* (no evidence of impact on North American pricing from expansions in Asia); Roe, Tr. 1813; Weerts, Tr. 4501, *in camera*).

Barriers to entry include a significant capital investment, sophisticated production processes, extensive customer relationships, patent-protected technology and high customer switching costs. (Gilchrist, Tr. 604-05; RX00741 at 015). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX0265 at 004, *in camera*).

{ [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] } (PX0265 at 011, *in*

*camera*). In order to have the competitive advantage of meeting the widest range of customer needs, Daramic has patents and know-how, product customization, technical support, sales support, and battery expertise. (Hauswald, Tr. 825-826, *in camera*; PX0194 at 036, *in camera*).

[REDACTED]  
[REDACTED] } (PX0907 (Kung, Dep. at 102), *in camera*). Manufacturers of separators have special know-how obtained in a learning-by-doing fashion. For example, Microporous “learned a lot of lessons, painful lessons, expensive lessons” when initially manufacturing CellForce at Piney Flats. These “expensive lessons” were incorporated into its new production lines in Feistritz. (Gilchrist, Tr. 395-397).

Dr. Simpson noted that [REDACTED] does not currently make deep-cycle or industrial battery separators and thus would need [REDACTED] before it could have a significant effect on these markets as a supplier. (Simpson, Tr. 3195-3196, 3408, *in camera*). Specifically, Dr. Simpson explained that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3408, *in camera*).

For entry to be sufficient, it must replace the competition lost through the merger or acquisition. (Simpson, Tr. 3204, *in camera*; Merger Guidelines §3.4). Dr. Simpson explained that since this acquisition eliminated Microporous as a competitor, sufficient entry would need to replace Microporous as a competitor to be sufficient. (Simpson, Tr. 3205, *in camera*).

Mr. Gilchrist explained, aside from Daramic and Entek, there [REDACTED]  
[REDACTED] }  
(Gilchrist, Tr. 423-434).  
*in camera*

[REDACTED]  
[REDACTED] }  
(Gillespie, Tr. 3028-3030, *in camera*). MPLP was better situated than all of the potential  
[REDACTED] suppliers in terms of [REDACTED]

[REDACTED] (Gillespie, Tr. 3028-3036, *in camera*). Asian firms do not compare favorably to the former Microporous. [REDACTED]

[REDACTED] (Axt, Tr. 2221, *in camera*).

Microporous's motive product was approved at EnerSys [REDACTED] [REDACTED] (Axt, Tr. 2222, *in camera*). Because [REDACTED] are located in [REDACTED] technical visits are more difficult and time consuming, as well as additional transportation costs and times, duties, and extra inventory. (Axt, Tr. 2223, *in camera*). [REDACTED]

[REDACTED] (Axt, Tr. 2223-2224, *in camera*).

f. [REDACTED] (Kahway, Tr. 5073, *in camera*);

**Response to Finding No. 1308 f.:**

Dr. Kahway's assertion is contradicted by the simple fact that *Daramic was already lowering its prices for PE* in response to Microporous's efforts to get customers. (Roe, Tr. 1261, 1263-1266, 1812-1813; PX0247, *in camera*; PX0153 at 2; PX0243, *in camera*; PX0023 at 004, *in camera*; PX0836 at 001; PX0409 at 001). [REDACTED]

[REDACTED] (See e.g.

Axt, Tr. 2166, *in camera*; PX1204, *in camera*; PX0209 at 001). Dr. Simpson noted that even if

[REDACTED] did have higher cost than [REDACTED] in the manufacture of [REDACTED] [REDACTED] these higher costs did not prevent Microporous from competing. (Simpson, Tr.

3463, *in camera*). Significantly, Daramic offered lower prices for SLI battery separators in response to competition from **Microporous**. (PX0258). In addition, since [REDACTED]

[REDACTED] (Riney, Tr. 5004, 4961-4962, *in camera*).

Dr. Kahwaty admits that he did not actually compare the production costs of CellForce vs. HD and concedes that { [REDACTED] } (Kahwaty, Tr. 5259, 5261, *in camera*; PX0395 at 040-041, *in camera*). Dr. Kahwaty did not know whether { [REDACTED] } (Kahwaty, Tr. 5259, *in camera*). Dr. Kahwaty testified that he did not consider { [REDACTED] } (Kahwaty, Tr. 5255, *in camera*). Dr. Kahwaty also testified that { [REDACTED] } (Kahwaty, Tr. 5217, 5256, *in camera*). Of course this makes no sense since PE is produced in roll form and then cut into pieces. (Hauswald, Tr. 1020-1022). Labor is { [REDACTED] } of manufacturing a PE separator. (Hall, Tr. 2727-2728, *in camera*). Much of the manufacturing process is { [REDACTED] } (Hall, Tr. 2727-2728, *in camera*). Thus the unsupported assertion that Microporous is a high cost producer of roll form PE is unlikely because the savings at the cutting machine would have to be extravagant to make it a lower cost producer of cut pieces, or the costs would have to be very close to Daramic's to begin with.

{ [REDACTED] } (Kahwaty, Tr. 5073, 5249-50, *in camera* (not offering efficiencies defense)). However, the line on which Microporous intended to produce PE in Piney Flats has not yet been built. (Gaugl, Tr. 4560). Microporous would have benefited from the scale economies of adding the additional lines in Piney Flats for EnerSys and Exide. (PX0072 at 067 (“[Microporous’s] [m]anagement anticipates that the successful execution of the U.S. and European automotive SLI initiative would also deliver significant additional efficiencies to the Company’s cost structure”)); Gilchrist, Tr. 373-

374). PE battery separator plants make continuous improvements in efficiency and quality. (Gaugl, Tr. 4605). It is reasonable to expect that MPLP would implement the lessons it learned building the three previous lines when it builds its fourth, fifth, and sixth PE lines. (See Gaugl, Tr. 4601).

Dr. Kahwaty's method is fundamentally flawed. It does not take an economist to see that such a method is inherently unreliable, because it does not contain the actual production costs as a starting point (*i.e.* comparing x-1 to y is meaningless without knowing the values of x and y). If Microporous's costs were equal to or lower than Daramic's prior to the transaction, then they are even lower now.

g. { [REDACTED] } (Kahwaty, Tr. 5073, *in camera*);

**Response to Finding No. 1308 g.:**

{ [REDACTED] } (Simpson, Tr. 3226, *in camera*, see also Simpson, Tr. 3404-3405 (Dr. Simpson refers to degrees of market power rather than monopoly power, but the analysis is the same).

Daramic's premerger market shares in SLI, motive, and UPS demonstrate its market power. MPLP documents reflect the fact that motive separators are a product market and reflect a highly concentrated North American geographic market projecting shares of 29 percent for Microporous and 71 percent for Daramic in 2008. (PX0072 at 024-025). Daramic PE separators have 95% market share for UPS battery applications in North America. (Brilmyer, Tr. 1833-1834). As a result of the acquisition, Daramic has "complete control" of the industrial flooded reserve power separator markets world-wide. (PX0076 at 002, see also Gilchrist, Tr. 422).

Daramic has 56% of the automotive sales worldwide, with around 50% in the Americas. (PX0040 at 002; PX0308 at 001, *in camera* ([REDACTED])); PX0194 at

019, *in camera*; PX0207 at 067, *in camera* ([REDACTED]). Daramic had a 53% market share in SLI in 2005. (PX0072 at 028). Post merger, Daramic's market share in motive is 100% and Daramic now has "complete control" or 100% of the deep-cycle separator markets world-wide. (PX0076 at 002; Gilchrist, Tr. 421).

Daramic's internal documents reflect its ability to control price: "Specifically, we will continue demonstrating pricing power in the market, not only to stay ahead of rising costs, but to capture the value we bring to our customers." (PX0938 at 002; Toth, Tr. 1439-1440; PX0831 at 003 ("Pricing power to capture the value we bring to customers"); Toth, Tr. 1447; PX0832 at 004, ("will continue demonstrating pricing power in the market regardless of movements in material and energy costs.")).

[REDACTED] (Simpson, Tr. 3209, *in camera*).

There is a significant body of evidence demonstrating Daramic's ability to deter entry. Through its contracting, corporate agreements, and mergers, Daramic has forestalled entry into the relevant markets. (PX0211, *in camera*; PX0212, *in camera*; PX0255 at 001, *in camera*; PX0257, *in camera*; PX0258 at 001; PX0744 at 001; PX0033 at 028-031, *in camera*; PX0171 at 004).

[REDACTED]

[REDACTED] (Simpson, Tr. 3226-3227). [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3227, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3227,

*in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3227-328, *in camera*).

Market share discounts operate to deter entry as well. (Simpson, Tr. 3256-3261).

Daramic's response to Exide's RFP is a perfect example of this as it [REDACTED] } (Gillespie, Tr. 3012, *in camera*; PX1036 at 002-003, *in camera*).

[REDACTED] } (PX0033 at 030, *in camera*). This delay imposed costs on Microporous. (PX1215).

[REDACTED] } (Simpson, Tr. 3236, *in camera*; PX0033 at 046, *in camera*).

[REDACTED] } (Simpson, Tr. 3230, *in camera*; PX0033 at 047, *in camera*).

[REDACTED] } (Simpson, Tr. 3230-3232, *in camera*).

As discussed above, Daramic possesses monopoly power.

h. [REDACTED] } (Kahwaty, Tr. 5074, *in camera*);

**Response to Finding No. 1308 h.:** [REDACTED] } (Simpson, Tr. 3209, *in camera*).

[REDACTED] } (Simpson, Tr. 3236, *in camera*; PX2052 at 002, *in camera*; PX2054 at 003, *in camera*; PX2056 at 001, *in camera*; PX2057 at 001, *in camera*; see PX0033 at 046, *in camera*; PX0949 at 22-189, 218-220, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3230, *in camera*; PX0637 at 002, *in camera*; PX2052 at 002, *in camera*; PX2054 at 003; PX2055 at 002, *in camera*; PX2056 at 001, *in camera*; PX2058 at 002, *in camera*; see PX0033 at 047, *in camera*; PX0949 at 22-189, 218-220, *in camera*).

Market share discounts operate to deter entry as well. (Simpson, Tr. 3256-3261, *in camera*).

Daramic's response to Exide's RFP is a perfect example of this as it { [REDACTED] } (Gillespie, Tr. 3012, *in camera*; PX1036 at 002-003, *in camera*).

{ [REDACTED] }  
[REDACTED] }

(PX0033 at 025, 030, *in camera*). This delay imposed costs on Microporous. (PX1215).

{ [REDACTED] }  
[REDACTED] } (Simpson, Tr. 3226-3229, *in camera*). { [REDACTED] }

[REDACTED] } (Simpson, Tr. 3227, *in camera*).

{ [REDACTED] }  
[REDACTED] } (Simpson, Tr. 3227, *in camera*). { [REDACTED] }

[REDACTED]  
[REDACTED]

[REDACTED] } (Simpson, Tr. 3227-3228, *in camera*).

{ [REDACTED] }  
[REDACTED] }

(Simpson, Tr. 3227-3228, *in camera*). { [REDACTED] }

[REDACTED] } (Simpson, Tr. 3227, *in camera*; PX0265 at 004, *in camera*; PX0595, PX0835 at 003, *in camera*). { [REDACTED]

[REDACTED] }  
(Simpson, Tr. 3227, *in camera*). [REDACTED]

[REDACTED]. (Simpson, Tr. 3227-3228, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]. (Simpson, Tr. 3228, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] }

(Simpson, Tr. 3228, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED] } (Simpson, Tr. 3229, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Simpson,

Tr. 3229, *in camera*). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3229, *in camera*).

i. { [REDACTED] } (Kahway, Tr. 5075, *in camera*);

**Response to Finding No. 1308 i.:**

The cross agency agreement prevented entry by H&V into the markets for PE separators and prevented entry by Daramic into the markets for AGM separators which would have resulted in increased competition and lower prices in the markets for PE and AGM separators. H&V is “always looking for opportunities to provide other types of separator [other than AGM] to the industry,” including PE battery separators. (PX0925 (Porter, Dep. at 37)). H&V was

{interested in purchasing the Corydon PE facility.} (PX0917 (Cullen, Dep. at 11)). On July 1, 1999, H&V submitted to BHC a proposal to acquire the Corydon plant for \$26,000,000 in cash, and to enter into a series of five-year agreements to supply PE and AGM battery separators to Exide. (PX1368 at 001-002). Daramic was a competing bidder. (PX0726 at 006-008). Daramic was aware that H&V was interested in the Corydon facility. (Hauswald, Tr. 640-641; PX0169 at 001). Although { [REDACTED] } Daramic remained concerned that H&V would pursue an alternative strategy for entering the PE separator market. (PX0169 at 001; PX0035 at 005).

The original { [REDACTED] }  
[REDACTED].} (PX0094 at 001-002, 006, *in camera*). { [REDACTED] }  
[REDACTED].} (PX0158, *in camera*; PX2147).

The parties agreed and understood that { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0094 at 002, *in camera*; RX01014; PX2150 at 001, *in camera*; PX0158, *in camera*).

In considering { [REDACTED] }  
[REDACTED] } (PX0923 (Hauswald, IHT  
at 290), *in camera*). That { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0923 (Hauswald, IHT at 292, *in camera*)).

{ [REDACTED] }  
[REDACTED].} (PX2150 at 001, *in camera*; PX1318). *See also* (RX00095 at 001, *in camera*  
{ [REDACTED] })).

As a result of the cross agency agreement, the North American markets for motive and SLI separators have remained a duopoly, and the market for UPS separators has remained a

monopoly, since 1999, until the acquisition of Microporous reduced competition in these markets even further.

j. { [REDACTED] } (Kahwaty, Tr. 5075, *in camera*); and

**Response to Finding No. 1308 j.:**

Dr. Simpson testified that to restore the competition lost through Daramic's acquisition of Microporous, a remedy would need to recreate a firm similar to the Microporous that would have existed but for the acquisition. (Simpson, Tr. 3262-3263). Dr. Simpson stated that, at a minimum, this would require recreating a firm with production facilities in both the United States and Europe, with intellectual property comparable to that of Microporous, a technical staff comparable to that of Microporous, a product mix comparable to that of Microporous, and intangible assets (knowledgeable and skilled workforce, industry reputation) comparable to that of Microporous. (Simpson, Tr. 3263).

{ [REDACTED] }  
[REDACTED] }  
(Simpson, Tr. 3418, *in camera*; PX0072 at 067 (“[Microporous’s] [m]anagement anticipates that the successful execution of the U.S. and European automotive SLI initiative would also deliver significant additional efficiencies to the Company’s cost structure”). { [REDACTED]

[REDACTED] } (Simpson, Tr. 3418, *in camera*). Mr. Gilchrist testified that Microporous { [REDACTED] } (Gilchrist, Tr. 525, 593-601, *in camera*).

{ [REDACTED] } (Axt, Tr. 2143, *in camera*). { [REDACTED]

[REDACTED]}. (Simpson Tr. 3225-3226; 3229, 3233, *in camera*;  
Gillespie, Tr. 3053, *in camera*).

The Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and giving the acquirer a second source of supply in case problems arose at one plant. (PFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216; Gaugl, Tr. 4602). { [REDACTED]

[REDACTED] } Trevathan testified that opening of the Feistritz Plant freed up capacity at Piney Flats. (Trevathan, Tr. 3721).

k. { [REDACTED] }.  
(Kahwaty, Tr. 5077-5081, *in camera*).

**Response to Finding No. 1308 k.:**

This "finding" is no more than a vaguely worded ad hominem. Dr. Simpson's opinions are well reasoned, ignore no evidence, are fully and accurately supported, consistent, follow the Horizontal Merger Guidelines and discuss appropriate and necessary relief. Dr. Simpson wrote two detailed reports and testified for approximately two days. (PX0033; PX2251; Simpson, Tr 3161-3503). Respondent's assertion that Dr. Simpson ignored the Merger Guidelines and its commentary is contradicted by Dr. Simpson's testimony. (Simpson, Tr. 3166, 3494).

1309. This Court credits Dr. Kahwaty's opinions as well stated and supported and accepts those opinions under the relevant standards.

**Response to Finding No. 1309:**

Dr. Kahwaty abandoned or weakend a number of his opinions under cross examination. (See e.g. Kahwaty, Tr. 5249, 5261, 5269, 5294, 5317, 5325, 5326, 5332, 5343, 5344, 5354, 5364, 5370, 5382, 5417, *in camera*).

1310. { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5084-85, *in camera*). {  
[REDACTED] } (Kahwaty, Tr. 5085, *in camera*).

**Response to Finding No. 1310:**

Complaint Counsel has no specific response.

1311. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5071, 5106-07, 5112-13, *in camera*).

**Response to Finding No. 1311:**

Flex-Sil is not its own antitrust product market. (CCRF 1308 a.).

1312. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5072, *in camera*).

**Response to Finding No. 1312:**

The evidence demonstrates that the geographic market is North America. (CCRF 1308 c.).

1313. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5072, 5179, *in camera*).

**Response to Finding No. 1313:**

The evidence demonstrates that in three markets, the merger creates a monopoly where unilateral effects are a certainty, while in SLI, the merger would eliminate one of three suppliers, causing unilateral effects and making coordinated effects more likely. (CCRF 1308 d.).

1314. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5072-5073, *in camera*).

**Response to Finding No. 1314:**

Other than Microporous and Daramic, no entry has occurred in recent years and none is likely. (CCRF 1308 e.).

1315. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5073, *in camera*).

**Response to Finding No. 1315:**

Dr. Kahwaty did not offer an efficiencies analysis of any kind. (Kahwaty, Tr. 5249-5250, *in camera* ("I've not argued an efficiencies defense.")). The assertion that Microporous was a high-cost producer is contradicted by the record. (CCRF 1308 f.).

1316. { [REDACTED] } (Kahwaty, Tr. 5073-74, *in camera*).

**Response to Finding No. 1316:**

[REDACTED]. (Simpson, Tr. 3226, *in camera*, see also Simpson, Tr. 3404-3405, *in camera* (Dr. Simpson uses the term market power rather than monopoly power, but they are the same). In recent years, Daramic has withheld supply, threatened to cut off large customers, and raised its prices, with no fear of entry by Entek or anyone else. (CCRF 1308 g.).

1317. { [REDACTED] } (Kahwaty, Tr. 5242-5243, *in camera*).  
{ [REDACTED] } (Kahwaty, Tr. 5074, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5235-5236, *in camera*).  
{ [REDACTED] } (Kahwaty, Tr. 5074, *in camera*).

**Response to Finding No. 1317:**

Dr. Simpson uses the term market power rather than monopoly power, but most economists consider them to have the same meaning. (Simpson, Tr. 3404-3405, *in camera*). Dr. Simpson testified that Daramic had market power both before and after its acquisition of Microporous. (Simpson, Tr. 3226, *in camera*).

Pre-merger, Daramic impeded Microporous's entry by refusing to supply separators to customers dealing with Microporous. (CCFOF 1108-1166).

“Daramic’s acquisition of Microporous led to price increases.” (Simpson, Tr. 3165).

Post-merger, Daramic raised prices beyond what was justified by its costs, with little regard of competition from Entek, Asian suppliers, or anyone else. (Simpson, Tr. 3199, 3463, *in camera*; CCFOF 790-816).

1318. {Dr. Kahwaty’s testimony supports the view that the Cross-Agency Agreement between Daramic and H&V did not harm competition.} (Kahwaty, Tr. 5074-75, *in camera*.)

**Response to Finding No. 1318:**

The cross agency agreement prevented entry by H&V into the markets for PE separators and prevented entry by Daramic into the markets for AGM separators which would have resulted in increased competition and lower prices in the markets for PE and AGM separators. (CCRF 1308 i.).

1319. { [REDACTED] } (Kahwaty, Tr. 5075, *in camera*).

**Response to Finding No. 1319:**

The remedies sought by the FTC are appropriate and are chosen to replace the competition lost as a result of Daramic’s anticompetitive behavior and the acquisition of Microporous. (CCRF 1308 j.).

1320. { [REDACTED] } (Kahwaty, Tr. 5076, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5076, *in camera*) { [REDACTED] } (Kahwaty, Tr. 5077, *in camera*).

**Response to Finding No. 1320:**

This finding is contradicted by the fact that Dr. Simpson’s analysis *includes* the basic industry facts and characteristics that Dr. Kahwaty claims are missing. Dr. Simpson analyzed whether or not Entek was an uncommitted entrant in the motive, UPS, and deep-cycle markets. (Simpson, Tr. 3342, *in camera*; PX2251 at 007-008, *in camera*; PX0033 at 008-009, 015, *in camera*). Developing and testing a new separator takes several years. (Simpson, Tr. 3207-3208,

*in camera*, 3395, *in camera*). Thus, supply side substitution and entry - in terms of new sales to new customers - can occur only after a long delay. (Simpson, Tr. 3206-08, *in camera*). Not in two hours as Kahwaty claims.

Dr. Simpson also very carefully analyzed the affects of contracts on pricing in the industry. (See e.g. Simpson, Tr. 3197, 3226-29, 31-32, 64, 3350, 87-88, 96-97, 3426, 38, 62, 75, *in camera*). Among other things, he found that Daramic used exclusive contracts to exclude competition. (Simpson, Tr. 3209, *in camera*; PX0033 at 030, *in camera*). Moreover, Dr. Kahwaty's reliance on contract pricing is misplaced. New prices are frequently negotiated and taken during a pre-existing contract in this industry. For example, on November 7, 2007, Tucker Roe wrote an email to Larry Burkert in which he informed Mr. Burkert that { [REDACTED] } (RX00768 at 001, *in camera*). Mr. Roe added, however, that Daramic would { [REDACTED] } (RX00768 at 001, *in camera*). Indeed the entire 2006 price negotiations between EnerSys and Daramic started in { [REDACTED] } before the contract was to expire in { [REDACTED] } (CCFOF 1114-1115, 1121, *in camera*). The new contract pricing began in October of 2006, approximately eight months before the previous contract was to expire. (PX1224 at 007, *in camera*).

Dr. Simpson's analysis is far more nuanced than Dr. Kahwaty's, as Dr. Simpson took into account both large purchasers of separators and small ones. (Simpson, Tr. 3194-3195, *in camera*). Dr. Kahwaty does not account for the fact that large, sophisticated purchasers of separators like EnerSys are nevertheless victims of Daramic's monopoly power. (CCRF 624). Daramic's own strategic audit states that { [REDACTED] } (PX0265 at 008, *in camera*).

1321. { [REDACTED] } (Kahwaty, Tr. 5077, *in camera*). { [REDACTED] }

[REDACTED] (Kahwaty, Tr. 5077-78, *in camera*).

**Response to Finding No. 1321:**

Dr. Simpson in fact did look at the available empirical data in conducting his analysis.

(Simpson, Tr. 3415, *in camera*). This included an empirical analysis of the impact of the acquisition on the pricing of Flex-Sil. (Simpson, Tr. 3472-3473, *in camera*). Dr. Simpson also used an empirical approach in his use of the differences-in-differences analysis. (Simpson, Tr. 3473, *in camera*). Contrary to Kahwaty's assertion, empirical analysis is not necessary to answer the question of whether arbitrage would defeat geographic price discrimination. (Simpson, Tr. 3325, *in camera*). Further, Dr. Simpson addressed the question of cross-price elasticities implicitly by means of the hypothetical monopolist test. (Simpson, Tr. 3482-83, *in camera*). Dr. Simpson's reliance on testimony to examine cross elasticity is appropriate under the Horizontal Merger Guidelines 6, 7, and 9. By contrast, Dr. Kahwaty admitted that he knows of no examples of the type of arbitrage on which his broadly defined market is based (other than an internal - and inconsequential - transfer within Daramic). (Kahwaty, Tr. 5364, *in camera*). Despite his erroneous allegations, Dr. Kahwaty himself did not present an econometric analysis. (Kahwaty, Tr. 5482-5483, *in camera*). Moreover, the Merger Guidelines and the Commentary on the Merger Guidelines do not require that quantitative data be used to analyze the effect of a merger. (See CCRF 1175; RX01652 at 017).

1322. [REDACTED]

[REDACTED] (Kahwaty, Tr. 5080-81, *in camera*).

**Response to Finding No. 1322:**

This "finding" is a vaguely worded ad hominem. It is contradicted by the detailed, high-quality work encompassed in Dr. Simpson's two expert reports and nearly two days of

testimony. (PX0033, *in camera*; PX2251, *in camera*; Simpson, Tr 3161-3503, *in camera*). Dr. Simpson did empirical work on this case where it was appropriate. (CCRF 1321).

1323. { [REDACTED] } (Kahwaty, Tr. 5241, *in camera*).

**Response to Finding No. 1323:**

Complaint Counsel has no specific response.

1324. { [REDACTED] } (Kahwaty, Tr. 5078, *in camera*).

**Response to Finding No. 1324:**

This "finding" is no more than an ad hominem. It is contradicted by the flawless, detailed, high-quality work encompassed in Dr. Simpson's two expert reports and nearly two days of testimony. (PX0033, *in camera*; PX2251, *in camera*; Simpson, Tr. 3161-3503, *in camera*).

1325. { [REDACTED] } (Kahwaty, Tr. 5078-80, *in camera*; Simpson, Tr. 3187; Simpson, Tr. 3199, 3341-3342, *in camera*).

**Response to Finding No. 1325:**

Dr. Simpson's testimony is consistent with the facts. If product testing requires more than a year then Entek should not be considered either as an uncommitted entrant or a participant in a deep-cycle market. (Kahwaty, Tr. 5391, *in camera*). Deep-cycle testing takes more than a year. (CCFOF 896-904). In contrast, Microporous's white PE had been in testing at EnerSys, was fully developed, and EnerSys had agreed to purchase white PE from Microporous. (CCRF 663; Axt, Tr. 2104; *Burkert*, Tr. 2326). Microporous anticipated separator sales from project LENO in late 2008 or early 2009. (Brilmyer, Tr. 1858; PX0664 at 002, *in camera*).

1326. { [REDACTED] } (Kahwaty, Tr. 5080, *in camera*).

**Response to Finding No. 1326:**

This "finding" is a vaguely worded ad hominem. Dr. Simpson testified that he followed the Merger Guidelines approach. (Simpson, Tr. 3170; Simpson, Tr. 3294-3295, *in camera*).

1327. { [REDACTED] }

(Kahwaty, Tr. 5080, *in camera*).

**Response to Finding No. 1327:**

The remedies sought by the FTC are appropriate and are chosen to replace the competition lost as a result of Daramic's anticompetitive behavior and the acquisition of Microporous. (CCRF 1308 j.).

1328. { [REDACTED] }

} (Kahwaty, Tr. 5090, *in camera*). {

} (Kahwaty, Tr. 5091, *in camera*; RX00677, *in camera*). {

} (Kahwaty, Tr. 5091, *in camera*). {

} (Kahwaty, Tr. 5092, *in camera*).

**Response to Finding No. 1328:**

The bare assertions in this finding are not supported by evidence and are no more than an ad hominem attack. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion). The only actual evidence cited does not support the assertion. (RX00677, *in camera* (no mention of prices)).

Dr. Simpson's analysis of the Entek/JCI MFN provision is supported by actual evidence.

[REDACTED]

[REDACTED] (Weerts, Tr. 4510, *in camera*).

1329. { [REDACTED] }

[REDACTED] }  
(Kahwaty, Tr. 5093, *in camera*). {

[REDACTED].} (Kahwaty, Tr. 5093-94, *in camera*). {

[REDACTED] } (Kahwaty, Tr. 5094, *in camera*).

**Response to Finding No. 1329:**

The bare assertions in this finding are not supported by evidence. The supposed “facts” that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1330. {

[REDACTED] }  
[REDACTED] } (Kahwaty, Tr. 5095-97,  
*in camera*). {

[REDACTED] }  
(Kahwaty, Tr. 5097, *in camera*).

**Response to Finding No. 1330:**

The bare assertions in this finding are not supported by evidence. The supposed “facts” that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

The unsupported assertions in this finding are contradicted by a great deal of evidence. Supply side substitution does not occur in this industry because customer testing takes years. (CCRF 1308 b.). Intellectual Property and proprietary technology are barriers to entry. (CCFOF 1003-1029).

1331. Daramic now has substantial excess capacity. Its plant at Potenza has been shut down and the equipment is being relocated to Thailand. (Hauswald, Tr. 1118-1119). { [REDACTED] } (Kahwaty, Tr. 5098, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5099, *in camera*; Weerts, Tr. 4459-60, *in camera*).

**Response to Finding No. 1331:**

This finding is contradicted by Mr. Hauswald who testified that { [REDACTED]

[REDACTED] } (Hauswald, Tr. 910, *in*

camera). One line in Potenza is still there. (Hauswald, Tr. 712-713). The cite provided by respondent does not support the assertion (Hauswald, Tr. 1118-19 (no mention of where equipment is going)).

The assertion that { [REDACTED] } is not supported by the record. Mr. Weerts testified that { [REDACTED] } in Europe. (Weerts, Tr. 4458-4459, *in camera*).

1332. { [REDACTED] } (Kahwaty, Tr. 5100, *in camera*).

**Response to Finding No. 1332:**

The bare assertions in this finding are unsupported, and are contradicted by the evidence.

According to one Daramic document, there are at least [REDACTED] Daramic customers in North America, [REDACTED] of which presumably make up the other supposed { [REDACTED] } of Daramic's sales. (PX1450, *in camera*). The majority of Daramic's customers, therefore, are small.

The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1333. { [REDACTED] } (Kahwaty, Tr. 5102-04, *in camera*).

**Response to Finding No. 1333:**

These findings are contradicted by the evidence. Customers testify that as a result of the merger, they have no competitive options in the motive, UPS, and deep-cycle markets and that Daramic { [REDACTED] }. (Gillespie, Tr. 3021, *in camera*; Axt, Tr. 2186-2187, *in camera*; Craig, Tr. 2567, *in camera*).

The bare assertions in this finding are unsupported. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

c. Product Market Issues

1334. {

(Kahwaty, Tr. 5107-10, *in camera*).

**Response to Finding No. 1334:**

Dr. Kahwaty misconstrues the requirements of a Merger Guidelines analysis. As Dr.

Simpson explained, the proposition is contradicted by the record evidence. The Merger

Guidelines state:

[B]ecause the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. . . . Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.

(RX01653 at 004). The Commentary on the Merger Guidelines state:

[a]t times, the Agencies may act conservatively and focus on a market definition that might not be the smallest possible relevant market. For example, the Agencies may focus initially on a bright line identifying a group of products or areas within which it is clear that a hypothetical monopolist would raise price significantly and seek to determine whether anticompetitive effects are--or are not--likely to result from the transaction in such a candidate market. If the answer for the broader market is likely to be the same as for any plausible smaller relevant market, there is no need to pinpoint the smallest market as the precise line drawn does not affect the determination of whether a merger is anticompetitive."

(RX01652 at 013). Thus, the Merger Guidelines do not require what respondent claims.

In fact, Dr. Simpson's analysis is the result of aggregating individual markets for which the competitive conditions are similar. This aggregation is done to simplify the presentation without

affecting the analysis. (Simpson, Tr. 3173-3174, *in camera*). Dr. Kahwaty agrees that this is entirely proper. (Kahwaty, Tr. 5294, *in camera*).

1335. { [REDACTED] } (Kahwaty, Tr. 5112-13, *in camera*).

**Response to Finding No. 1335:**

Complaint Counsel has no specific response.

1336. { [REDACTED] } (Kahwaty, Tr. 5114-19, *in camera*).

**Response to Finding No. 1336:**

This finding is contradicted by the fact that economic testimony reaches the conclusion that Flex-Sil is not a properly defined antitrust product market, but rather is in the deep-cycle product market. (Simpson, Tr. 3176). Contrary to Dr. Kahwaty's testimony, however, Dr. Simpson's testimony is supported by evidence in the record. (CCRF 1308 a.).

1337. { [REDACTED] } (Kahwaty, Tr. 5566, *in camera*).

**Response to Finding No. 1337:**

This confusing assertion appears to be self-defeating and is not supported by the testimony cited by respondent. The proper way to define a product market under the Merger Guidelines can be found in Section 1.1 of the Guidelines. (RX01653 at 009).

1338. { [REDACTED] } (Kahwaty, Tr. 5115-16, *in camera*).

**Response to Finding No. 1338:**

The bare assertions in this finding are unsupported, and are contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion). Contrary to Dr.

Kahwaty's testimony, Trojan was considering moving another 10 to 15 percent of its batteries to CellForce rather than the 4 percent suggested by Dr. Kahwaty. (Godber, Tr. 226-227).

Moreover, as Dr. Kahwaty is aware, Trojan used HD to get a better price on its purchases of Flex-Sil. (Godber, Tr. 191-192, 201-202; CCRF 395-421; Kahwaty, Tr. 5325, *in camera*).

Kahwaty cannot properly conclude, from the customers' perspective, that the two products are in different markets.

Dr. Simpson opined, given that Flex-Sil and CellForce were owned by the same entity, that entity would be setting optimal prices for those products, and as far as what would represent a constraint on that entity, it would not be CellForce; it would be the independently owned product, Daramic HD. (Simpson, Tr. 3177-3178). Moreover, Dr. Simpson stated the ultimate question is would this acquisition enable the owner of Flex-Sil to set a higher price, and it was Daramic HD that was the constraint on the Flex-Sil pricing; it would be the shift in sales to Daramic HD that would be recaptured by this joint owner that would support higher pricing for Flex-Sil. (Simpson Tr. 3456-3457, *in camera*).

1339. {

} (Kahwaty, Tr. 5117-19, *in camera*; Gillespie, Tr. 2954-2955; Gillespie, Tr. 2996, *in camera*; Gillespie, Tr. 3092; RX01119, *in camera*)

**Response to Finding No. 1339:**

The bare assertions in this finding are unsupported, and are contradicted by the evidence.

The cites at the end of this finding are not to a U.S. Battery witness, but to the testimony of Mr. Gillespie of Exide and support only the assertion in the second sentence that Flex-Sil is priced higher than HD. The supposed "facts" that respondent attempts to introduce through Dr.

Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Contrary to the assertions made in this finding, Dr. Kahwaty is aware that U.S. Battery and Exide are both interested in expanding their purchases of HD. (Qureshi, Tr. 2090; PX0904 (Seibert, Dep. at 191, *in camera*; Kahwaty, Tr. 5551-5552, *in camera*). Indeed as Dr. Kahwaty acknowledged, U.S. Battery views Flex-Sil and HD as comparable, and would buy more HD if Daramic was willing to supply it. (Qureshi, Tr. 2063 (“identical in performance”), 2049, 2090; Kahwaty, Tr. 5333, *in camera*). U.S. Battery was also successful in getting lower prices for Flex-Sil by threatening to move to Daramic’s deep-cycle product. (Wallace, Tr. 1946). Thus a SSNIP in Flex-Sil pricing would lead to greater switching by U.S. Battery, but for Daramic’s refusal to sell HD to them. (Wallace, Tr. 1979-1980; *See also* PX0904 (Seibert, Dep. at 191, *in camera*)).

1340. { [REDACTED] } (Kahwaty, Tr. 5119-31, *in camera*). {  
[REDACTED] } (Kahwaty, Tr. 5119-20, *in camera*).  
{ [REDACTED] } (Kahwaty, Tr. 5121-  
23, *in camera*). {  
[REDACTED] } (Kahwaty, Tr. 5126-27, *in camera*).

**Response to Finding No. 1340:**

Dr. Kahwaty’s assertions in this finding are unsupported, and are contradicted by the evidence. The cites in this finding are not to a U.S. Battery witness, but to the testimony of Dr.

Kahwaty. The supposed “facts” that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Contrary to the assertions made in this finding, Dr. Kahwaty is aware that U.S. Battery and Exide are both interested in expanding their purchases of HD. (Qureshi, Tr. 2090; PX0904 (Seibert, Dep. at 191, *in camera*; Kahwaty, Tr. 5551-5552, *in camera*). As Dr. Kahwaty admits, U.S. Battery is already willing to switch more than the 28.2 percent of its purchases that would defeat a price increase in Flex-Sil in defining a product market under a critical loss analysis. (Kahwaty, Tr. 5330-5331). Indeed as Dr. Kahwaty acknowledged, U.S. Battery views Flex-Sil and HD as comparable, and would buy more HD if Daramic was willing to supply it. (Qureshi, Tr. 2063 (“identical in performance”), 2049, 2090; Kahwaty, Tr. 5333, *in camera*). U.S. Battery was also successful in getting lower prices for Flex-Sil by threatening to move to Daramic’s deep-cycle product. (Wallace, Tr. 1946; Qureshi, Tr. 2023). Thus a SSNIP in Flex-Sil pricing would lead to greater switching by U.S. Battery, but for Daramic’s refusal to sell HD to them. (Wallace, Tr. 1979-1980; *see also* PX0904 (Seibert, Dep. at 191, *in camera*)). According to Dr. Kahwaty’s analysis, a switch from Flex-Sil to HD by U.S. Battery alone would render a price increase in Flex-Sil unprofitable (assuming hypothetically that HD remained the same price or U.S. Battery were permitted to switch), and thus Flex-Sil must be in the product market. (Kahwaty, Tr. 5330, *in camera*).

Critically however, Dr. Kahwaty fails to acknowledge the market place reality that U.S. Battery and Trojan have already succeeded in getting lower prices for Flex-Sil by threatening to switch their deep-cycle separator purchases to HD, something they would not be able to do if the products were not in the same market. (Wallace, Tr. 1946; Qureshi, Tr. 2023; Godber, Tr. 191-192, 201-202; CCRF 395-421).

1341. [REDACTED]

[REDACTED] (Kahwaty, Tr. 5127-31, *in camera*; RX00983; *in camera*).

**Response to Finding No. 1341:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. There is no evidence that Dr. Simpson *assumes* that HD controlled the price of Flex-Sil. Dr. Simpson carefully analyzed the effect of HD pricing on Flex-Sil price. (Simpson, Tr. 3472-3473, *in camera*). Nor is there any evidence that Dr. Simpson failed to take into account that Microporous could not simply raise the price of Flex-Sil because the price is set by contracts. In fact, Dr. Simpson's analysis includes existing contracts and negotiations. (CCRF 1320).

The facts support Dr. Simpson's analysis and are contrary to Dr. Kahwaty's unsupported assertions. Microporous raised Flex-Sil prices to customers with whom it had contracts that had been in existence for many years, but was constrained from doing so fully because of competition from HD. (*see* CCRF 395-21). Thus, as Dr. Kahwaty was forced to acknowledge,

[REDACTED] (Kahwaty, Tr. 5325, *in camera*). Moreover, Trojan and Microporous were negotiating a contract extension prior to the acquisition, including price terms. (Godber, Tr. 215-216). The extension was not completed prior to the acquisition. (Godber, Tr. 215-216). [REDACTED]

[REDACTED] (Godber, Tr. 236-238, *in camera* ([REDACTED]

[REDACTED] )).

1342. [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5132-34, *in camera*).

**Response to Finding No. 1342:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Supply-side substitution is not easy and is not observed in this industry because customer testing requirements for new separators take longer than a year for each of these markets. (CCRF 1308 b.).

1343. [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5137-39, *in camera*).

**Response to Finding No. 1343:**

In the second sentence, Dr. Kahwaty attempts to confuse the court. Dr. Simpson analyzed each product then aggregated them into "buckets" for tractability. (Simpson, Tr. 3173-3174). Dr. Kahwaty would have the court suffer through an analysis of each SKU, something even he was unprepared to do. (Kahwaty, Tr. 5143, *in camera* ("[i]n fact, it's probably a good thing to do. Instead of coming here and talking about 500 markets, we can aggregate those individual markets, individual markets up"). Thus, the North American deep-cycle "bucket" includes all SKUs sold into deep-cycle applications and delivered in North America. (See Simpson, Tr. 3173-3174). The same is true with each of the markets analyzed by Dr. Simpson. (Simpson, Tr. 3173-3174). The SKUs purchased by Daramic's customers are each sold to a specific customer, a specific location, and a specific end use. (See PX1450, *in camera*; Simpson, Tr. 3171-3174).

1344. [REDACTED]

[REDACTED]

} (Kahwaty, Tr. 5577-79, *in camera*). {

(Kahwaty, Tr. 5137-38, *in camera*).

**Response to Finding No. 1344:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

East Penn uses the HD separator from Daramic for its golf cart and floor scrubber batteries. (Leister, Tr. 4039). Crown has never used PE in its golf cart batteries. (Balcerzak, Tr. 4096).

[REDACTED] (PX1450, *in camera*). In a multi-million dollar market, with no other customers using PE (with or without fiberglass) in deep cycle applications, PE can safely be excluded from the deep-cycle market.

1345. { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5144-55, *in camera*).

**Response to Finding No. 1345:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. Dr. Simpson aggregated markets for tractibility and ease of presentation and described the relevant competitive conditions, including the identity and size of suppliers. (Simpson, Tr. 3173-3174). Dr. Kahwaty would have the court suffer through an analysis of each SKU, something even he was unprepared

to do. (Kahwaty, Tr. 5143, *in camera* (“[i]n fact, it’s probably a good thing to do. Instead of coming here and talking about 500 markets, we can aggregate those individual markets, individual markets up”).

Dr. Kahwaty in fact aggregates *all* PE into a single market, arguing that they are *all subject to the same competitive analysis*. (Kahwaty, Tr. 5144-5151, *in camera*). Thus Dr. Kahwaty’s argument is flawed, as nowhere in the record does he walk the court through any of the smaller markets that he argues make up an all PE market. The difference is that Dr. Kahwaty uses supply-side substitution in his definition of product market. (Kahwaty, Tr. 5152, *in camera*). Dr. Kahwaty errs because market definition is a demand side analysis. (RX01653 at 010 (“[t]he terms of sale of all other products are held constant in order to focus market definition on the behavior of consumers. Movement in the terms of sale for other products, as may result for the behavior of producers of those products, are accounted for in the analysis of competitive effects and entry.”)). Even if Dr. Kahwaty were correct that aggregation should account for supply-side responses, his assertion that supply-side responses would be sufficiently quick and easy to make Entek or any other SLI PE supplier an uncommitted entrant into any of the other markets is contradicted by the fact that customer testing on new separators takes longer than a year. (CCRF 1308 b.).

1346. { [REDACTED] } (Kahwaty, Tr. 5155, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5296, *in camera*).  
{ [REDACTED] } (Kahwaty, Tr. 5295, *in camera*).

**Response to Finding No. 1346:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty’s assertion in this finding is unsupported, and is contradicted by the evidence. The supposed “facts” that

respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Dr. Kahwaty in fact aggregates *all* PE into a single market, arguing that they are *all subject to the same competitive analysis*. (Kahwaty, Tr. 5144-5151, *in camera*). Dr. Kahwaty uses supply-side substitution in his definition of product market. (Kahwaty, Tr. 5152, *in camera*). Dr. Kahwaty errs because market definition is a demand side analysis. (RX01653 at 010 (“[t]he terms of sale of all other products are held constant in order to focus market definition on the behavior of consumers. Movement in the terms of sale for other products, as may result for the behavior of producers of those products, are accounted for in the analysis of competitive effects and entry”)). Even if Dr. Kahwaty were correct that aggregation should account for supply-side responses, his assertion that supply-side responses would be sufficiently quick and easy to make Entek or any other SLI PE supplier an uncommitted entrant into any of the other markets is contradicted by the fact that customer testing on new separators takes longer than a year. (CCRF 1308 b.).

1347. {

} (Kahwaty, Tr. 5304-05, *in camera*). {

} (Kahwaty, Tr. 5306, *in camera*).

**Response to Finding No. 1347:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty’s assertion in this finding is unsupported, and is contradicted by the evidence. Dr. Kahwaty in fact aggregates *all* PE into a single market, arguing that they are *all subject to the same competitive analysis*. (Kahwaty, Tr. 5144-5151, *in camera*). Dr. Kahwaty uses supply-side substitution in his definition of product market. (Kahwaty, Tr. 5152, *in camera*). Dr. Kahwaty errs because market definition is a demand side analysis. (RX01653 at 010 (“[t]he terms of sale of all other products are held constant in order to focus market definition on the behavior of consumers.

Movement in the terms of sale for other products, as may result for the behavior of producers of those products, are accounted for in the analysis of competitive effects and entry”)). Even if Dr. Kahwaty were correct that aggregation should account for supply-side responses, his assertion that supply-side responses would be sufficiently quick and easy to make Entek or any other SLI PE supplier an uncommitted entrant into any of the other markets is contradicted by the fact that customer testing on new separators takes longer than a year. (CCRF 1308 b.; Simpson, Tr. 3205, 3207, *in camera*).

1348. { [REDACTED] } (Kahwaty, Tr. 5385, *in camera*).

**Response to Finding No. 1348:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty’s assertion in this finding is unsupported, and is contradicted by the evidence. Dr. Kahwaty has evidently had no conversation with Entek or any of the customers who testified at trial, but apparently relies only on Daramic’s self-serving statements about supply-side substitution, without crediting the Daramic documents that contradict it.

Dr. Simpson believes that supply-side substitution, as defined in the Horizontal Merger Guidelines, is not possible. (Simpson, Tr. 3205, 3207, *in camera*). The only two firms capable of supply-side substitution are Daramic and Microporous, at specific customers, because they are the only two firms that are qualified for products in different markets by those specific customers. Supply side substitution is greatly delayed by the testing required of new products (or new applications of existing products) (CCRF 1308 b.; Simpson, Tr. 3205, 3207, *in camera*).

d. Geographic Market

1349. { [REDACTED] } (Kahwaty, Tr. 5158, 5172-73, *in camera*).

**Response to Finding No. 1349:**

This finding is contradicted by the economic testimony of Dr. Simpson that establishes that the geographic market for all of the markets is North America. (Simpson, Tr. 3182-3183). The ability of suppliers to price discriminate (i.e. set different prices to customers in different regions) supports a more narrow market limited to North America. (Simpson, Tr. 3182-3183). Dr. Kahwaty's rebuttal requires that customers be able to arbitrage a North American price increase by shipping separators back to North America. (Simpson, Tr. 3328-3329, *in camera*). When North American customers cannot arbitrage then the geographic market is North America. (Simpson, Tr. 3333, *in camera*). Dr. Kahwaty knows of no examples of the arbitrage on which he bases a global market. (Kahwaty, Tr. 5364, *in camera*). The only example of a common profile ever sent from abroad to North America by a customer cost the customer 20 percent more for the material and was done only because Daramic did not have sufficient supply. (Burkert, Tr. 2333-2334). Moreover, Daramic can selectively raise prices in North America on those SKUs sold only in North America. (PX1450, *in camera*; Simpson, Tr. 3182-3183, 3172-3174).

1350. { [REDACTED] } (Kahwaty, Tr. 5159, *in camera*).

**Response to Finding No. 1350:**

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Dr. Kahwaty's argument in this finding defies logic. A North American geographic market is possible because firms can price discriminate. (Simpson, Tr. 3182-3183). This means that Entek and Daramic can export at lower prices than they sell domestically. If they do this, then there would be no effect on their sales abroad (i.e. no loss at all). Dr. Kahwaty concedes that this analysis is only relevant "in the absence of an ability to price-discriminate." (Kahwaty,

Tr. 5160, *in camera*). Daramic's ability to price discriminate is shown by the evidence. (CCFOF 53-55, 161-169).

1351. { [REDACTED] } (Kahwaty, Tr. 5159-5160, *in camera*).

**Response to Finding No. 1351:**

Dr. Kahwaty concedes that this applies only "in the absence of an ability to price-discriminate." (Kahwaty, Tr. 5160, *in camera*). A North American geographic market is possible because firms can price discriminate. (Simpson, Tr. 3182-3183). This means that Entek and Daramic can export at lower prices than they sell domestically. If they do this, then there would be no effect on their sales abroad (i.e. no loss at all, much less a critical loss). Daramic's ability to price discriminate is shown by the evidence. (CCFOF 53-55, 161-169).

This finding is not supported by the documents cited, which are Daramic documents, contain no information about Entek, and do not appear to show exports. (RX00677, *in camera*; RX01407, *in camera*). Thus the assertion is not supported at all.

1352. { [REDACTED] } (Kahwaty, Tr. 5161, *in camera*).

**Response to Finding No. 1352:**

This finding is contradicted by the facts, which demonstrate that Asian suppliers are a poor, high-cost substitute for U.S. production of PE battery separators for the relevant markets and would not constrain SSNIPs by North American producers in North America. (Simpson, Tr. 3182-3183; CCFOF 170-257).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2735, 2745-2747, *in camera*; see also CCFOF 207-

246). { [REDACTED]

[REDACTED]. } (Hall, Tr. 2727, *in camera*; PX1522 at 005, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1522 at 005, *in camera*; Hall, Tr.

2727, 2734-2735, *in camera*).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2735-2736, 2764, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED]. } (PX0907

(Kung, Dep. at 172-173, *in camera*)). { [REDACTED]

[REDACTED]

[REDACTED] }

(PX1522 at 005, *in camera*; see also CCFOF 234-242).

{ [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] } (Hall, Tr. 2745, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Axt, Tr. 2220, *in camera*; see also PX1248 at 001, *in camera* { [REDACTED]  
[REDACTED] }.

[REDACTED]  
[REDACTED] } (Gillepsie, Tr. 3024-3025, *in camera*).

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (RX01497 at 01-02, *in camera*; see also Toth, Tr. 1404 (the Asian separator manufacturers are not selling separators in North America because the margins are not high enough).

{ [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] } (Roe, Tr. 1812-1813; Weerts, Tr. 4501, 4512, *in*

camera; see also Weerts, Tr. 4502-4503, *in camera* [REDACTED]

[REDACTED] }).

Even Dr. Kahwaty admitted being aware of no Asian suppliers ever selling PE separators in any product market in North America. (Kahwaty, Tr. 5343, *in camera*).

1353. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5161-63, *in camera*).

**Response to Finding No. 1353:**

Dr. Kahwaty concedes that his analysis with respect to Entek and Darmic exports applies only "in the absence of an ability to price-discriminate." (Kahwaty, Tr. 5160, *in camera*). A North American geographic market is possible because firms can price discriminate. (Simpson, Tr. 3182-3183). This means that Entek and Darmic can export at lower prices than they sell domestically. If they do this, then there would be no effect on their sales abroad (i.e. no loss at all, much less a critical loss). Darmic's ability to price discriminate is shown by the evidence. (CCFOF 53-55, 161-169).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion). Dr. Kahwaty conceded that international trade flows do not include any imports to North America, and Dr. Kahwaty did not have any data for any of the Asian firms. (Kahwaty, Tr. 4369-4370, *in camera*).

1354. { [REDACTED]  
[REDACTED] }  
Kahwaty, Tr. 5164-65, *in camera*).

**Response to Finding No. 1354:**

This finding is contradicted by the economic testimony of Dr. Simpson that establishes that the geographic market for all of the product markets is North America. (Simpson, Tr. 3182-3183). The ability of suppliers to price discriminate (i.e. set different prices to customers in different regions) supports a more narrow market limited to North America. (Simpson, Tr. 3182-3183). Daramic's ability to price discriminate is shown by the evidence. (CCFOF 53-55, 161-169). Daramic can selectively raise prices in North America on those SKUs sold only in North America. (PX1450, *in camera*; Simpson, Tr. 3182-3183, 3172-3174).

Dr. Kahwaty's argument that the markets are global requires that customers be able to arbitrage a North American price increase by shipping separators back to North America. (Simpson, Tr. 3328-3329, *in camera*). When North American customers cannot arbitrage then the geographic market is North America. (Simpson, Tr. 3333, *in camera*). The inability of customers to arbitrage is supported by the evidence. (CCFOF 163, 199-246, 53-55). There are no opportunities for arbitrage between North and South America because buyers on the two continents are buying different SKUs. (PX1450, *in camera*). Indeed, Dr. Kahwaty knows of no examples of arbitrage. (Kahwaty, Tr. 5364, *in camera*). The only example of a substitute profile ever sent from abroad to North America by a customer was for one SKU sent from Europe to Mexico which cost the customer 20 percent more for the material. (Burkert, Tr. 2333-2334 (material shipped at EnerSys's cost to cover lack of supply during Owensboro strike)).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1355. { 

[REDACTED] } (Kahwaty, Tr. 5163-65, *in camera*).

**Response to Finding No. 1355:**

The assertion in this finding is not supported by the record. Dr. Simpson testified that he considered arbitrage in his analysis. (Simpson, Tr. 3328, *in camera*). When North American customers cannot arbitrage then the geographic market is North America. (Simpson, Tr. 3333, *in camera*). The inability of customers to arbitrage is supported by the evidence. (CCFOF 163, 199-246, 53-55).

1356. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5166-68, *in camera*).

**Response to Finding No. 1356:**

This finding is unsupported by any facts and is contradicted by a great deal of facts that show that Asian separators are not cost competitive in North America. (See CCFOF 185-190, 202-203, 211, 213-246; Weerts, Tr. 4500, *in camera*; PX0907 (Kung, Dep. at 172), *in camera*

[REDACTED] ). [REDACTED]

[REDACTED] (PX0907 (Kung, Dep. at 189, *in camera*). [REDACTED]

[REDACTED] (PX1522 at 005, *in camera* ( [REDACTED]

[REDACTED]

[REDACTED]

(PX0907 (Kung, Dep. at 148-149), *in camera*). This finding is also contradicted by Mr. Kung's testimony that [REDACTED]

(PX0907 (Kung, Dep. 176-77), *in camera*).

{ [REDACTED]

[REDACTED] } (Simpson, Tr. 3237-3238, *in camera*).

{ [REDACTED]

[REDACTED]  
[REDACTED] } (Simpson, Tr. 3238, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson,  
Tr. 3238, *in camera*). Finally, [REDACTED]  
[REDACTED] } (Simpson, Tr. 3238, *in camera*). Dr. Kahwaty admitted being aware of no Asian suppliers selling in North America. (Kahwaty, Tr. 5343).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1357. [REDACTED] }  
(Kahwaty, Tr. 5169-70, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5168-70, *in camera*; RX00677).

**Response to Finding No. 1357:**

This finding is contradicted by the evidence which shows that other Asian producers with significantly smaller lines are higher cost. (CCFOF 956-982). Mr. Kung testified that [REDACTED]  
[REDACTED]. } (PX0907 (Kung, Dep. at 154-156), *in camera* ([REDACTED])). [REDACTED]  
[REDACTED]. }  
(PX1522 at 005, *in camera*). [REDACTED]

[REDACTED] (Hall, Tr. 2736, *in camera*). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This does not include any other inland freight, logistics costs and, of course, no margin.

[REDACTED]

[REDACTED] (PX0907 (Kung, Dep. at 188-89), *in camera*). Thus small manufacturing lines are more expensive.

[REDACTED]

[REDACTED] (PX0645 at 011, *in camera*; Kahwaty, Tr. 5168-5169, *in camera*

([REDACTED])). Dr. Kahwaty does not include import or export duties, or China's nonrecoverable VAT in his calculation, all of which would increase the costs of Asian producers. (Kahwaty, Tr. 5354, *in camera*). Dr. Kahwaty admitted being aware of [REDACTED]

[REDACTED] (Kahwaty, Tr. 5343, *in camera*).

The document cited by respondent does not appear to support the assertions made in this finding. (RX00677, *in camera*). Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1358. [REDACTED] (Kahwaty, Tr. 5171-5172, *in camera*).

**Response to Finding No. 1358:**

Asian producers are already producing at a higher *cost* than prices after a SSNIP in North America, without any margin. (CCRF 1357). Warehousing facilities would add additional costs.

(Kahwaty, Tr. 5379-5380, *in camera*). Dr. Kahwaty admitted being aware of [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5343, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1359. [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5172, *in camera*).

**Response to Finding No. 1359:**

Asian producers are already producing at a higher *cost* than prices after a SSNIP in North America, without any margin. (CCRF 1357). Warehousing facilities would add additional costs. (Kahwaty, Tr. 5379-5380, *in camera*). Dr. Kahwaty admitted being aware of [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5343, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1360. [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5544, *in camera*).

**Response to Finding No. 1360:**

This finding is contradicted by the testimony of Mr. Weerts, who testified [REDACTED]  
[REDACTED] (Weerts, Tr. 4503, *in camera*). It is contradicted by the testimony of Mr. Hall, who noted [REDACTED]  
[REDACTED] (Hall, Tr. 2722, *in camera*). Mr. Burkert also testified that

EnerSys paid a duty of 6.5 percent when it had to import separators from Austria to Mexico. (Burkert, Tr. 2402).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1361. { [REDACTED] } (Kahwaty, Tr. 5544-46, *in camera*).

**Response to Finding No. 1361:**

This finding is contradicted by Mr. Kung who testified that [REDACTED] (PX0907 (Kung, Dep. at 146-147), *in camera*). Asian PE firms are not cost competitive in North America. (CCRF 1357). If they were, they would have expanded capacity and exported separators to North America. Despite the assertion in this finding that there have been "so few" imports, { [REDACTED] } (Kahwaty, Tr. 5343, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

e. Concentration and Competitive Effects

1362. { [REDACTED] } (Kahwaty, Tr. 5173-76, *in camera*).

**Response to Finding No. 1362:**

The Horizontal Merger Guidelines state that the very high HHIs and deltas like those observed in this case create a presumption of competitive harm. (Kahwaty, Tr. 5294, *in camera*).

{ [REDACTED]

[REDACTED] } (Hall, Tr. 2828-2829, *in camera*). [REDACTED]

[REDACTED] } (Hall, Tr.

2828-2829, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2886-2887, *in camera*). { [REDACTED]

[REDACTED]

[REDACTED] } (Hall, Tr. 2887, *in camera*).

To use Dr. Kahwaty's method consistently, all customer switches since 2007 would have to be accounted for, something Dr. Kahwaty failed to do.

1363. { [REDACTED]  
[REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5579 – 85, *in camera*).

**Response to Finding No. 1363:**

The Horizontal Merger Guidelines state that the very high HHIs and deltas, like those observed in this case create a presumption of competitive harm. (Kahwaty, Tr. 5294, *in camera*).

1364. { [REDACTED]  
[REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5176-77, *in camera*).

**Response to Finding No. 1364:**

This finding is contradicted by the record. The purpose of defining markets and identifying market participants is to reach an understanding of a merger's likely effect on competition. (RX01652 at 010). Identifying Microporous as a market participant in SLI is consistent with that purpose. Microporous was marketing SLI separators and Exide was interested in obtaining SLI battery separators from Microporous. (Simpson, Tr. 3439, *in camera*; CCFOF 604-630). Microporous envisioned taking market share away from Daramic. (PX0080 at 060, *in camera*). Daramic feared that Microporous would take market share from it. (CCFOF 526-527). In fact, Daramic had responded to Microporous's entry into the SLI market by lowering the price of its SLI separators to at least one customer. (PX0258). Identifying Microporous as a market participant in UPS is also consistent with the purpose of defining markets and identifying market participants. MPLP was Daramic's only competitive constraint in UPS. (CCFOF 501-507). MPLP was in the process of commercializing a UPS separator that would address the black scum issue. (CCFOF 508-519). And, MPLP expected to make sales in late 2008 or early 2009. (CCFOF 520).

In contrast, identifying Entek as a market participant in either the deep-cycle or motive separator market would not be consistent with the purpose of defining markets and identifying market participants. Entek has repeatedly declined to serve the deep-cycle and motive separator markets. (CCFOF 311-319). And, Entek would need several years to obtain the tangible and intangible assets required to compete at the level of Daramic or the pre-acquisition MPLP. (CCFOF 919-932, CCFOF 311-319). Similarly, identifying Amer-Sil, BFR, Anpei, or other Asian firms as market participants in the North American SLI, deep-cycle, motive, or UPS would not be consistent with the purpose of defining markets and identifying market participants since they could not enter in under two years and were not viewed by customers as reasonable alternatives to Daramic or Microporous. (CCFOF 260-267, 283-286, 933-986).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1365. {

(Kahwaty, Tr. 5178, *in camera*).

**Response to Finding No. 1365:**

Dr. Simpson's testimony is consistent with industry facts. East Penn buys Daramic's HD separators for its deep-cycle batteries. (Leister, Tr. 4039). East Penn was paying Entek higher prices for deep-cycle separators than East Penn is currently paying to Daramic for HD separators. (Leister, Tr. 4041). Dr. Simpson noted that { } does not currently make deep-cycle or motive battery separators and thus would need { } before it could have a significant effect on these markets as a supplier. (Simpson, Tr. 3195-3196, *in camera*). Specifically, Dr. Simpson explained that to enter the deep-cycle battery separator market at a level sufficient to restore the pre-acquisition competitive environment, { } would need to develop a reliable product, modify its production line, get qualified by customers, and then gain the learning by doing necessary to be efficient. (Simpson, Tr. 3408, *in camera*). It will take at least 18 months of customer testing for Entek to reenter the deep-cycle market. (CCFOF 896-904).

Entek is unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996. (Gilchrist, Tr. 363). Moreover, Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process. (Gilchrist, Tr. 365, 389-390). JCI pursued

discussions with Entek about possible supply of deep-cycle separators. JCI [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (PX1515 at 006, *in camera*).

Dr. Kahwaty was forced to admit [REDACTED]

[REDACTED] (Kahwaty, Tr. 5417, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Accordingly, Entek is not an uncommitted entrant in the deep-cycle market.

- f. Economic testimony supports the view that the acquisition would produce no anticompetitive unilateral affects.

1366. {

[REDACTED]

} (Kahwaty, Tr. 5256, *in camera*).

**Response to Finding No. 1366:**

This finding is contradicted by the facts. Even in the broad market defined by respondent's expert, high concentration creates a presumption of competitive harm. (Kahwaty, Tr. 5294, *in camera*).

Moreover, the evidence shows that Microporous was a low cost producer and a maverick willing to take lower margins for its products to gain market share. (CCRF 1308 f.). Dr.

Kahwaty conceded [REDACTED]

[REDACTED] (Kahwaty, Tr. 5255, *in camera*). Dr. Kahwaty also conceded that he could not say whether Microporous [REDACTED] (Kahwaty, Tr. 5256, *in camera*). Dr. Kahwaty then conceded [REDACTED] [REDACTED] (Kahwaty, Tr. 5259, *in camera*). Dr. Kahwaty was also unable to cite any data to support his argument that [REDACTED] [REDACTED] (Kahwaty, Tr. 5257, *in camera*). The statement in the last sentence is also contradicted by Dr. Kahwaty's nonsensical assertion that [REDACTED] [REDACTED] (Kahwaty, Tr. 5217, 5256, *in camera*).

Dr. Kahwaty acknowledged that, after allowing for its Feistritz facility, Microporous had [REDACTED] [REDACTED] (Kahwaty, Tr. 5432, *in camera*). Microporous was also expanding quickly, adding lines to take on new customers.

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

It follows that there is a well established basis for concern that the acquisition would give Daramic an increased ability to raise prices in the PE separator market that respondent argues.

1367. { [REDACTED] }  
(Kahwaty, Tr. 5556-57, *in camera*).

**Response to Finding No. 1367:**

This finding is contradicted by the testimony of Mr. Hall, who testified that he did not know whether [REDACTED] } (Hall, Tr. 2825-2826, *in camera*). Further, Mr. Gillespie testified that Exide is reluctant to buy from a supplier that is partly owned by a competitor because Exide considers it a risk that { [REDACTED]

[REDACTED]  
[REDACTED]}. (Gillespie, Tr. 3024-3025, *in camera*). Exide considers [REDACTED]  
[REDACTED] as adding risk to the supply chain. (Gillespie, Tr. 3024-3025, *in camera*).

[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3442, *in camera*). Dr. Simpson explained: [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3441, *in camera*). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3442, *in camera*; see also Gillespie, Tr. 3024-3025, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed statement by Mr. Hall that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1368. [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5181-82, *in camera*).

**Response to Finding No. 1368:**

Respondent's proposed finding is contradicted by the record. Dr. Simpson explained that the terms of coordination need not be overly elaborate – such terms could be as simple as a division of markets or the assignment of customers. (Simpson, Tr. 3200, *in camera*).

Coordination via a market division agreement - similar to that explicitly agreed upon by Daramic and H&V - would be relatively simple to monitor and enforce. (Simpson, Tr. 3389-3390, *in camera*). Dr. Kahwaty later conceded that his testimony on the likelihood of coordinated interaction concerned coordination of price rather than market division or assignment of customers. (Kahwaty, Tr. 5473-5476, *in camera*).

The acquisition will facilitate coordinated interaction. (Simpson, Tr. 3201, *in camera*). In SLI, the merger would eliminate one of three suppliers, enhancing the ability to monitor any explicit or implicit noncompetitive agreement. (Simpson, Tr. 3201-3202, *in camera*). The acquisition also removed a maverick firm, the firm that was most aggressive about introducing new products and adding market share. (Simpson, Tr. 3201-3202, *in camera*).

The SLI market lends itself to coordinated interaction because (1) there are a small number of firms; (2) there is repeated interactions among those firms; and (3) information is about competitor actions is readily available in the marketplace. ( [REDACTED]

[REDACTED]

(Simpson, Tr. 3390-3391, *in camera*).

1369. { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5182-83, *in camera*).

**Response to Finding No. 1369:**

Respondent's proposed finding is contradicted by the record, which shows that Daramic was knowledgeable about the actions of its competitors and Dr. Simpson explained how

punishment for any violation could work. (CCFOF 530-546; Simpson Tr. 3200, *in camera*,

PX2251 at 009-010 Dr. Kahwaty admitted being aware of {

} (Kahwaty, Tr. 5343, *in camera*).

(PX0471, *in camera*; Toth Tr. 1604-1605, *in camera*). This shift occurred after the merger with Microporous and during the course of the FTC's investigation. {

} (Simpson, Tr. 3390-3391, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1370. {

} (Kahwaty, Tr. 5183-84, *in camera*).

**Response to Finding No. 1370:**

Respondent's proposed finding is contradicted by Dr. Simpson's testimony, explaining that "the fact that a company has excess capacity does not automatically make it a fierce competitor." (Simpson Tr. 3196, *in camera*). Dr. Simpson pointed out that excess capacity was created by the recession and would likely go away when the economy recovers. (Simpson, Tr. 3195, *in camera*). Finally, Dr. Simpson noted that Daramic did not seem to fear





Daramic [REDACTED] (CCFOF 422-424). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Simpson, Tr. 3211-3219, *in camera*; PX0203 at 85-89).  
in camera

Economic analysis indicates that Daramic increased price anticompetitively as a result of this acquisition. (CCFOF 790-816). The two methods that Dr. Simpson used are widely accepted in the industrial organization field. (Simpson, Tr. 3209-3211, *in camera*). Respondent incorrectly states that Dr. Simpson testified that the issue of whether Daramic increased price could only be investigated using econometrics. (Simpson, Tr. 3209-3211, *in camera*). Respondent's error is manifest in their citation of Dr. Kahwaty's testimony for something to which respondent claims Dr. Simpson testified.

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1374. { [REDACTED] }  
(Kahwaty, Tr. 5188-90, *in camera*). {

[REDACTED]

} (Kahwaty, Tr. 5190-92, 5207, *in camera*).

**Response to Finding No. 1374:**

Respondent's assertion that Dr. Simpson's difference-in-differences analysis was inadequate is contradicted by the record. (RFOF 1263-1269). Respondent's argument that Dr.

Simpson's control group did not adequately capture market conditions in a but-for world without the acquisition is also contradicted by the record. Dr. Simpson explained why [REDACTED]

[REDACTED] (CCFOF 799-801).

These three firms received more favorable pricing than firms that were not covered by long-term contracts, firms that had contracts with Microporous, and firms that had entered into long-term contracts with Daramic prior to the more-competitive environment created by Microporous's expansion. (CCFOF 802). Simply put, the customers that Daramic offered favorable pricing in response to MPLP's expansion received lower price increases than other firms.

The distinction between the control and treatment groups highlight the fact that Daramic has, on numerous occasions, raised its prices in the middle of a contract. Whether Daramic chooses to bear this risk is a competitive tactic (just as pricing is). The control group consists of customers for whom Daramic agreed to bear the risk of cost increases, a pre-merger benefit offered by Daramic to compete with Microporous. By contrast, the treatment group consists of customers who agreed to bear part of the risk of cost increases. Pre-merger competition motivated Daramic to bear risk that it shed post-merger, to the detriment of its customers. The treatment group wound up paying higher prices in part due to the effect of the merger on Daramic's market power. The control group, of course, did not. (PX0033 at 25, *in camera*).

1375. { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5206-07, *in camera*).

**Response to Finding No. 1375:**

This finding is contradicted by the testimony of Dr. Simpson that preacquisition Daramic accepted the risk of being unable to pass on "cost shocks" in order to stymie Microporous's expansion. (CCRF 1374).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1376. {

(Kahwaty, Tr. 5559, *in camera*). {

} (Kahwaty, Tr. 5202-04, *in camera*).

**Response to Finding No. 1376:**

Respondent's proposed finding is contradicted by the fact that Daramic knew that the contracts that set zero percent price increases for 2009 eliminated the possibility of passing through cost increases. (CCFOF 726, PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, 1350-1354, *in camera*). Thus, the contracts accounted for cost shocks - they only did so by assuming that Daramic would absorb such cost shocks. Had the acquisition not occurred, other customers could have received similar favorable treatment.

The two methods that Dr. Simpson used are widely accepted in the industrial organization field. (Simpson, Tr. 3209-3211, *in camera*). Moreover, Complaint Counsel requested price data from respondent and did not receive it. (PX0950 at 016-017, *in camera*; Simpson, Tr. 3369-3373, *in camera*). Respondent may not now hide behind its refusal to produce damning information--Complaint Counsel is entitled to a presumption that the data, had it been produced as required, would also support its case.

1377. {

} (Kahwaty, Tr. 5204-05, 5557-58, *in camera*).

**Response to Finding No. 1377:**

Respondent's proposed finding is contradicted by the record. Dr. Simpson did not discuss the price index for plastic products. (Simpson, Tr. 3214-3219, *in camera*). Rather, Dr. Simpson discussed a general price index based on crude oil. (Simpson, Tr. 3215-3216, *in camera*). Daramic had previously told its customers that examining such a price index was precisely what they should do to verify changes in Daramic's input costs. (PX2068 at 001; Kahwaty, Tr. 5495-5496, *in camera*).

h. Ease of entry

1378. {

} (Kahwaty, Tr. 5209-15, *in camera*).

**Response to Finding No. 1378:**

Respondent's proposed finding is contradicted by the record. Entry into the production of battery separators is not easy. (CCFOF 817-1043; CCRF 1308 e.).

1379. {

} (Kahwaty, Tr. 5209-11, *in camera*).

**Response to Finding No. 1379:**

Respondent's proposed finding is contradicted by the record. Respondent alleges that Entek and firms added production capacity outside North America to argue that entry is easy. But Entek is an existing competitor in SLI, not an entrant. (CCRF 296). Likewise, BFR and Anpei have added additional SLI capacity, a market they already compete in abroad. (CCRF

321, 894). In addition, the record shows that entry involves much more than adding production capacity abroad (CCFOF 817-918).

[REDACTED]  
[REDACTED]}. (Axt, Tr. 2221, *in camera*;  
Burkert, Tr. 2359-2360, *in camera*). Buyers of motive and UPS battery separators do not view Anpei and Separindo as able to replace the competition in the motive or UPS separator markets lost by Daramic's acquisition of MPLP. (CCFOF 936, 960, 965, 967-968, 970-971).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1380. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5211-12, *in camera*).

**Response to Finding No. 1380:**

Respondent's proposed finding is contradicted by the record. Dr. Kahwaty alleges that firms added production capacity outside North America to argue that entry is easy. (CCRF 296). Likewise, BFR and Anpei have added additional SLI capacity, a market they already compete in abroad. (CCRF 321, 894, 1379). The record shows that entry involves much more than adding production capacity abroad. (CCRF 817-918, 1379).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1381. { [REDACTED] } (Kahwaty, Tr. 5209-10, *in camera*).

**Response to Finding No. 1381:**

Respondent's proposed finding is contradicted by the record. Dr. Simpson carefully considered what would be required for foreign firms to enter the North American geographic market and for firms producing only SLI separators to enter one of the markets for deep-cycle, motive, or UPS separators. (CCFOF 919, 847-918). Dr. Simpson concluded, and the record indicates, that these types of entry would not be timely, likely, nor sufficient to replace the competition lost as a result of the merger. (CCFOF 919, 847-918).

The only firm available in North America to expand is Entek. Entek's expansion could only be timely in SLI. (CCFOF 919-932, 881-904, 905-908).

The creation of a new facility by an Asian producer in North America would be de novo entry and would not be timely, likely, nor sufficient to replace the competition lost as a result of the merger. (CCFOF 817-918, 937-1036).

The second sentence, which states: "[t]he acquisition of assets that Dr. Simpson describes and the long time frames that he indicates would be necessary would not be applicable to a firm that is already participating in the market" is true, but irrelevant: one would not analyze entry by firms already participating in a market.

1382. { [REDACTED] } (Kahwaty, Tr. 5213-14, *in camera*).

**Response to Finding No. 1382:**

Respondent's proposed finding is contradicted by the record. { [REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2150, *in camera* ({ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } (Axt, Tr. 2151, *in camera*). Thus, a new entrant would have to build at least two lines in order to get the business of just one customer.

Further, respondent suggests that a firm could attain scale economies with one production line. Relating to this, Dr. Kahwaty initially testified that a divestiture of one production line would be sufficient to remedy any anticompetitive harm from this acquisition. (Kahwaty, Tr. 5239, *in camera*). However, Dr. Kahwaty later conceded that he had done absolutely no analysis to determine what it would take to have a stand-alone business at Newco that would be profitable. (Kahwaty, Tr. 5271, *in camera*). Dr. Kahwaty further conceded that there is nothing in the record to suggest that another firm would buy a divestiture package comprised of one production line of Daramic HD or Cellforce along with equipment for a second line. (Kahwaty, Tr. 5272, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1383. { [REDACTED]

[REDACTED]

[REDACTED] } (Kahwaty, Tr. 5532, *in camera*).

**Response to Finding No. 1383:**

Dr. Kahwaty's assertion about the length of time an expansion in Europe by an incumbent producer there tells the court nothing about de novo entry into North America. New product testing takes 18 to 40 months depending on the market. (CCRF 1308 b., 1308 e.).

Beyond the need for production, there are numerous other barriers to entry including { [REDACTED]

[REDACTED]

[REDACTED] } (PX0265 at 004, 011, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

i. Efficiencies

1384. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5215-5218, *in camera*).

**Response to Finding No. 1384:**

Respondent's proposed finding is contradicted by the record. Dr. Kahwaty conceded that

[REDACTED] (Kahwaty, Tr.

5256, *in camera*). Dr. Kahwaty conceded that he had not compared the production cost of

CellForce with Daramic HD. (Kahwaty 5259, *in camera*). Dr. Kahwaty was unable to cite any

data to support his argument that [REDACTED]

[REDACTED] (Kahwaty, Tr. 5257, *in camera*). Dr. Kahwaty later acknowledged that, after

allowing for its Feistritz facility, { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5432, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

Dr. Kahwaty did not offer an efficiencies analysis of any kind. (Kahwaty, Tr. 5249-5250, *in camera*).

1385. { [REDACTED] } (Kahwaty Tr. 5215-5218, *in camera*).

**Response to Finding No. 1385:**

Respondent's proposed finding is contradicted by the record. Dr. Kahwaty did not analyze efficiencies other than to attempt to argue that MPLP had [REDACTED] (Kahwaty, Tr. 5215, *in camera*). Dr. Kahwaty conceded that his discussion of efficiencies was not offered to say that such efficiencies are sufficient to counteract the competitive concern in this case. (Kahwaty, Tr. 5249-5250, *in camera*). Dr. Kahwaty conceded that he had not analyzed whether any cost savings from the acquisition would be passed on to customers. (Kahwaty, Tr. 5250, *in camera*). Dr. Kahwaty did not offer an efficiencies analysis of any kind, but discussed only competitive effects. (Kahwaty, Tr. 5249-5250, *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]”} (PX0950 at 060, *in camera*). Daramic last updated its interrogatories on March 17, 2009. (PX0952, *in camera*). { [REDACTED] } (PX0033 at 11, *in camera*; PX0950 at 59-60, *in camera*; PX0912 (Riney, Dep. 53, 54, 71, 77), *in camera*). Dr. Simpson concluded that Daramic’s acquisition of Microporous did not generate efficiencies sufficient to justify this acquisition. (Simpson, Tr. 3240, *in camera*).

The assertions in this finding are not supported by any facts. Dr. Kahwaty’s assertion in this finding is unsupported, and is contradicted by the evidence. The supposed “facts” that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

j. Monopoly power

1386. { [REDACTED] } (Kahwaty, Tr. 5223-5224, *in camera*).

**Response to Finding No. 1386:**

Respondent’s proposed finding is contradicted by many facts showing that Daramic has market power in the four markets identified in the FTC’s complaint. E.g., (CCFOF 270-271, 279-280, 1058-1088). As a result of the acquisition, Daramic has “complete control” or 100% of the deep-cycle separator markets world-wide. (PX0076 at 002, Gilchrist, Tr. 421).

1387. { [REDACTED] } (Kahwaty, Tr. 5225-5229, *in camera*).

**Response to Finding No. 1387:**

This finding is contradicted by Daramic’s documents which show its global market share to be at least 57 percent in 2006, and 58% in 2005. (PX0355 at 15; PX0245 at 015; PX0308 at

004, *in camera*). In 2007, Daramic had a [REDACTED] percent share of the Americas in all PE sales. (PX0308 at 001, *in camera*). Daramic's premerger market shares in SLI, motive, and UPS demonstrate its market power. MPLP documents reflect the fact that motive separators are a product market and reflect a highly concentrated North American geographic market projecting shares of 29 percent for Microporous and 71 percent for Daramic in 2008. (PX0072 at 024-025). Daramic PE separators have 95% market share for UPS battery applications in North America. (Brilmyer, Tr. 1834). As a result of the acquisition, Daramic has "complete control" of the industrial flooded reserve power separator markets world-wide. (PX0076 at 002, Gilchrist, Tr. 422). Daramic has 56% of the automotive sales worldwide, with around 50% in the Americas. (PX0040 at 002; PX0308 at 001, *in camera* ([REDACTED] share in Americas in 2007); PX0194 at 019, *in camera*; PX0207 at 067, *in camera* ([REDACTED] worldwide in 2007). Daramic had a 53% market share in SLI in 2005. PX0072 at 028. Post merger, Daramic's market share in motive is 100% and Daramic now has "complete control" or 100% of the deep-cycle separator markets world-wide. (PX0076 at 002, Gilchrist, Tr. 421).

1388. [REDACTED] (Kahwaty, Tr. 5229-5230, *in camera*).

**Response to Finding No. 1388:**

This finding is contradicted by Daramic's documents, which reflect market shares in the Americas to be in the [REDACTED] range. (PX0076 at 002; PX0308 at 001, *in camera*). Daramic has also demonstrated its ability to dictate SLI market pricing in its recent negotiations with Exide. (CCFOF 1059-1088).

1389. [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5230-5231, *in camera*).

**Response to Finding No. 1389:**

Respondent's proposed finding is contradicted by the record. Daramic has demonstrated its ability to dictate price to its customers. (CCFOF 1059-1088). When faced with the prospect of losing business to other suppliers, Daramic has threatened to cut off supply to its customers. (CCRF 1108-1166; PX1793, *in camera*; Hauswald, Tr. 743-744; Hauswald, Tr. 1132-1133, *in camera*; Roe, Tr. 1267-1268; Hall, Tr. 2869-2870; McDonald, Tr. 3880-3882). This is evidence of monopoly power.

[REDACTED] (PX2050, *in camera*). It is not surprising that Exide should refuse to pay it.

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion):

1390. { [REDACTED]

[REDACTED] } (Kahwaty, Tr. 5231-5232, *in camera*).

**Response to Finding No. 1390:**

Respondent's proposed finding is contradicted by the record. Daramic has monopoly power and had monopoly power prior to the merger. (CCRF 1308 g.). The evidence shows that entry into these markets is difficult and would not be timely. (CCFOF 817-1043). Kahwaty alleges, without support, only expansions by incumbent suppliers in the markets in which they already competed. (CCRF1379-80). The record also demonstrates that Daramic used exclusive contracts to further impede entry into these markets. (CCFOF 1101-3).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

k. Customer contracts

1391. { [REDACTED] } (Kahwaty, Tr. 5224-5225, *in camera*). { [REDACTED] } (Kahwaty, Tr. 5225-5232, *in camera*).

**Response to Finding No. 1391:**

This finding is contradicted by the fact that Exclusionary contracts impeded entry by Microporous into the SLI and motive power markets. (CCRF 1308 h.).

{ [REDACTED] } (Simpson, Tr. 3230, *in camera*). { [REDACTED] } (Simpson, Tr. 3231, *in camera*). { [REDACTED] } (Simpson, Tr. 3232, *in camera*).

1392. { [REDACTED] } (Kahwaty, Tr. 5225-5226, 5232, *in camera*).

**Response to Finding No. 1392:**

This finding is contradicted by the fact that the exclusionary contracts at issue operated in specific markets, not to a general all PE market argued by respondent. { [REDACTED]

[REDACTED] }  
(Simpson, Tr. 3236, *in camera*; PX2052 at 002, *in camera*; PX2054 at 003, *in camera*; PX2056 at 001, *in camera*; PX2057 at 001, *in camera*; see PX0033 at 046, *in camera* PX0949 at 22-189; 218-220, *in camera*). { [REDACTED]

[REDACTED] }  
(Simpson, Tr. 3230, *in camera*; PX0637 at 002, *in camera*; PX2052 at 002, *in camera*; PX2054 at 003, *in camera*; PX2055 at 002, *in camera*; PX2056 at 001, *in camera*; PX2058 at 002, *in camera*; See PX0033 at 047, *in camera*; PX0949 at 22-189; 218-220, *in camera*). Market share discounts operate to deter entry as well. (Simpson, Tr. 3256-3261, *in camera*). Daramic's response to Exide's RFP is a perfect example of this as it { [REDACTED] } (Gillespie, Tr. 3012, *in camera*; PX1036 at 002, *in camera*; PX1036 at 003, *in camera*).

As Dr. Kahwaty acknowledged, the monopolization counts are not forward-looking, but apply to past conduct. (Kahwaty, Tr. 5227-5228, *in camera*). Thus it does not matter that some of the exclusionary contracts at issue have expired, Daramic can simply replace them with new ones.

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1393. { [REDACTED] } (Kahwaty, Tr. 5233, *in camera*; Douglas, Tr. 4066-4067, *in camera*; Balcerzak, Tr. 4112-4114, *in camera*).

**Response to Finding No. 1393:**

{ [REDACTED] }  
[REDACTED] } (Simpson, Tr. 3230, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED] } (Simpson, Tr.  
3231, *in camera*). { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } (Simpson, Tr. 3232, *in camera*).

The cited testimony by Mr. Douglas does not support the finding, but relates only to a separate { [REDACTED] } (Douglas, Tr. 4066-4067, *in camera* (no connection to exclusivity or efficiency)). The cited testimony by Mr. Balcerzak also does not support the finding, but relates only to the { [REDACTED] } (Balcerzak, Tr. 4112-4114, *in camera* (no connection to exclusivity or efficiency)).

1394. { [REDACTED] } (Kahwaty, Tr. 5233-5234, *in camera*).

**Response to Finding No. 1394:**

In deep-cycle, where intellectual property and technological barriers exist, Daramic does not need an exclusive contract to exclude competition and has fought to avoid entering into a long term contract with Trojan, who seeks one. (RFOF 759-761).

1. The Daramic/H&V agreement

1395. { [REDACTED] } (Kahwaty, Tr. 5234, *in camera*).

**Response to Finding No. 1395:**

The cross agency agreement prevented entry by H&V into the markets for PE separators and prevented entry by Daramic into the markets for AGM separators which would have resulted in increased competition and lower prices in the markets for PE and AGM separators. H&V is {"always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators.} (PX0925 (Porter, Dep. at 37)). H&V was {"interested in purchasing the Corydon PE facility.} (PX0917 (Cullen, Dep. at 11)). On July 1, 1999, H&V submitted to BHC a proposal to acquire the Corydon plant for \$26,000,000 in cash, and to enter into a series of five-year agreements to supply PE and AGM battery separators to Exide. (PX1368 at 001-002). Daramic was a competing bidder. (PX0726 at 006-008). Daramic was aware that H&V was interested in the Corydon facility. (Hauswald, Tr. 640-641; PX0169 at 001). Although { [REDACTED] } Daramic remained concerned that H&V would pursue an alternative strategy for entering the PE separator market. (PX0169 at 001; PX0035 at 005).

The original { [REDACTED] }  
[REDACTED] } (PX0094 at 001-002, 006, *in camera*). { [REDACTED] }  
[REDACTED] } (PX0158, *in camera*; PX2147,  
*in camera*). The parties agreed and understood that { [REDACTED] }  
[REDACTED]  
[REDACTED] } (PX0094 at 002, *in camera*; RX01014; PX2150 at 001, *in camera*;  
PX0158, *in camera*).

In considering { [REDACTED] }  
[REDACTED] } (PX0923 (Hauswald, IHT  
at 290), *in camera*). That { [REDACTED] }

[REDACTED]

[REDACTED] (PX0923 (Hauswald, IHT at 292, *in camera*)).

[REDACTED]

[REDACTED] (PX2150 at 001, *in camera*; PX1318; *see also* RX00095 at 001, *in camera* [REDACTED]

[REDACTED] )).

As a result of the cross agency agreement, the North American markets for motive and SLI separators have remained a duopoly, and the market for UPS separators has remained a monopoly, since 1999, until the acquisition of Microporous reduced competition in these markets even further.

1396. [REDACTED] (Kahwaty, Tr. 5234-5235, *in camera*).

**Response to Finding No. 1396:**

This finding is contradicted by H&V's actual effort to enter the PE market by acquisition of Exide's Corydon plant. (PX0917 (Culllen, Dep. at 11)). H&V is {"always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators.} (PX0925 (Porter, Dep. at 37)). On July 1, 1999, H&V submitted to BHC a proposal to acquire the Corydon plant for \$26,000,000 in cash, and to enter into a series of five-year agreements to supply PE and AGM battery separators to Exide. (PX1368 at 001-002). Daramic was a competing bidder. (PX0726 at 006-008). Daramic was aware that H&V was interested in the Corydon facility. (Hauswald, Tr. 640-641; PX0169 at 001).

Daramic, likewise, has long expressed an interest in entering AGM. In April, 2005, Mr. Hauswald wrote "[e]very time Frank, or the Board or me meet investors, they ALL ask : what

about AGM ? Aren't you missing the boat ? What do you do ? . . . Only during the last 3 months, we got 2 offers to buy , in Asia, AGM and Glassmat manufacturing plants. Funny enough, it would have been a great deal ! Either they want a JV with us, or to sell everything. We can't because of the agreement with H&V." (PX0169 at 001).

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1397. { [REDACTED] } (Kahwaty, Tr. 5536-37, in camera).

**Response to Finding No. 1397:**

Daramic and H&V did not develop any new separator product for a battery application as a result of the Agreement. (PX0925 (Porter, Dep. at 107-108) ).  
Joint technical collaboration was not within the scope of the Agreement. (PX1356 at 001) (Daramic and H&V each "will maintain [their] own intellectual property" under the Agreement).  
The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1398. { [REDACTED] } (Kahwaty, Tr. 5537-38, in camera).

**Response to Finding No. 1398:**

This finding is contradicted by the fact that both Daramic and H&V had expressed interest in entering the market of the other, and had agreed with each other not to. (CCRF 1396,

1308 i.). Dr. Kahwaty's assertion is pure obfuscation: that there is little evidence of efforts to enter each other's markets after the agreement is hardly surprising in view of the fact that they had agreed not to enter each other's markets.

The assertions in this finding are not supported by any facts. Dr. Kahwaty's assertion in this finding is unsupported, and is contradicted by the evidence. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

m. Remedies

1399. [REDACTED]

[REDACTED] Kahwaty, Tr. 5075, 5236.

**Response to Finding No. 1399:**

The remedies sought by Complaint Counsel are appropriate and necessary to restore competition. (CCRF 1308 j.)

1400. [REDACTED]

[REDACTED] Kahwaty, Tr. 5236-5237.

**Response to Finding No. 1400:**

The Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and giving the acquirer a second source of supply in case problems arose at one plant. (CCFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216; Gaugl, Tr. 4602). { [REDACTED] } (Gilchrist, Tr. 344). Trevathan testified that opening of the Feistritz Plant freed up capacity at Piney Flats. (Trevathan, Tr. 3721). Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

1401. [REDACTED]

[REDACTED]  
Kahwaty, Tr. 5519.

[REDACTED]  
Kahwaty, Tr. 5519.

[REDACTED]  
Kahwaty,  
Tr. 5555.

**Response to Finding No. 1401:**

[REDACTED]  
[REDACTED] (Kahwaty, Tr. 5523). Dr. Kahwaty's assertion in the final sentence of this finding is contradicted by the fact that the Feistritz Plant would aid viability and competitiveness of an acquirer by enabling it to serve global customers and giving the acquirer a second source of supply in case problems arose at one plant. (CCFOF 1034, 1203, 1206, 1207, 1209, 1210, 1214, 1215, 1216; Gaugl, Tr. 4602). Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198). Indeed, as Mr. Axt of EnerSys testified, building Feistritz was the only way that Microporous was able to gain all of EnerSys's North American business. (Axt, Tr. 2129 ("[w]e cannot rely on one manufacturing facility to support our motive power business. It's 50 percent of our revenue. We couldn't have just one plant, one provider for separator for motive power.")).

1402. [REDACTED]

[REDACTED]  
Kahwaty, Tr. 5237.

**Response to Finding No. 1402:**

ACE-SIL is used as an input in the production of CellForce. (Gilchrist Tr. 312; Hauswald, Tr. 672; PX0798). The two buildings at the Piney Flats Plant, which contain the

ACE-SIL production line (along with the Flex-sil production line) and the CellForce production line, have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager, (Gilchrist, Tr. 539), and the administrative office for both buildings are contained in the building housing the ACE-SIL production line. (Gilchrist, Tr. 311). Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

1403.

Kahwaty, Tr. 5238-5240.

**Response to Finding No. 1403:**

Flex-sil is not its own product market. (CCRF 1308 a.) Flex-Sil competed with Daramic HD in deep-cycle. (PX0078 at 007; Gilchrist, Tr. 305, 343; PFOF 260-263). At the time of the acquisition, Daramic's profit margins on HD were [REDACTED] than the profit margins on CellForce and Flex-Sil (Gilchrist, Tr. 467, *in camera*). Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

1404.

5561-62.

Kahwaty, Tr.

**Response to Finding No. 1404:**

At the time of the acquisition, Daramic's profit margins on HD were [REDACTED] than the profit margins on CellForce and Flex-Sil (Gilchrist, Tr. 467, *in camera*).

The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager. (Gilchrist, Tr. 539). They also share the same administrative office. (Gilchrist, Tr. 311).

The assertions in this finding are not supported by any facts. (See also RFOF 1143 (no citation to record for same proposition). Dr. Kahwaty's assertion in this finding is unsupported. The supposed "facts" that respondent attempts to introduce through Dr. Kahwaty in this finding should be stricken (impermissible to cite expert for anything but his opinion).

1405.

Kahwaty, Tr. 5267.

Kahwaty, Tr. 5269.

**Response to Finding No. 1405:**

Microporous competed in the motive market with CellForce. (Gilchrist, Tr. 385). If the divested entity had HD, it would have to produce a new motive separator. Testing of a new product in motive power takes three years. (Whear, Tr. 4798; PX0568; see also Whear, Tr. 4813, *in camera*; PX0564, *in camera*; Gagge, Tr. 2490). It would thus take Newco three years to reenter the market for motive power with some other separator. Microporous's UPS product also contained AceSil dust. (PX0661 at 001). Newco would have to invent a new product which would have to undergo at least 40 months of testing to reenter the UPS market. (Gagge, Tr. 2491-2492). Thus Dr. Kahwaty's proposed "remedy" would not remedy the harm in the motive or UPS markets and create a high cost competitor in the deep-cycle market. The divestiture of HD would be significantly more difficult than a divestiture of the entire former Microporous.

The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager. (Gilchrist, Tr. 539). They also share the same administrative office. (Gilchrist, Tr. 311).

At the time of the acquisition, Daramic's profit margins on HD were [REDACTED] than the profit margins on CellForce and Flex-Sil (Gilchrist, Tr. 467, *in camera*).

1406. [REDACTED]

[REDACTED] Kahwaty, Tr. 5570 – 72.

**Response to Finding No. 1406:**

Microporous competed in the motive market with CellForce. (Gilchrist, Tr. 385). If the divested entity had only PE and/or HD, it would have to produce a new motive separator. Testing of a new product in motive power takes three years. (Whear, Tr. 4798; PX0568; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*; Gagge, Tr. 2490). It would thus take Newco three years to reenter the market for motive power with some other separator. The divestiture of CellForce would require the divestiture of the AceSil line because AceSil dust is the input for CellForce. (Gilchrist Tr. 312; Hauswald, Tr. 672; PX0798). Dr. Simpson testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager. (Gilchrist, Tr. 539). They also share the same administrative office. (Gilchrist, Tr. 311).

1407. The viability of divestiture to deal with any competition concerns might be increased if it were not to a brand new startup company (a "Newco") but rather to an established company that has some experience in the industry but that would be competitively acceptable. Kahwaty, Tr. 5572 – 73.

**Response to Finding No. 1407:**

Complaint Counsel has no specific response.

1408. [REDACTED]

[REDACTED]  
Kahwaty, Tr. 5273.

**Response to Finding No. 1408:**

The equipment purchased by Microporous for its North American expansion is necessary to support the EnerSys business for which Microporous had contracted. { [REDACTED]

[REDACTED] }. (RX00207 at 010; Axt, Tr. 2152, *in camera*). { [REDACTED]  
[REDACTED] } (RX00207 at 010; Axt, Tr. 2156, *in camera*). According

to Mr. Axt, { [REDACTED]  
[REDACTED] }. (Axt, Tr. 2153, *in camera*). In order for Newco to support the EnerSys business, Daramic will need to install this line in Piney Flats.

1409. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5240, *in camera*).

**Response to Finding No. 1409:**

The H&V cross-agency agreement harmed competition in the markets for PE and AGM separators by reducing competition in those markets. (CCRF 1308 i.).

1410. { [REDACTED]  
[REDACTED] } (Kahwaty, Tr. 5240, *in camera*).

**Response to Finding No. 1410:**

Daramic's exclusionary contracts harmed competition. (CCRF 1391-94).

As Dr. Kahwaty acknowledged, the monopolization counts are not forward-looking, but apply to past conduct. (Kahwaty, Tr. 5227-5228, *in camera*). Thus it does not matter that some of the exclusionary contracts at issue have expired, as a monopolist, Daramic can simply replace them with new ones as it did with EnerSys in 2006. (CCFOF 1111-66).

1411. {

} (Kahwaty, Tr. 5275-76, *in camera*).

**Response to Finding No. 1411:**

The facts demonstrate that Microporous would be a strong, vibrant, rapidly expanding company today. (CCRF 421-22).

1412. {

} (Kahwaty Tr. 5546-49, *in camera*).

**Response to Finding No. 1412:**

The two buildings at the Piney Flats Plant, which contain the ACE-SIL production line (along with the Flex-sil production line) and the CellForce production line, have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager, (Gilchrist, Tr. 539), and the administrative office for both buildings are contained in the building housing the ACE-SIL production line. (Gilchrist, Tr. 311). Dr. Simpson testified that the likelihood of coordinated effects are increased by information transparency. (CCRF 1308 d). Sharing common office space, parking lots, and other necessary interaction would enhance the probability that the post divestiture firms would coordinate their behaviour. Dr. Simpson also testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

1413. {

} (Kahwaty, Tr. 5547-48, *in camera*).

**Response to Finding No. 1413:**

ACE-SIL is used as an input in the production of CellForce. (Gilchrist Tr. 312; Hauswald, Tr. 672; PX0798). The two buildings at the Piney Flats Plant, which contain the

ACE-SIL production line (along with the Flex-sil production line) and the CellForce production line, have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager, (Gilchrist, Tr. 539), and the administrative office for both buildings are contained in the building housing the ACE-SIL production line. (Gilchrist, Tr. 311). Dr. Simpson testified that the likelihood of coordinated effects are increased by information transparency. (CCRF 1308 d.). Sharing common office space, parking lots, and other necessary interaction would enhance the probability that the post divestiture firms would coordinate their behaviour. Dr. Simpson also testified that to restore competition a remedy would need to recreate a firm similar to Microporous. (CCFOF 1197-1198).

1414. [REDACTED]

] (Kahwaty, Tr. 5548-49, *in camera*).

**Response to Finding No. 1414:**

The two buildings at the Piney Flats Plant have never been operated independently. (Gaugl, Tr. 4641). The two buildings share the same plant manager. (Gilchrist, Tr. 539). They also share the same administrative office. (Gilchrist, Tr. 311).

Dr. Simpson testified that the likelihood of coordinated effects are increased by information transparency. (CCRF 1308 d.). Sharing common office space, parking lots, and other necessary interaction would enhance the probability that the post divestiture firms would coordinate their behaviour.

## CONCLUSIONS OF LAW

### **XI. COMPLAINT COUNSEL BEAR THE BURDEN OF PERSUASION ON ALL ELEMENTS OF A SECTION 7 VIOLATION.**

1415. Section 7 of the Clayton Act prohibits mergers/acquisitions “where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

1416. Complaint Counsel bear the burden of proving every element of the claim that the merger or acquisition violates Section 7. Complaint Counsel retain the ultimate burden of persuasion at all times and on all components of the Section 7 claim. *FTC v. Arch Coal, Inc.*, 329 F. Supp.2d 109, 116-17 (D.D.C. 2004); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 937 F.2d 1206, 1218 (11<sup>th</sup> Cir. 1991); *United States v. Oracle Corp.*, 331 F. Supp.2d 1098, 1110 (N.D. Cal. 2004).

1417. The legality of a particular merger or acquisition should be determined based on the conditions prevailing at the time of the trial or administrative hearing. *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957). Post-acquisition evidence may be introduced to show that a merger or acquisition did not violate Section 7 so long as the events shown by the evidence were not controlled by the acquiring firm. *United States v. General Dynamics Corp.*, 415 U.S. 485, 506 (1974); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7<sup>th</sup> Cir. 1981); *United States v. International Harvester Co.*, 564 F.2d 769, 777-80 (7<sup>th</sup> Cir. 1977).

#### **A. MERGER CHALLENGES HAVE GENERALLY OCCURRED IN INDUSTRIES WHERE THE CONCENTRATION LEVELS SPECIFIED BY THE GUIDELINES HAVE BEEN EXCEEDED SUBSTANTIALLY.**

1418. The Horizontal Merger Guidelines (hereinafter, “Merger Guidelines” or “Guidelines”) were issued in 1992 by the Federal Trade Commission and the United States Department of Justice Antitrust Division. These Guidelines use, and define, the Herfindahl-Hirschman Index (“HHI”) as the method of measuring pre-merger and post-merger market concentration.

1419. The Merger Guidelines provide that where the post-merger HHI exceeds certain levels, it will be presumed that mergers producing a certain increase in the HHI are likely to create or enhance market power or facilitate its exercise. Sec. 1.51(c). The Guidelines also provide, however, that this “presumption may be overcome by a showing that factors set forth in Sections 2-5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.” Sec. 1.51(c).

1420. According to data issued jointly by the FTC and the Antitrust Division in 2003, which was a study of merger challenges that had occurred during 1999 to 2003, the actual merger challenges involved post-merger HHIs that were substantially higher than the level stated in the Merger Guidelines as triggering a presumption of market power. Federal Trade Commission & U.S. Department of Justice, Merger Challenges Data, Fiscal Years 1999-2003 (Dec. 18, 2003).

B. THE GUIDELINES IDENTIFY A FIVE-STEP APPROACH TO THE ANALYSIS OF A MERGER OR ACQUISITION.

1421. The Merger Guidelines set up a five-step approach to the assessment of a merger or acquisition under Section 7: (1) defining the relevant market or markets and assessing concentration in that market or markets; (2) determining whether the acquisition would trigger concerns about impact on competition; (3) assessing entry conditions and whether new entry would moderate or eliminate any concerns regarding impact on competition; (4) considering whether the acquisition would result in efficiencies; and (5) determining whether the acquired company was a failing firm. Guidelines Sections 1 - 5.

C. COMPLAINT COUNSEL MUST PROVE THE RELEVANT PRODUCT MARKET OR MARKETS AND THEY HAVE FAILED TO DO SO.

1422. Complaint Counsel must establish the relevant product market or markets and the geographic territory for each of them as a precondition to any Section 7 claim. "Determination of a relevant market is the necessary predicate" to a claimed violation of Section 7. *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957). The Merger Guidelines require definition of the relevant product and geographic markets in order to determine whether there has been a violation. "A merger is unlikely to create or enhance market power or facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured." Sec. 1.0.

1423. A relevant market must be defined even though the agency or the court relies on direct evidence of market power or competitive effects. Proof of an effect on competition "is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 737 (7<sup>th</sup> Cir. 2004).

1424. In several cases, challenges to mergers were rejected where the plaintiff failed to establish the relevant market. *FTC v. Freeman Hospital*, 69 F.3d 260 (8<sup>th</sup> Cir. 1995); *California v. Sutter Health System*, 84 F. Supp.2d 1057 (N.D. Cal. 2000).

1425. For purposes of determining both the product or products and the geographic area of the relevant market or markets, the Guidelines apply the "'smallest market' principle." Section. 1.21.

1426. To define the product market, the Guidelines "begin with each product . . . 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 ('SSNIP'), but the terms of sale of all other products remained constant." Sec. 1.11. If the result of that price increase were that the hypothetical monopolist would not find the price increase profitable, then it would be necessary to add to the relevant product market the product(s) to which purchasers shifted. The process would then be repeated until a product or group of products is identified for which the SSNIP is profitable. Sec. 1.11.

1427. Complaint Counsel in this case have not used the hypothetical monopolist (SSNIP) system as the basis for identifying the relevant product markets they allege. The only use of the

SSNIP system made by Complaint Counsel is for the purpose of contending that non-PE battery separators are not included in their relevant product markets. Complaint Counsel's Pre-Trial Brief at 8 - 13. Instead they rely upon a claim that battery separators used in certain applications cannot be used in other applications. Complaint, ¶ 14. In doing so, Complaint Counsel apply an erroneous principle and one that is not supported by the facts. This Court concludes that AceSil and FlexSil are separate markets and that an all PE separator market exists.

1428. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel has failed to prove the relevant product market or markets.

D. COMPLAINT COUNSEL MUST PROVE THE RELEVANT GEOGRAPHIC MARKET OR MARKETS AND THEY HAVE FAILED TO DO SO.

1429. To define the geographic market, the Guidelines "delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price ('SSNIP'), holding constant the terms of sale for all products produced elsewhere." Sec. 1.21. If purchasers, in response to the SSNIP, shifted to suppliers outside the initial area, then it would necessary to add to the geographic market the areas to which these purchasers switched. Sec. 1.21.

1430. Similarly, for purposes of defining the relevant geographic market, Complaint Counsel do not use the "smallest market principle" incorporated in the Merger Guidelines and they do not use the SSNIP system promulgated by the Guidelines. Complaint Counsel claim that "[a] monopolist of all North American separator production could profitably increase prices to *North American customers* for each relevant product by a SSNIP." Complaint Counsel's Pre-Trial Brief at 13 (emphasis added). The Guidelines, however, contain no requirement that the profitability of the price increase be limited to customers actually located within the initial territory. The Guidelines simply ask whether the "hypothetical monopolist . . . [could] profitably impose a [SSNIP], holding constant the terms of sale for all products produced elsewhere." The Guidelines then inquire as to the responses of "buyers," without reference to their location.

1431. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth here, the Court concludes that Complaint Counsel has failed to prove the relevant geographic market or markets.

E. COMPLAINT COUNSEL FAIL PROPERLY TO TAKE ACCOUNT OF ALL MARKET PARTICIPANTS FOR PURPOSES OF CALCULATING MARKET CONCENTRATION EVEN IN THE IMPROPER MARKETS THEY ALLEGE.

1432. In order to calculate market concentration in each relevant market, the Guidelines direct that market participants be identified. Market participants include firms that produce or sell the products in the relevant market, including vertically integrated firms "to the extent that such inclusion accurately reflects their competitive significance in the relevant market prior to the merger." Sec. 1.31.

1433. According to the Guidelines, other firms will also be included as market participants even though they are not currently producing or selling products in the relevant market. These firms are referred to as "uncommitted entrants." They are counted if production or sales by them in the market are "likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a [SSNIP]." Sec. 1.32. The category of uncommitted entrants includes firms that can within the timeframe specified and without incurring significant sunk costs shift production from the production of other products to the production of products in the relevant market ("production substitution"). Sec. 1.321. Complaint Counsel's concentration calculations for their alleged motive, UPS and deep cycle markets are defective because of their failure to include Entek, a significant uncommitted entrant, in their calculations for these markets.

1434. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel has failed to take account of all market participants for purposes of calculating market concentration, even in the improper market(s) they allege.

F. MARKET SHARES ALONE MAY NOT BE SUFFICIENT TO PREDICT THE COMPETITIVE EFFECTS OF A MERGER OR ACQUISITION.

1435. Market shares are calculated for all firms determined to be market participants and, for purposes of gauging the level of market concentration, the HHI is then calculated using the market shares. Secs. 1.4 and 1.5.

1436. Courts and the FTC cannot rely on market shares and concentration alone to determine whether a violation of Section 7 has occurred. Such information alone does not "as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974). Courts must also assess the "structure, history and probable future" of the relevant product market. *Id.* at 501-02. The court in *Baker Hughes* said that "[t]he Supreme Court has adopted a totality-of-the-circumstances approach to [Section 7], weighing a variety of factors to determine the effects of particular transactions on competition." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990). The Merger Guidelines provide that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger" (Sec. 2.0) and that "market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger." Sec. 1.52.

1437. In this case, however, the very low market share of Microporous before the acquisition demonstrates that it had no ability to increase output sufficiently to affect market prices in the PE separator market, even in North America alone. "The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable." Merger Guidelines Sec. 2.0.

1438. In the Boeing/McDonnell Douglas merger (1997), the FTC itself decided, even though the two companies were two of three market competitors and Boeing had 60% of the market, that the merger should not be challenged because McDonnell Douglas was "no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market" and that it

was “no longer an effective competitor.” The Commission decided that McDonnell Douglas was “no longer a competitive constraint on the pricing of Boeing and Airbus.” See Statement of Chairman Robert Pitofsky and Comm’rs Janet D. Steiger, Roscoe B. Staret III, and Christine A Varney, Boeing Co., FTC File No. 971-0051 (July 1, 1997), available at <http://www.ftc.gov/opa/1997/07/boeingsta.shtm>. Federal Trade Commission & U.S. Department of Justice, Commentary on the Horizontal Merger Guidelines (2006) at 16.

1439. Based on the Court’s foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel with respect to Daramic’s so-called “market shares” is insufficient to predict the competitive effects of Polypore’s acquisition of Microporous.

G. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW THAT THE ACQUISITION WOULD HARM COMPETITION BECAUSE OF COORDINATED INTERACTION.

1440. The Merger Guidelines outline the two principal methods of assessing the possibility of an anticompetitive effect resulting from a merger, coordinated interaction and unilateral effects. Secs. 2.1 and 2.2. “Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group, (2) to have a means to detect deviations that would undermine the coordinated interaction, and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of deviations. . . . It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade.” Commentary on the Horizontal Merger Guidelines at 18-19.

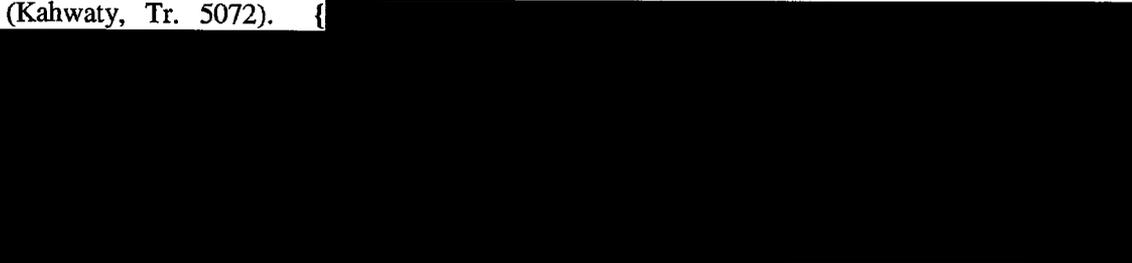
1441. In addition: the presence of sophisticated customers (“power buyers”) in markets involving infrequent purchases, long-term contracts and bidding can be a substantial factor in promoting a competitive market. In *United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. cir. 1990) the court in affirming the lower court pointed to the fact of sophisticated buyers purchasing expensive equipment using “multiple, confidential bids for each order.” The court said that “[t]his sophistication . . . was likely to promote competition even in a highly concentrated market.” 908 F.2d at 986. ABA Section of Antitrust Law, Mergers and Acquisitions at 159-60 (3d ed. 2008) (hereinafter, “ABA, Mergers and Acquisitions”) (“Courts have recognized that evidence that a small number of buyers purchase most of the product in the market indicates that sellers may not have a great deal of freedom in establishing prices and thus may be less likely to adhere to a collusive agreement. Sophisticated buyers are more likely to detect collusion and offer sellers large orders to induce defections from the agreement or to vertically integrate.”); *FTC v. Elders Grain*, 868 F.2d 901, 905 (7<sup>th</sup> Cir. 1989)(sophisticated buyers may cause sellers to cheat on any price agreement); *FTC v. R.R. Donnelley & Sons Co.*, Civ. No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361, at 10 (D.D.C. 1990)(“[T]he sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction.”)

1442. Complaint Counsel have been unable to prove sufficient facts to support the coordinated interaction theory. The problem for their case is the aggressiveness of Daramic’s two largest customers in moving purchases away from Daramic in favor of its largest rival, Entek. Entek has taken over Daramic’s second largest customer, JCI, and has been negotiating with Exide

(Daramic's largest customer) to acquire its business. Entek also competes aggressively with Daramic for East Penn's business. In this competitive climate, coordinated interaction will not occur.

1443. Past efforts of the FTC to apply the coordinated effects theory to nonprice coordination have been unsuccessful. *E.g., FTC v. Arch Coal, Inc.*, 329 F. Supp.2d 109 (D.D.C. 2004)(court rejected the FTC's theory that the sellers would use tacit coordination to restrict output).

1444. Respondent's economist expert, Dr. Henry Kahwaty, concluded that anticompetitive coordinated effects were not likely to result from the Daramic acquisition of Microporous. (Kahwaty, Tr. 5072). {

 (Kahwaty, Tr. 5183-84, *in camera*). This Court credits and accepts the opinions of Dr. Kahwaty.

1445. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore's acquisition of Microporous would harm competition because of coordinated interaction.

H. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW THAT THE ACQUISITION WOULD HARM COMPETITION BECAUSE OF ANTICOMPETITIVE UNILATERAL EFFECTS.

1446. The Merger 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." Sec. 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.*, 331 F. Supp.2d 1098 (N.D. Cal. 2004) 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. Applying these principles, the court rejected the government's claim of anticompetitive unilateral effects in *Oracle*, finding that the government failed to prove that the products of the merging companies occupied a "product 'node' alone," i.e., "a 'node' or an area of localized competition." *Id.* at 1170, 1172.

1447. The presence of sophisticated customers ("power buyers") in markets involving infrequent purchases, long-term contracts and bidding can be a substantial factor in promoting a

competitive market. In *Baker Hughes*, the court in affirming the lower court pointed to the fact of sophisticated buyers purchasing expensive equipment using “multiple, confidential bids for each order.” The court said that “[t]his sophistication . . . was likely to promote competition even in a highly concentrated market.” 908 F.2d at 986. The role of such purchasers was also relied upon in *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 673 (D. MN 1990) where the five substantial purchasers of fluid milk in the MSP/MSA, if faced with a threatened price increase, would “negotiate a reduction or . . . seek a substitute or replacement supplier of fluid milk,” if necessary “from outside dairies.” This Court has found substantial evidence in the record that Daramic’s customers are sophisticated buyers, yielding great power in contract negotiations and pricing. This Court concludes that such customers, including JCI, EnerSys and Exide are power buyers.

1448. 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.*, Dkt. No. 9300 at 7 (Jan. 6, 2005). *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9<sup>th</sup> Cir. 1997).

1449. Complaint Counsel have also been unable to prove sufficient facts to support their unilateral effects theory. As with the coordinated interaction theory, the problem for their case is the aggressiveness of Daramic’s two largest customers in moving purchases away from Daramic in favor of its largest rival, Entek. Entek has taken over Daramic’s second largest customer, JCI, and has been negotiating with Exide (Daramic’s largest customer) to acquire its business. These facts show that Daramic does not have unilateral power in the PE separator market.

1450. Complaint Counsel have been unable to make the necessary showings in this case. They have been unable to show (1) that the alleged price increases were accompanied by lower output; (2) that the alleged price increases were out of line with pre-acquisition increases or that they were not cost justified; or (3) that the alleged price increases were the result of post-merger enhanced market power as opposed to other, competitively neutral factors.

1451. Respondent’s economist expert, Dr. Henry Kahwaty, concluded that anticompetitive unilateral effects were not likely to result from the Daramic acquisition of Microporous. (Kahwaty, Tr. 5072). {

[REDACTED]

(Kahwaty, Tr. 5187-5207, 5557-58, *in camera*). This Court credits and accepts the opinions of Dr. Kahwaty, gives no weight to the opinions of Dr. Simpson and concludes that Complaint Counsel has failed to show that the acquisition would harm competition because of anticompetitive unilateral effects.

**Response to Conclusion of Law No. 1451:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

1452. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore's acquisition of Microporous would harm competition because of anticompetitive unilateral effects.

I. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW THAT THERE ARE SIGNIFICANT BARRIERS TO ENTRY INTO THE PRODUCTION AND SALE OF BATTERY SEPARATORS.

1453. The Merger 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." Sec. 3.0. "In the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive prices for any length of time." *Baker Hughes*, 908 F.2d at 987. The Guidelines further provide that if entry will be "timely, likely and sufficient in its magnitude," then "the merger raises no antitrust concern and ordinarily requires no further analysis." *Id.* The Guidelines consider entry to be timely where it "can be achieved within two years from initial planning to significant market impact." Sec. 3.2. Entry will be considered likely "if it would be profitable at premerger prices, and if such prices could be secured by the entrant." Sec. 3.3. Entry is likely to be sufficient whenever it is likely pursuant to Sec. 3.3. Sec. 3.4.

1454. Another form of entry contemplated by the Guidelines occurs if differentiated product markets where "rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines." Sec. 2.212. The Guidelines note that "where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider. If either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices." *Id.*

1455. "[L]arge, sophisticated buyers can counteract potentially anticompetitive postmerger 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 and Acquisitions* at 196 n.27.

1456. Respondent's economist expert, Dr. Henry Kahwaty, concluded that any anticompetitive effects that might arise from the acquisition of Microporous by Daramic would be dispelled by new entry. (Kahwaty, Tr. 5072-73). {

{ (Kahwaty, Tr. 5209-14, 5532, in camera). This Court credits and accepts the opinions of Dr. Kahwaty.

Response to Conclusion of Law No. 1456:

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

1457. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel has not shown that there are significant barriers to entry into the production of and sale of battery separators.

J. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW THAT MICROPOROUS WAS A VIABLE POTENTIAL ENTRANT INTO SEGMENTS OF THE BATTERY SEPARATOR INDUSTRY OTHER THAN DEEP CYCLE.

1458. The Supreme Court in *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) provided the legal standards relating both to the theory of elimination of actual potential competition and the theory of perceived potential competition. The Court affirmed the district court, which had decided against the government on the ground that extensive state and federal regulation of banks created "legal" barriers to entry preventing National Bank of Commerce ("NBC"), a subsidiary of Marine Bancorp based in Seattle, from entering independently into the Spokane banking market located in the eastern part of the state. The Court identified the elements of the perceived potential competition theory, stating: "[A] market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities and economic incentive to render it a perceived potential de novo entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market." 418 U.S. at 624-25. The Court found in this case, however, that existing participants in the Spokane banking market were aware of the regulatory barriers preventing NBC from entering that market and, therefore, from exercising any competitive impact in that market.

1459. The Court in *Marine Bancorp* also applied the actual potential competition theory and defined its elements by stating two requirements, in addition to those identified for the perceived potential competition theory: (1) "that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (2) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." 418 U.S. at 633. The Court found that this second requirement was not met because legal restrictions would have prevented expansion from an initial toehold acquisition. 418 U.S. at 636-37.

1460. As for the first prong, the FTC itself has required "clear proof" that the firm would have entered the market. *In re B.A.T. Industries*, 104 F.T.C. 852, 926-28 (1984). In *B.A.T. Industries*, the FTC found that subjective evidence, e.g., capital expenditure plans and internal management studies, were the "best evidence" that the firm would have entered but it also relied on objective evidence, e.g., capabilities, interests and incentives to enter. 104 F.T.C. at 922, 926-28.

1461. Based on the Court's foregoing findings of fact and the applicable legal standards and principles, Complaint Counsel has not shown that Microporous was a viable potential entrant into segments of the battery separator industry other than the deep cycle.

K. MICROPOROUS WAS IN A PRECARIOUS FINANCIAL CONDITION AS OF THE TIME OF THE ACQUISITION, WHICH SIGNIFICANTLY REDUCED ITS COMPETITIVE SIGNIFICANCE.

1462. The Merger Guidelines recognize that acquisition of a "failing firm" would not be likely to have an adverse effect on competition. Status of a "failing firm" is recognized if (1) the firm "would be unable to meet its financial obligations in the near future;" (2) if it could not reorganize successfully under Ch. 11 of the Bankruptcy Act; (3) if it has attempted in good faith to obtain alternative offers of acquisition of its assets that would retain its assets in the relevant market "and pose a less severe danger to competition than does the proposed merger;" and (4) if, "absent the acquisition, the assets of the failing firm would exit the relevant market." Sec. 5.1.

1463. Moreover, no violation of Section 7 has been found in some cases where the court found the acquired firm not to be actually failing but to be for some reason in a sufficiently weak condition that it would not be an effective competitor. *United States v. International Harvester Co.*, 564 F.2d 769 (7<sup>th</sup> Cir. 1977)(impaired financial resources); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108 (E.D. Pa. 1978)(sales decline to the point that ability to compete was impaired); *FTC v. National Tea Co.*, 603 F.2d 694 (8<sup>th</sup> Cir. 1979)(acquired company impaired and likely to depart the market). See ABA Mergers and Acquisitions at 285-86.

1464. The Merger Guidelines point out that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance" and "The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data." Sec. 1.521. These provisions are based on *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) where the Court found no violation of Section 7 because the acquired company's coal reserves were depleted or committed in long term contracts. The analysis did not create a failing company finding but a finding that the acquisition would not produce an adverse effect on competition. An FTC Staff Report concluded that this form of analysis was appropriate. FTC Staff Report, *Anticipating the 21<sup>st</sup> Century: Competition Policy in the New High-Tech, Global Marketplace*, reprinted in 70 *Antitrust & Trade Reg. Rep.* (BNA) No. 1765, S-1 (June 6, 1996). These concepts may have application in this case where the general economic downturn has created substantial excess capacity in the industry and where the economic decline combined with Microporous' pre-transaction weak financial condition and poor management raise questions as to whether the firm would have survived the recession as a viable competitive entity.

1465. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Microporous was in precarious financial condition as of the time of the acquisition, such that Microporous was not competitively significant.

L. DARAMIC HAS REALIZED SUBSTANTIAL EFFICIENCIES SINCE THE ACQUISITION AND THESE HAVE GENERATED PROCOMPETITIVE EFFECTS.

1466. The Merger Guidelines recognize that efficiencies may result from mergers and state that "[t]he Agency will not challenge a merger if cognizable efficiencies are of a character and

magnitude such that the merger is not likely to be anticompetitive in any relevant market.” Sec. 4. “Cognizable efficiencies” are defined as “merger-specific efficiencies that have been verified and do not arise from anticompetitive reduction in output or service.” *Id.* The Guidelines praise one kind of efficiency that has been realized in this case: “efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output.”

1467. The 8<sup>th</sup> Circuit Court of Appeals held in the *Tenet Health Care* case that “the district court should . . . have considered evidence of enhanced efficiency in the context of the competitive effects of the merger.” It held that there was evidence that the merged hospital could offer better medical care than either of the merging hospitals could alone and that it would “be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care.” *United States v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8<sup>th</sup> Cir. 1999).

1468. Based on the Court’s foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Daramic has realized substantial efficiencies since the acquisition and those have generated procompetitive effects.

M. CUSTOMER TESTIMONY MAY BE OF LIMITED WEIGHT AND SIGNIFICANCE REGARDING SUBSTANTIVE ISSUES.

1469. The courts treat with great care and caution customer testimony about relevant markets and adverse effects on competition allegedly resulting from mergers and acquisitions. In *United States v. Oracle Corp.*, 331 F. Supp.2d 1098 (N.D.Cal. 2004), the government offered ten witnesses on the product market and competitive effects questions. Their testimony supported the government’s position that “high function enterprise resource planning software” was the relevant product market. But the court concluded that the testimony was “largely unhelpful” because the witnesses testified to their preferences and “[t]here was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle.” 331 F. Supp.2d at 1131. The court said that none gave testimony about the costs of alternatives, the cost of outsourcing or “how much it would cost to adapt other vendors’ products to the same functionality that the Oracle and PeopleSoft products afford.” *Id.* Finally, the court said that “unsubstantiated customer apprehensions do not substitute for hard evidence.” *Id.*

1470. Based on a number of factors as discussed in the foregoing findings of fact, the Court has multiple questions about the credibility of customer testimony and concludes that it is of limited utility in this matter.

N. COMPLAINT COUNSEL’S EXPERT LACKED INDEPENDENCE AND FAILED TO PERFORM ANALYSIS NECESSARY TO FORM AND SUBSTANTIATE HIS OPINIONS.

1471. Independent analysis of the issues forming the opinion of a proffered expert witness is critical to a court’s receipt of that expert’s opinion. *In re TMI Litigation*, 193 F.3d 613, 698 (3<sup>rd</sup> Cir. 1999), opinion amended by *In re TMI Litigation*, 199 F.3d 158 (3<sup>rd</sup> Cir. 2000); *Crowley v.*

Chait, 322 F.Supp.2d 530, 542, 546-547 (D.N.J. 2004); Lyman v. St. Jude Medical S.C., Inc., 580 F.Supp.2d 719, 726-727 (E.D.Wis. 2008). “That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9<sup>th</sup> Cir. 1995) citing Peter W. Huber, *Galileo’s Revenge: Junk Science in the Courtroom*, 206-09 (1991). Under Federal Rule of Evidence 702, a testifying expert lacks credibility absent evidence of independence from the party or its advocates. Trigon Ins. Co. v. United States, 204 F.R.D. 277, 295 (E.D. Va. 2001); see also Fed.R.Evid. 702 (Expert testimony will be admissible if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.”)

1472. Complaint Counsel’s expert, John Simpson, offered little more than a regurgitation of the allegations of the Complaint and certain selected testimony. Simpson ignored key evidence and failed to conduct any quantitative analysis outside of his HHI calculations, which were in any event in error. Much more is required for this Court to accept Dr. Simpson’s opinions. Accordingly, this Court concludes that Dr. Simpson’s opinions failed to meet the relevant legal standard and are unsupported by the record. In addition, Dr. Simpson lacked credibility in his testimony regarding his opinions and the manner in which they were derived. Therefore, this Court will give no weight to Dr. Simpson’s opinions.

**Response to Conclusion of Law No. 1472:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

O. **COMPLAINT COUNSEL FAILED TO PROVE THAT DARAMIC ENGAGED IN “MONOPOLIZATION” THROUGH THE USE OF EXCLUSIONARY CONTRACTS.**

1473. The offense of monopolization under Section 2 of the Sherman Act “requires, in addition to the possession of monopoly power in the relevant market, ‘the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’” Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872, 878-79 (2004), quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

1474. Monopoly power is “the power to control prices or exclude competition.” United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Daramic had no ability to control prices or exclude competition. Monopoly power that exists for only a short period of time will not support a monopolization claim. “Market power, to be meaningful for antitrust purposes, must be durable.” Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 968 (10<sup>th</sup> Cir. 1990).

1475. Moreover, monopoly power cannot exist where barriers to entry are non-existent or modest. United States v. Microsoft Corp., 253 F.3d 34, 54 (DC Cir. 2001)(“[B]ecause of the possibility of competition from new entrants, looking to market shares alone can be misleading.”) Barriers to entry into the production and sale of battery separators are modest. A firm may not have monopoly power if the industry faces “dwindling market demand.” Antitrust

L. Dev. at 236. The market for battery separators has been dwindling since before the acquisition occurred.

1476. Respondent's economist expert, Dr. Henry Kahwaty, concluded that Daramic did not have monopoly power both because it lacked the power to control prices or exclude entry and because its market shares were insufficient to support a finding that it had monopoly power. (Kahwaty, Tr. 5073-74).

**Response to Conclusion of Law No. 1476:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

1477. For exclusive dealing arrangements to raise antitrust problems, "the competition foreclosed by the contract must be found to constitute a *substantial* share of the relevant market." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961). *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."). The plaintiff must prove the degree of market foreclosure and show that it is substantial. *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) ("it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure;" "[t]he share of the market foreclosed is important because, for the contract to have an adverse effect upon competition, 'the opportunities for other traders to enter into or remain in that market must be significantly limited.'" quoting *Tampa Electric*, 365 U.S. at 328.). *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 394 (7<sup>th</sup> Cir. 1984) (The plaintiff in an exclusive dealing case "must prove . . . that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition.") *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) ("[t]he test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.")

1478. The allegedly exclusionary contracts pointed to by Complaint Counsel were, in fact, not exclusionary. Microporous was not excluded by these contracts either because it was not being considered by the customers for such contracts or because it lacked capacity at the time to produce the products that were the subject of the contracts. Moreover, Complaint Counsel have failed to make any showing of the extent to which they claim the market was foreclosed by the allegedly exclusionary contracts. {

[REDACTED] } (Kahwaty; Tr. 5074, *in camera*). {

[REDACTED] } (Kahwaty, Tr. 5224-33, *in camera*). This

Court credits and accepts the opinions of Dr. Kahwaty.

**Response to Conclusion of Law No. 1478:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

1479. Based on the foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel failed to prove that Daramic engaged in “monopolization” through the use of exclusory contracts.

## **XII. COMPLAINT COUNSEL FAILED TO PROVE THAT THE CROSS AGENCY AGREEMENT BETWEEN DARAMIC AND H&V UNLAWFULLY RESTRAINED TRADE.**

### **A. The Agreement is Governed by the Ancillary Restraints Doctrine.**

1480. The ancillary restraints concept is traced to *Addyston Pipe & Steel co. v. United States*, 175 U.S. 211 (1899). The doctrine is used in assessing a joint venture or competitor collaboration that has a legitimate business purpose but also has some components that are claimed to adversely affect competition. As explained more recently by the Supreme Court in *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006), the doctrine requires a court to determine whether it confronts “a naked restraint of trade . . . or one that is ancillary to the legitimate and competitive purposes of the business association.”

1481. Ancillary restraint analysis was used by the court in *Polk Brothers, Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985). The court found no violation where two potential retail competitors agreed not to sell competing products in order to facilitate joint ownership of a retail outlet. It held that this ancillary restraint was valid because it might “contribute to the success of a cooperative venture that promises greater productivity and output.” 776 F.2d at 189.

### **B. The FTC’s “Inherently Suspect” Doctrine has not been Accepted by the Supreme Court.**

1482. The FTC adopted its “inherently suspect” doctrine in *In re Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988). That doctrine, particularly its burden shifting component, was challenged in *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) and has not been accepted by the Supreme Court. *Texaco Inc. v. Dagher* was a joint sales venture case decided after *Polygram*. In that case, the Court did not recognize the “inherently suspect” system but endorsed (without applying it) the historical “ancillary restraints” method for assessing collateral restraints in joint ventures.

1483. The FTC’s “inherently suspect” doctrine is subject to significant limitations. In *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir 2008), the court said that before a court or the FTC can shift the burden to the defendant to show procompetitive effects, it must make its “inherently suspect” announcement in more than a “ cursory and conclusory manner.” 528 F.3d at 361.

1484. Like the agreement in *Polk Brothers*, the agreement between Daramic and H&V was a legitimate and productive “cooperative venture” which (1) had no effect of limiting or restraining competition between the two companies and/or (2) was reasonably ancillary because it “promote[d] the success of this more extensive cooperation.” 776 F.2d at 189.

1485. Respondent's economist expert, Dr. Henry Kahwaty, concluded that the agreement between Daramic and H&V did not have any adverse effect on competition. (Kahwaty, Tr. 5074-75). Dr. Kahwaty testified that in the absence of any evidence indicating that Daramic and H&V intended to commence production of products made by the other company, the joint marketing arrangements contemplated by the agreement were procompetitive. This Court credits and accepts the opinions of Dr. Kahwaty.

**Response to Conclusion of Law No. 1485:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

1486. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel failed to prove that the Cross Agency Agreement between Daramic and H&V unlawfully restrained trade.

**XIII. THE DIVESTITURE AND OTHER RELIEF SOUGHT BY COMPLAINT COUNSEL ARE UNNECESSARILY OVERBROAD TO ADDRESS COMPLAINT COUNSEL'S COMPETITION CONCERNS AND ARE PUNITIVE.**

A. **Divestiture of all the Acquired Assets is not Required by Law.**

1487. Complete divestiture of all acquired assets is not required unless necessary to restore the competition lost. *RSR Corp. v. FTC*, 602 F.2d 1317, 1325-26 (9th Cir. 1979); *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). There was no competitive overlap between Microporous' Ace-Sil and Flex-Sil products and any products sold by Daramic, and Microporous' plant in Feistritz, Austria, did not sell product in the US. Accordingly, there is no basis for any claim that these production assets should be divested.

1488. Respondent's economist expert, Dr. Henry Kahwaty, concluded that "the remedies that the FTC is seeking in this matter are overbroad and not supported by the record." (Kahwaty, Tr. 5075, 5080).

**Response to Conclusion of Law No. 1488:**

Dr. Kahwaty is not the law. This Conclusion of Law is an improper factual assertion and should be stricken.

B. **Any Divestiture or other Relief must be Keyed to the Status of the Acquired Company Today if the Acquisition had not Occurred.**

1489. The "key" to an antitrust remedy is a determination of the measures needed to effectively restore the competition that was lost and eliminate the effects of the acquisition. *In the Matter of Chicago Bridge & Co.*, Dkt. No. 9300 at 7 (Op. of Comm'n)(Jan. 6, 2005). 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. 207, 345 (1988). Complaint Counsel fail to acknowledge Microporous' weak financial condition at the time of the

acquisition and the real likelihood that it might not have survived the current economic downturn or, at a minimum, would have been reduced to the status of an ineffective competitor.

C. Divestiture is an Equitable Remedy the Need for which must be Proved, and Punitive Relief is not Permissible.

1490. Divestiture is “an equitable remedy designed to protect the public interest.” *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961). It must be based on facts “and economic theory as applied to such facts.” *United States v. Crowell, Collier & MacMillian, Inc.*, 361 F.Supp. 983, 991 (D.C.N.Y. 1973) Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive.” *E.I. du Pont de Nemours & Co.*, 366 U.S. at 326; *In the Matter of Grand Union Co.*, 102 F.T.C. 812 (1983)(“The Supreme Court . . . has ruled that punitive relief is inappropriate in a civil antitrust proceeding.”). Complaint Counsel has failed to prove facts to support all the claims for relief, in particular the claim that certain Daramic assets that were not part of the acquisition should be divested. Any such divestiture would be punitive.

D. Relief, including Divestiture, in a Consummated Merger Case Should be Fashioned Giving Consideration to Post-Transaction Developments and Market Conditions at the Time the Relief is Ordered.

1491. In *Evanston Northwestern Healthcare Corporation*, FTC Docket No. 9315 (Aug. 6, 2007) the Commission considered relief to be ordered in a case where the merger had occurred some seven years earlier. In light of various costs and risks associated with divestiture and since certain improvements that had been made by the merged entity might be adversely affected if divestiture were ordered, the Commission adopted instead a conduct remedy that required separate negotiating teams for the formerly separate hospitals. The Commission said, “A long time has elapsed between the closing of the merger and the conclusion of the litigation. This does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure.” FTC Docket No. 9315 at 89.

1492. Similarly, in *Chicago Bridge & Iron Co.*, FTC Docket No. 9300 (January 6, 2005), the Commission ordered certain “water tank assets” to be included in divestiture even though those assets were not involved in production of the relevant products. The Commission believed that inclusion of the water tank assets was appropriate since revenue from those assets had helped stabilize the relevant market businesses. However, in order “to ensure that narrower relief is available if it is warranted by market conditions,” the Commission also “included a provision that allows the exclusion of the water tank assets if the acquirer and monitor trustee both find them unnecessary and agree to exclude them.” FTC Docket No. 9300 at 95. Reflecting this tailoring of the divestiture order in light of conditions existing at the time of the divestiture, the 5<sup>th</sup> Circuit Court of Appeals in affirming the Commission noted that “CB&I and the monitor are required to divest to the new separate entity *no more* nor less of the former PDM assets as are necessary for the new separate entity to compete with CB&I in the relevant markets on an equal footing.” *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 442 (5<sup>th</sup> Cir. 2008)(emphasis added).

E. COMPLAINT COUNSEL HAS FAILED TO SHOW THAT RECISSION OF DARAMIC'S CONTRACTS IS WARRANTED OR NECESSARY.

1493. Complaint Counsel seeks rescission of Daramic's contracts entered into subsequent to the acquisition. *See* Complaint, XIV. Based on the evidence, this Court concludes that such relief is neither warranted nor necessary. Complaint Counsel has failed to prove its conduct claims and therefore, no relief is required. In addition, to the extent Complaint Counsel seeks rescission of contracts entered into prior to the acquisition, which is not part of the relief sought in the Complaint, such relief, for the reasons stated above, is also not required, necessary or warranted.

**XIV. CONCLUSION**

For the reasons stated above, the Court finds that Complaint Counsel have not proven their claims and the acquisition between Polypore and Microporous Products has not, and will not, cause competitive harm in the worldwide PE separator market. Accordingly, the Court dismisses the FTC's claims with prejudice.

Dated: August 7, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Post-Trial Reply Findings of Fact with:

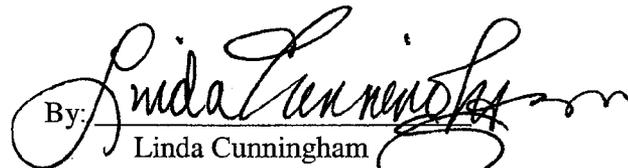
Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Rm. H-135  
Washington, DC 20580

I hereby certify that on August 7, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Post-Trial Reply Findings of Fact with:

The Honorable D. Michael Chappell  
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Federal Trade Commission  
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