

ORIGINAL



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

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

Docket No. 9327

PUBLIC

**RESPONDENT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW FOR RE-OPENED HEARING**

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I. EXHIBIT AND WITNESS INDICES

- A. Exhibit Index – *see* Exhibit A hereto.
- B. Witness Index – *see* Exhibit B hereto.

II. PROCEDURAL BACKGROUND

1494. On June 22, 2009, after a five-week hearing in this proceeding, the record was closed.

1495. On September 25, 2009, Respondent, Polypore International, Inc. (“Polypore or Respondent”) moved for a second time to re-open the record in this proceeding to permit the introduction of new and additional evidence (the “Second Motion to Re-open”). By its Second Motion to Re-open, Respondent sought leave to introduce new and additional evidence regarding (1) {

} and (2) { }, set

forth in four proffers.

1496. After briefing, the Honorable D. Michael Chappell granted Respondent’s Second Motion to Re-open.

1497. On November 12, 2009, in connection with the Second Motion to Re-open, a hearing was held before Administrative Law Judge Chappell. At the November 12 hearing, Respondent presented additional evidence to the Court through witnesses and exhibits regarding the four proffers. Respondent called two witnesses: Mr. Robert Toth (“Toth”), Chief Executive Officer of Respondent and Mr. Harry D. Seibert (“Seibert”), Vice President and Business Director for Respondent’s Daramic subsidiary. Respondent also cross-examined Mr. Douglas Gillespie (“Gillespie”), Vice President of Global Procurement for Exide, who was called by Complaint Counsel as their witness. Respondent introduced 46 exhibits which were admitted into evidence, some over Complaint Counsel’s objections. (Tr. 5632-5642, 5812, 5841; Pre. Tr. 10-11, 14-20). Complaint Counsel called only Gillespie in rebuttal. The record of the November 12, 2009 hearing was closed by Order dated November 23, 2009.

1498. Respondent incorporates herein the definitions set forth in its Proposed Findings of Fact and Conclusions of Law, submitted on July 10, 2009.

III. {
}

A. { _____ }

1499. On May 28 and May 29, 2009, Gillespie testified in this proceeding. (JX-9).

1500. At the time of the hearing this past spring, {

} (RX01720, *in camera*). {

} (Gillespie, Tr. 5807-08, *in camera*;

see also RFOF 524, 530, 531).

1501. {

} (JX-9, *in camera*).

1502. {

} (RX01119, *in camera*; Hauswald,

Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*).

1503. {

} (Gillespie, Tr. 5855-56, *in*

camera).

1504. At the time of the hearing this past summer, {

}. (Seibert, Tr.

5646-48, *in camera*; RX01721, *in camera*).

1505. {

a. { _____

1506. {

}. (RX01721 at 002, *in*

camera; Seibert, Tr. 5648, *in camera*).

1507. {

}. (Seibert, Tr. 5648-49, 5662-63, *in camera*). {

}. (Seibert, Tr. 5682, *in camera*). Even this year, {

}. (Seibert, Tr. 5681-83, *in*

camera; RX01724, *in camera*). {

}. (Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*). {

}. (Seibert, Tr. 5681-83, *in*

1507. {

}. (Toth, Tr. 5648-49, *in camera*). {

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

1508. {

}. (Seibert, Tr. 5649,

5658, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*; RX01669 at 002, *in camera*; RX01713, *in camera*; RX01718, *in camera*; RX01714 at 001 (“{

}.”), *in camera*).

1509. {

}. (Seibert,

Tr. 5651, *in camera*). {

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

1510. {

}. (Seibert, Tr. 5668,

in camera). {

}.” (Seibert, Tr. 5668, *in camera*).

1511. This Court finds Seibert to be a credible witness. Seibert’s testimony is consistent with Respondent’s exhibits. This Court credits Seibert’s testimony in this matter. In contrast, for the

reasons stated herein and previously, this Court does not find Gillespie to be a credible witness. The evidence adduced during the hearing on November 12 and May 28 and 29, 2009 demonstrates that Exide has attempted to manipulate this proceeding by intentionally refraining from certain relevant conduct until after the hearing record had been closed. Gillespie's testimony on May 28 and 29, 2009 was rehearsed with Complaint Counsel, including Exide's "recommendation" of relief. (RFOF 602). Accordingly, this Court does not credit Gillespie's testimony.

b. { _____ }

1512. After Gillespie testified in this hearing on May 28 and 29, 2009, {

} (Seibert, Tr. 5650, *in camera*; RX01665, *in*

camera). {

}." (RX01665 at 001, *in*

camera).

1513. {

} (Seibert, Tr. 5650-51, 5697, 5669-70, *in camera*; RX01665 at 002-

003, *in camera*).

1514. In addition, {

}.
}

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

}, (Gillespie, Tr. 2934, *in*

camera), and is further evidence that {

} and therefore, contrary to Complaint Counsel's assertions, there are no significant barriers to entry for battery separators due to testing, whether for automotive, motive or some other application or use.

1515. {

}. (Seibert, Tr. 5670, *in camera*; RX01697, *in camera*).

1516. At the hearing, {

}.” (Gillespie, Tr. 5852, *in camera*). {

}. (RX01665 at 001, *in camera*). {

}. This Court finds Gillespie's testimony not to be credible and further finds that Exide has attempted to manipulate this proceeding to its benefit.

B. { _____ }

1517. {

}. (RX01713, *in camera*; RX01667, *in camera*; Seibert, Tr. 5665, *in camera*). {

}. (RX01713 at 002, *in camera*). {

}. (RX01713 at 003; Seibert, Tr. 5657, *in camera*).

a. { _____ }

1518. {

}. (Seibert, Tr. 5651-53, 5655, *in camera*; RX01617, *in camera*).

1519. {

}. (Seibert, Tr. 5651-52, 5670, *in camera*). {

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

in camera). {

}. (Seibert, Tr. 5658, *in camera*).

1520. {

}. (Seibert, Tr. 5652-53, *in camera*). {

}. (RX01667 at 002, *in camera*; Seibert, Tr. 5658, *in camera*). {

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

1521. {

}. (RX01667 at 002; Seibert, Tr. 5670, *in camera*).

b. { _____
_____ }

1522. {

}. (RX01668, *in camera*; RX01669, *in camera*;
Seibert, Tr. 5658-59, 5662, *in camera*). {

}. (RX01668 at 002, *in camera*; Seibert, Tr. 5659-60, *in camera*; Gillespie, Tr.
5839,
in camera).

1523. At the same time {

}. (RX01668 at 002
(
}), *in camera*; Seibert,
Tr. 5734, *in camera*). {

}.
}

1524. Upon learning that {

} (Seibert, Tr. 5660, *in camera*). {

} (RX01720 at 035, *in camera*;

Seibert, Tr. 5660, *in camera*). {

} (Seibert, Tr. 5660, *in camera*).

1525. {

} (Seibert, Tr. 5660-61, *in camera*). {

} (Seibert, Tr. 5661, *in camera*).

1526. In subsequent discussions, {

} (Seibert, Tr. 5662-63, 5666, *in camera*;

Toth, Tr. 5749-50, *in camera*; RX01714 at 002, *in camera*; RX01718 at 002, *in camera*). In addition, {

}.
}

(Seibert, Tr. 5663-65, *in camera*; Toth, Tr. 5750-51, 5760-61, *in camera*; RX01718 at 002, *in camera*; RX01683, *in camera*; RX01714 at 002, *in camera*). {

}.
}

1527. {

}.
}

(Seibert, Tr. 5732-34, *in camera*).

1528. {

} (Seibert, Tr. 5645, *in camera*; Gillespie, Tr. 5851, *in camera*; RX01665, *in camera*;
RX01669 at 002, *in camera*; RX01687, *in camera*).

C. { _____ }

1529. After the record was closed on June 22, 2009, {

} (RX01676,

in camera; Seibert, Tr. 5674, *in camera*; Gillespie, Tr. 5845, *in camera*). {

} (Seibert, Tr. 5673-74,

5676-77, *in camera*; Gillespie, Tr. 5845-46, *in camera*; RX01676, *in camera*). {

} (RX01676, *in camera*; JX-9, *in camera*;

Gillespie, Tr. 5839, 5843, *in camera*). Specifically, {

} (Gillespie, Tr. 5843, *in camera*; Toth, Tr. 5752-53, *in camera*;
RX01686, *in camera*).

1532. Based on past practice, {

} (Seibert, Tr. 5671, *in camera*; JX-9, *in camera*). In
contrast, {

}

(RX01676, *in camera*; JX-9, *in camera*; Seibert, Tr. 5673-74, *in camera*; Gillespie, Tr. 5839, *in camera*).

1533. {

} (Seibert, Tr. 5671, *in camera*). {

} (Seibert, Tr. 5672, *in camera*;
RX01723, *in camera*). {

} (Seibert, Tr. 5673,
in camera; RX01708 ({
}), *in camera*.)

1534. {

} (Seibert, Tr. 5678-79, 5709-10, *in camera*). {

} (RX01698, *in camera*;
Seibert, Tr. 5672, *in camera*). {

} . (RX01699, *in camera*; Seibert, Tr. 5672-73, *in camera*).

1535. {

)}, (Seibert, Tr. 5674, *in*

camera), {

} . (Seibert, Tr.

5683, *in camera*). {

} . (Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*). {

} . (RX01723, *in camera*; Gillespie, Tr. 5837, *in camera*).

1536. Moreover, {

} . (Seibert,

Tr. 5681-82, *in camera*). In addition, {

} . (Seibert, Tr.

5682-83, *in camera*; RX01724, *in camera*). {

} . (Gillespie, Tr. 5849-50, *in camera*). {

} . (RX01724, *in camera*; Seibert, Tr. 5683, *in camera*). For example,

{

} . (RX01724,

in camera). Similarly, {

} . (RX01724, *in camera*). {

} .

1537. {

}. (Seibert, Tr. 5683, *in camera*). {

}.”

(RX01717, *in camera*; Gillespie, Tr. 5848-49, *in camera*; Seibert, Tr. 5683-84, *in camera*).

Here, {

)). (Seibert, Tr. 5676-77, 5732, *in camera*).

1538. {

:

}.

(Gillespie, 5842-43, *in camera*).

1539. {

} . (Seibert, Tr. 5680-81,

in camera).

1540. {

}.

(Seibert, Tr. 5677-78, *in camera*). {

} . (RX01693, *in camera*; Seibert, Tr. 5679-80, *in camera*). {

}.” (Gillespie, Tr. 5862, *in camera*). Yet {

} . (Gillespie, Tr. 5846, *in camera*). {

} . (Gillespie, Tr. 5849, *in camera*). In any event, {

} . (Seibert, Tr. 5672,

in camera).

1541. {

} . (Seibert, Tr. 5684-85, *in camera*;

Gillespie, Tr. 5840-41, *in camera*; RX01681, *in camera*). {

} . (Gillespie, Tr. 5840, *in*

camera). {

}.” (RX01681, *in camera*). {

}. (Gillespie, Tr.

5839, *in camera*). Again, Gillespie’s testimony is not credible.

1542. {

}. (Gillespie, Tr. 5836-37, *in camera*). {

}. (Gillespie, Tr. 5843; RX01726).

1543. {

}.
}

1544. {

camera).

}. (RX01679, *in camera*; RX01693, *in*

1545. {

camera).

}.” (RX01720 at 005, *in*

1546. {

RX01680, *in camera*; RX01685, *in camera*; Seibert, Tr. 5681, 5684, *in camera*). {

}. (RX01693, *in camera*;

}. (Seibert, Tr. 5734-35, *in camera*).

Further, the Court finds that {

}.
}

1547. {

}. (Seibert, Tr. 5684, 5707, 5715, 5723, *in camera*; RX01685, *in*

camera). {

}. (Seibert, Tr. 5681, 5722, *in camera*).

1548. {

}. (Gillespie, Tr. 5807, 5843-44, *in camera*). Gillespie's testimony here, and elsewhere, is not credible. According to Exide's second quarter results, Exide's sales of transportation and industrial batteries are down 29% and 26%, respectively. (Gillespie, Tr. 5843-44; RX01726). Moreover, Exide's free cash has declined 129% from last year, which Gillespie does not dispute. (Gillespie, Tr. 5844). {

}. (Gillespie, Tr. 5862, *in camera*). This Court does not find Gillespie to be a credible witness.

D. {
_____ }
_____ }

1549. {

}.” (RX01704, *in camera*; Gillespie, Tr. 5838, *in camera*). {

}. (Gillespie, Tr. 5838, *in camera*).

{

}. (Toth, Tr. 5750-51, *in camera*; RX01704, *in camera*). {

}. (Gillespie, Tr. 5838-39, *in camera*). Accordingly, {

}.
}

1550. Previously, Respondent provided evidence demonstrating that even in Complaint Counsel's SLI market in North America, {

(RFOF 927). {

}. (RX01668, *in*

camera). {

}.
}

1551. {

}.
}

1552. Similarly, {

}. (RX01687 at 002, *in*

camera). {

}.
}

1553. Based on the foregoing, including specifically {

}.

E. { _____ }

1554. Respondent's Chief Executive Officer, Robert Toth ("Toth"), testified at the hearing on November 12, 2009. Toth's testimony went uncontradicted by Complaint Counsel. This Court finds Toth to be a credible witness and credits his testimony in this hearing.

1555. {

}. (Toth, Tr. 5737-38, 5776, *in camera*).

{

}. (Toth, Tr. 5777, *in camera*).

1556. Around the same time, {

}. (Toth, Tr. 5737-39, 5741, *in*

camera; Seibert, Tr. 5645, *in camera*).

a. { _____
_____ }

1557. {

}. (Toth, Tr. 5738-39, *in camera*).

1558. {

}. (Toth, Tr. 5739, *in camera*). From the very beginning, {

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

1559. At that time, {

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

camera).

1560. {

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

1561. {

}. (RX01685, *in camera*).

1562. {

}, (RX01694, *in camera*), {

}.

(RX01694 at 006, *in camera*).

1563. {

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

}. (Toth, Tr. 5742, *in*

camera).

1564. {

}. (Toth,

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

}.

1565. At that time, {

}. (Toth,

Tr. 5742-43, *in camera*; RX01712 at 001, *in camera*).

1566. {

}.

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

} . (Toth, Tr. 5744, *in*

camera).

1567. {

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

1568. {

} . (RX01704, *in camera*).

b. { _____ }

1569. {

} . (Toth, Tr. 5745, *in camera*; RX01703, *in camera*).

1570. {

} . (Toth, Tr. 5745-46, *in camera*).

1571. {

} . (Toth, Tr. 5745-46, *in camera*). As Toth explained:

1572. {

} . (Toth, Tr.

5746-47, *in camera*).

1573. {

} (Toth, Tr. 5746-47, *in camera*).

1574. {

} (Toth, Tr. 5746-47, *in camera*).

1575. Consequently, {

} (Toth, Tr. 5746, *in camera*). As Toth elaborated

at the November 12, 2009 hearing, “{

}.” (Toth, Tr. 5746, *in camera*)(emphasis added).

1576. {

}.

(Toth, Tr. 5772, *in camera*). {

} (Toth, Tr. 5747, *in camera*).

1577. First, {

}.

(Toth, Tr. 5748, *in camera*).

1578. {

} (RX01706, *in camera*; Toth, Tr. 5747-49, *in camera*).

1579. {

} (Toth, Tr. 5747, *in camera*).

1580. {

}. (Toth, Tr. 5780, *in camera*).

1581. {

}. (Toth, Tr.

5747-48, *in camera*).

1582. Finally, {

}. (Toth, Tr. 5748-49,

in camera).

1583. {

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

}.
(PX5075 at 008, *in camera*).

1584. {

}. (Toth, Tr.

5749-50, *in camera*).

1585. {

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

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

}.
}

1586. Although, {

} . (Toth, Tr. 5750-51,

in camera).

1587. {

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

}.
}

1588. Moreover, {

} . (Toth, Tr. 5752, *in camera*).

1589. {

* } (Toth, Tr. 5753-54, *in camera*).

1590. {

} (Toth, Tr. 5755-56, *in camera*). {

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

} (RX01712 at 002, *in camera*).

1591. Thereafter, {

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

1592. {

} (Toth, Tr. 5756, 5758-59, *in camera*).

1593. {

} . (Toth, Tr. 5760-61, 5780, *in camera*).

1594. {

} . (Toth, Tr. 5760-61, *in camera*; Gillespie, Tr. 5838-39, 5867-68, *in camera*).

{

} .

1595. {

} . (Toth, Tr. 5760-61, *in camera*; PX5075 at 007, *in camera*).

F. { _____ }

1596. {

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

} . (RX01714 at 002, *in*

camera). {

}. (RX01714, in

camera).

1597. {

}. (RX01687 at 002, in camera;

Toth, Tr. 5761-62, in camera).

1598. {

}. (RX01687 at 002, in camera; Seibert, Tr. 5686,

in camera; Gillespie, Tr. 5852-53, in camera). {

}. (Seibert, Tr. 5687, in

camera; RX01687, in camera). {

}. (RX01687 at 003, in camera; Seibert, Tr. 5686-87, in camera). {

}. (Seibert, Tr. 5690, in camera).

{

}. (RX01712, in

camera).

1599. {

}. (Seibert, Tr. 5690-91, *in camera*). {

}. (Toth, Tr. 5762-63, *in camera*; RX01693, *in camera*; RX01712, *in camera*; Seibert, Tr. 5691, *in camera*; Gillespie, Tr. 5854-55, *in camera*).

1600. {

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

}. (RX01712, *in camera*). {

}.

1601. {

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

camera). {

}.

1602. {

} (Gillespie, Tr. 5851, *in camera*). {

} (Gillespie, Tr. 5852, *in camera*).

1603. {

} (

}).” *in*

camera).

1604. {

} (Gillespie, Tr. 5870, *in camera*). {

}.” (RX01693, *in*

camera; see also RX01685 (“{

}).”), *in camera*).

1605. {

} . (Seibert, Tr. 5691, *in camera*). {

} . (Seibert, Tr. 5691, *in camera*; Toth, Tr.

5762-63, *in camera*).

IV. { }

1606. {

} . (Toth, Tr. 5737, *in camera*). {

} . (RX01701, *in camera*; RX01702, *in*

camera).

1607. {

} . (Toth, Tr. 5737, *in camera*). In addition, {

} . (Toth, Tr. 5737, *in camera*; RX01706,

in camera).

1608. {

} . (Seibert, Tr. 5673, *in camera*; Toth, Tr. 5737, *in*

camera).

1609. {

} . (RX01719, *in camera*; Seibert, Tr. 5701-03, *in camera*).

1610. {

} .

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

1611. {

}. (Toth, Tr. 5737, *in camera*;

Seibert, Tr. 5692-93, *in camera*). {

}. (Seibert, Tr. 5692, *in camera*).

1612. {

}.
(RX01692, *in camera*; Toth, Tr. 5772, *in camera*).

(RX01692, *in camera*; Toth, Tr. 5772, *in camera*).

1613. {

}. (Seibert, Tr.

5718-19, *in camera*).

1614. As Toth testified, {

}. (Toth, Tr. 5747-49, 5772, 5739-40, *in*

camera).

1615. {

}. (Seibert, Tr. 5694, *in camera*; Toth, Tr. 5766, *in camera*).

1616. {

} . (RX01696, *in camera*; Toth, Tr. 5764-67, *in camera*;

Seibert, Tr. 5694-95, *in camera*).

1617. {

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

1618. {

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

1619. {

} . (Toth, Tr. 5765, *in camera*).

1620. {

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

1621. {

} .

(Toth, Tr. 5767, *in camera*).

1622. Currently, {

} . (RX01707 at 003, *in*

camera).

1623. Based on the foregoing, the Court finds that {

}. The Court further finds that these facts manifest that {

}.
}

CONCLUSIONS OF LAW

1624. As previously found in RFOFCOL 1436, Courts and the FTC must not rely on market shares and concentration alone to determine whether a violation of Section 7 has occurred. The Merger Guidelines state that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger.” (Sec. 2.0). The Guidelines further provide that “market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger.” (Sec. 1.52). The courts have agreed that concentration data “[are] not conclusive indicators of anticompetitive effect.” United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). “[E]vidence of a high market share does not require a district court to conclude that there is an antitrust violation” (United States v. Syufy Enterprises, 903 F.2d 659, 665 n.6 (9th Cir. 1990)), because market share statistics can be “misleading as to actual future competitive effect.” United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984). As the D.C. Circuit said, “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.” United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

1625. As this Court has previously found, Microporous was not an actual participant or uncommitted entrant in Complaint Counsel’s SLI market in North America prior to the merger. RFOFCOL 1437-39. No evidence was presented at the hearing on November 12, 2009 to alter this conclusion.

1626. Evidence was introduced, however, at the November 12 hearing further demonstrating to this Court that competition is robust in Complaint Counsel's alleged SLI North America market and that {

}.

1627. As found previously by this Court, {

}. (RFOF 306). Now,

{

}.

1628. {

}. (RX01719, *in camera*). All of this evidence demonstrates that even after the merger, competition in North America among separator suppliers is vigorous.

1629. It is appropriate for this Court to consider post-acquisition evidence to determine that the acquisition had no anticompetitive effect. *See e.g. United States v. Int'l Harvester Co.*, 564 F.2d 769 (7th Cir. 1977) (post acquisition evidence showed no anticompetitive conduct); *Lektro-Vend. Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (post acquisition evidence showed that defendant's profits and market shares declined); *Vaney v. Coleman Co.*, 385 F. Supp. 1337 (D.N.H. 1974) (post-acquisition evidence showed that defendant lost market share); *United*

States v. Falstaff Brewing Corp., 383 F.Supp. 1020 (D.R.I. 1974) (evidence showed a decline in market share and profits). From the evidence before this Court, the merger has had no anticompetitive effect in this alleged market. The Court's conclusion here is buttressed by the fact that {

}.

1630. The evidence from the November 12, 2009 hearing further demonstrates that the conditions for coordinated interaction do not exist in the alleged SLI market. According to the *Commentary on the Merger Guidelines*, "Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group; (2) to have a means to detect deviations that would undermine the coordinated interaction; and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of deviations It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade." (*Commentary on the Horizontal Merger Guidelines* at 18-19).

1631. Here, at the hearing on November 12, 2009, Complaint Counsel offered no evidence to the Court to show that these conditions can be met. Rather, ample evidence was presented to this Court, both through testimony and exhibits, demonstrating just the opposite. Indeed, {

}.

}.
}

1635. Complaint Counsel’s argument that { } is not a powerful buyer because it does not have “{ }” is incorrect. The courts have not required a minimum market share when making “powerful buyer” determinations. (*See, e.g., Federal Trade Commission v. Elders Grain*, 868 F.2d 901 (7th Cir. 1989); *United States v. Baker Hughes, Inc.*, 908 F.2d 918 (D.C. Cir. 1990); *In the Matter of Owens-Illinois, Inc.*, 115 F.T.C. 170 (1992); *United States v. Archer-Daniels-Midland Co.*, 781 F.Supp. 1400 (S. Dist. Iowa, 1991)). In fact, if Complaint Counsel’s statement were true, there could be only one powerful buyer in each market – a suggestion that is contrary to existing case law. Even the Horizontal Merger Guidelines, which recognize the “power buyer” defense, do not require that a powerful buyer have a requisite share of the relevant purchases. Rather, the Guidelines note that “[b]uyer size alone is not the determining characteristic.” (Sec. 2.12).

1636. 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.

1637. The evidence adduced at the November 12 hearing further refutes Complaint Counsel’s unilateral effects theory. As this Court previously found, where the FTC focus in a merger case is on the alleged dominance of the merged entity, the FTC 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 (9th Cir. 1997). (RFOFCOL 1448).

1638. The testimony and exhibits introduced at the November 12 hearing demonstrate Daramic’s complete lack of ability to unilaterally increase price. In fact, the evidence demonstrates just the opposite: {

}. 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 has no ability to control prices or exclude competition.

1639. 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.

1640. The evidence adduced at the November 12 hearing further demonstrates that Daramic does not have monopoly power in Complaint Counsel’s SLI market. As found previously, Dr. Simpson’s data shows {

}. (RFOF 1287, 1388) By themselves, those figures are too low to find monopoly power. Here, however, the evidence

shows that {

}. Accordingly, {

}.

1641. Finally, additional evidence was introduced at the November 12 hearing supporting this Court's previous finding that there are no substantial barriers to entry into the production of battery separators. (RFOFCOL 1453-57). First, {

}, (RFOF 1209, 1212), {

}.

1642. Second, {

}.

1643. 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.

V. CONCLUSION

For the reasons stated above, and in Respondent's previous submissions, 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: December 2, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
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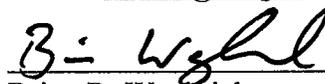
I hereby certify that on December 2, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand delivery of the foregoing ***Respondent's Proposed Findings of Fact and Conclusions of Law for Re-opened Hearing [PUBLIC]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580
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I hereby certify that on December 2, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Proposed Findings of Fact and Conclusions of Law for Re-opened Hearing [PUBLIC]*** upon:

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