ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S POST-TRIAL REPLY BRIEF FOR RE-OPENED HEARING

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I. INTRODUCTION

Complaint Counsel have failed in their proof in this case and this Court should dismiss Complaint Counsel's claims. Apparently recognizing this reality, Complaint Counsel spend their Post-Trial Brief on the Reopened Record ("PTR Br.") distorting facts and statements made by Respondent, and ignoring large swaths of information and evidence adduced at the re-opened hearing.[1] Myopically focusing on facts that they like, Complaint Counsel turn a blind eye to the full context of all the facts that this Court must interpret to come to a reasoned and appropriate decision. As Respondent has pointed out previously: "facts matter;" what Complaint Counsel still seems not to understand is that all facts matter, not just those Complaint Counsel deigns to address.

Notwithstanding the new information brought out in the November 12, 2009 hearing, however, the evidence before this Court from the first hearing is sufficient in and of itself to sink the FTC's case. First, Complaint Counsel has not, and cannot, properly prove their alleged product and geographic markets. This fact, standing alone, ends their case. See,e.g., Section 7 of the Clayton Act, 15 U.S.C. § 18 ("Section 7"); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Additionally, they have not, and cannot show that the effects of the acquisition have been to "substantially lessen competition, or tend to create a monopoly." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355 (1963).

The November 12 hearing confirmed {

} This is a powerful fact that Complaint Counsel almost entirely ignore. It does not matter how Daramic's defenses are labeled, the fact is that

[1] Complaint Counsel's distortive and malevolent tone begins in the first paragraph, where they have taken Mr. Welsh's words completely and improperly out of context, and continues *ad nauseam* throughout their brief. However, as Complaint Counsel admits, "Mr. Welsh is correct" - significant evidence has emerged since the prior hearing because of new events and because of calculated efforts { } as they relate to Daramic.

{

.}

All these facts matter and are inconsistent with a lessening of competition or monopoly power.

Importantly, Complaint Counsel have failed to explain in any of their briefs how a company that { } can be the monopolist they claim, or how relief that reaches beyond Complaint Counsel's alleged geographic market can be appropriate under these circumstances.

We are now almost a full two years after the merger and there is no need for the Court to guess at the effects of the merger – there are two years of history to review showing that Daramic {

} Complaint Counsel's suggestion that Daramic has somehow manipulated these facts is untenable. It simply defies logic that Daramic would destroy its business for this proceeding. Similarly, Complaint Counsel's statement that Daramic is somehow punishing {

}

Complaint Counsel set their sights on the HHI numbers in this case then effectively put on blinders and have spent the ensuing months ignoring the myriad of facts showing that there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation in the worldwide PE market (or in any of Complaint Counsel's alleged markets). Complaint Counsel apparently also forgot what the D.C. Circuit made clear in Baker Hughes: "The Herfindahl-Hirschman Index cannot guarantee litigation victories." United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

The evidence at the November 12 hearing shows that competition is alive and well in the PE separator industry and thus, in addition to all the reasons set forth below,[2] and in Respondent's other briefing, the FTC's Complaint should be dismissed with prejudice.

II. FACTUAL BACKGROUND

Complaint Counsel claim that the evidence shows that Respondent's four proffers are false. Yet, they have ignored uncontroverted evidence that plainly supports Respondent's proffers. Respondent will not "re-argue" the points it has made in its previous filings here, or seek to address every unsupported statement of Complaint Counsel. Instead, Respondent will, by way of example, point out just a few of Complaint Counsel's unsupported factual assertions:

- Complaint Counsel are wrong when they state that Respondent's first proffer is baseless. (PTR Brief at p. 3). {

} (RX1668, *in camera*; RX1669, *in camera*; Seibert, Tr. 5660, *in camera,* Seibert, Tr. 5734, *in camera*); (2) place orders {

[2] Respondent will address Complaint Counsel's arguments in the order in which they were presented in Complaint Counsel's Post-Trial Brief on the Reopened Record pursuant to the Court's Order on Post-Trial Briefing.

}. (FOF 1529; RX01693, *in camera* {(

}; (3) {

}. (FOF 1541; RX01681, *in camera*; Toth, Tr. 5763-64, *in camera*); and (4) admit that {

}. (FOF 1531, 1532, 1540; RX01693, *in camera* {

}.

- Complaint Counsel's bald claim that thc {

} is specious. (PTR Brief p. 3). Tellingly, Complaint Counsel fail to actually identify the {

} - no doubt because in {

}. There is simply no basis for the claim that these orders are comparable. (FOF 1546; (Seibert, Tr. 5734-35, *in camera*).[3]

- Complaint Counsel have also failed to show that Respondent's second proffer is untrue. Complaint Counsel base their claim on {

[3] In fact, to compare properly the facts show that {

}. (FOF 1534). Thus, {

}

(Gillespie, Tr. 5863, *in camera*).

." (RX01693, *in camera*; see also RX001685, *in camera*).

. (Gillespie, Tr. 5826, 5838-39, *in camera*). If {

}

(Gillespie, Tr. 5838, *in camera*). To the extent Daramic supplies the remaining {

} (RX01693, *in camera*; FOF 1540, 1549)

Additionally, {

} (Seibert, Tr. 5720, *in camera*).

- Respondent's third proffer is likewise fully supported notwithstanding Complaint Counsel's arguments to the contrary. The testimony and evidence is replete that {

}. As Mr. Toth testified, {

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

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

}.

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

- Importantly, Mr. Toth's testimony related to his {

} is entirely undisputed. (Toth, Tr. 5749-50, *in camera,* Toth, Tr. 5756, 5758 *in camera*). Complaint Counsel did not present a single document into evidence that refutes any of these points, nor did they call Mr. Ulsh to the stand to refute anything said during the negotiations in which Mr. Ulsh participated.

- Finally, Respondent's fourth proffer is also fully supported by the actual facts on record. Complaint Counsel makes much of {

[4]

} (RX01692 at 002, *in camera*). {

(Toth, Tr. 5751, *in camera*).

} (RX01665 at 002-003, *in camera;* FOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489; Respondent's Response to CCFOF 324).

- {

} (FOF 1523, 1527-28, 1594-95, 1602). {

} ((FOF 1602-04; Seibert, Tr. 5733, *in camera*; Toth, Tr. 5759, *in* camera; RX01693, *in camera*).

- Significantly, {

}. (RX01687 at 002, *in camera*). Accordingly, Complaint Counsel's statement, and Mr. Gillespie's testimony, regarding the implication of industrial in the current hearing is misleading. {

[4] Complaint Counsel incorrectly references RX01692 at 002 as giving Daramic a {

}.

}}. (FOF 1552. Further, {

}. (FOF 1552).

III. COMPLAINT COUNSEL HAVE FAILED TO REFUTE RESPONDENT'S ARGUMENT THAT POWERFUL BUYERS WILL PREVENT COORDINATED INTERACTION IN THE ALLEGED SLI MARKET SEGMENT.

Complaint Counsel argue that: (1) where courts have favorably entertained a "power buyer" argument, they have also relied on "other significant factors;" (2) the argument doesn't apply when there are small buyers; (3) the evidence shows {

;} and (4) Respondent's evidence is entitled to "little or no weight" because it was "subject to manipulation by Respondent." These arguments are to no avail.

Complaint Counsel's first argument is aimed at a straw man since Respondent never sought to rely only on a power buyer argument. Indeed, as Respondent's Post-Trial Brief shows, it has argued that Complaint Counsel's product and geographic markets cannot be sustained, that there has been no showing of actual or probable coordinated interaction or anticompetitive unilateral effects (including price increases) in any alleged markets, that Microporous was not a participant in the alleged SLI segment and was not a viable potential entrant into any alleged market (other than deep-cycle), that entry barriers into the production and sale of PE battery

separators are low, that Microporous was a high-cost and nonviable independent producer and that the industry generally was characterized by sophisticated and powerful buyers that would demand competitive terms and conditions from Daramic and other suppliers.

In any event, Complaint Counsel's treatment of this argument fails. They cite United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991) ("ADM") for the proposition that buyers were able "to switch orders among various alternative producers." (Br. p. 7). The court, however, did not treat this as "[an]other significant factor" but simply as one of "numerous tactics" used by the powerful buyers of high fructose corn syrup ("HFCS"). 781 F. Supp. at 1417. Similarly, that buyers "closely examine[d] available options" and "typically insist[ed] on multiple, confidential bids for each order" in United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990) did not refer to "[an]other significant factor" but to a characteristic of the powerful buyers of hardrock hydraulic underground drilling rigs. In United States v. Country Lake Foods, 754 F. Supp. 669, 680 (D. Minn. 1990), the fact that the large buyers of fluid milk within the MSP/MSA could seek suppliers elsewhere spoke to buyer resourcefulness as well as to geographic market and competition issues.

Complaint Counsel's reliance on ADM, though, is appropriate here, but for a different reason than advanced by Complaint Counsel. ADM is a guide to the analysis that should be applied in this case. The court there held that the Antitrust Division had failed to show that the "acquisition," consisting of a long-term lease, violated Section 7. The court did not need to engage in speculation about the probable effect of the acquisition; it simply looked at 8-9 years of post-merger evidence. That evidence showed the "existence of large, powerful buyers" (781 F. Supp. at 1416), e.g., Coca-Cola and Pepsi-Cola, who "directly affect[ed] the market price for

HFCS."[5] Id. Although it found that the HHI data weighed against the acquisition, the evidence itself "fail[ed] to show . . . any form of coordinated pricing or price leadership . . . with respect to actual transaction prices, and fail[ed] to show any likelihood of it. . . . Indeed, the evidence reveal[ed] precisely the opposite – a vigorous, competitive struggle for business by negotiated, competitive pricing." Id. at 1421. ADM is, in other words, a case decided solely on the basis of market competition driven by powerful buyers - a case Complaint Counsel claims does not exist.[6]

ADM also makes a point already at least partially made in Respondent's opening brief (pp. 20-21), but which can be reiterated here briefly given its importance: empirical evidence of the state of market competition trumps market share and concentration information. In ADM the court noted that application of familiar concepts of Philadelphia National Bank would have it that the HHI data signaled that the acquisition would be "inherently likely to lessen competition substantially." 781 F. Supp. at 1421. But the court said that other factors here, i.e., sophisticated buyers, indicated that competition would not be lessened. Id. at 1423. It cited Baker Hughes, which had relied on Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986). The Seventh Circuit made the point emphatically: "Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them." 784 F.2d at 1336. Baker Hughes was equally emphatic: "To allow the government virtually to rest its case [after presenting

[5] The significance of these buyers had grown since the acquisition. The largest 20 buyers of HFCS represented 60% of Archer-Daniels-Midland's 1990 sales as opposed to 40% in 1983.

[6] FTC v. R.R. Donnelley & Sons Co., 1990 WL 193674 (D.D.C. 1990) may be another. Although the court had concluded that the FTC had failed to prove a viable product market, it said that "the evidence demonstrates that even if these customers constituted a separate market, their own size and economic power, and the other characteristics of the 'market,' make any anti-competitive consequences very unlikely." 1990 WL 193674 at 4.

market concentration statistics] . . . , leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under Section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories." 908 F.2d at 992. In the instant proceeding, the Court has the luxury of being able to examine almost two years of post-acquisition market evidence, which shows, contrary to the claims of Complaint Counsel based on their statistics, that competition is intense.

As noted previously, {

}. (RFOF 306). Now, {

}.

(RX01719, *in camera*). All of this empirical evidence demonstrates that after the merger the state of market competition among separator suppliers in North America is vigorous. As ADM teaches, this trumps the market share and concentration information evidence on which Complaint Counsel rely.

ADM contains many other facets that are also found in the instant case. The court there found that the industry was characterized by large, infrequent transactions the terms of which were treated as highly confidential by sellers and buyers. Id. at 1423. These facts served to

defeat any claim that coordinated interaction was likely. And, as with the instant case, where { }, the court noted that the ability of buyers to vertically integrate and sponsor new entry added to their market power. Id.[7] (RX00239; McDonald Dep., p. 34-36; Gilchrist Dep., p. 100-21; FOF 480, 491).

ADM found that the actions of powerful buyers in establishing a lower market price protected small buyers as well, in part, because of the Robinson-Patman Act prohibitions on price discrimination. 781 F. Supp. at 1419. Unlike the 109 arguably "unprotected" small buyers in United States v. United Tote, Inc., 768 F. Supp. 1064, 1085 (D. Del. 1991), relied on by Complaint Counsel for their small buyer argument, there are a very limited number of purchasers of SLI separators in North America. { }

(FOF 240; Seibert, Tr. 4172, *in camera*; RX01084, *in camera*). The minimal number of other buyers can also find lower separator prices given the prices driven by the large buyers and the substantial overcapacity in the industry.

The evidence in this case – another post-consummation case – demands precisely the same analysis and result as was reached in ADM. Just as in ADM and Baker Hughes, the HHI statistics here should not be allowed to "guarantee" an FTC victory when the evidence speaks so eloquently of vigorous competition. The court in ADM observed that the evidence of market competition driven by powerful buyers could not have been manipulated by the defendants. Id.

[7] The courts made similar findings in Country Lake Foods, 754 F. Supp. at 674, and FTC v. Cardinal Health, 12 F.Supp. 2d 34, 46 (D.D.C. 1998).

at 1422. Contrary to the authorities cited by Complaint Counsel, those cited to the court in Respondent's original brief (pp. 20-21) showed court reliance on post-acquisition evidence of competitive conditions leading to determinations that the merger or acquisition did not lessen competition. The evidence presented in detail in Respondent's original brief shows { } to { } Respondent would never have wished to manipulate the world to produce such devastating events. Common sense dictates that Daramic would not sabotage its own business for the sole purpose of pursuing victory in this case.[8]

IV. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT DARAMIC HAD MONOPOLY POWER IN THE ALLEGED SLI MARKET SEGMENT

At the end of the first hearing the evidence was overwhelmingly to the effect that Daramic lacked monopoly power in the alleged SLI segment. Apparently seeking to plug this hole in their case, Complaint Counsel now resort to a tortured and futile argument that Daramic's { } (PTR Brief p. 19).

Daramic's evidence at the close of the main hearing showed that it lacked monopoly power in any product market alleged (by anyone) in this case. Its market shares in all alleged markets were below the levels required for "monopoly power." As pointed out previously, Professors Areeda and Hovenkamp (relied on here by Complaint Counsel) have advised, "We

[8] Complaint Counsel's collection of alleged events manipulated by Respondent (Complaint Counsel's Post-Trial Brief on the Reopened Record pp. 13-14) is largely a list of circumstances having no relation to the important issue, i.e., the state of competition. By contrast, the { } made by Daramic { } and they show intense competition at work. Daramic has { }

believe 70 or 75 percent to be a reasonable minimum for a 'well defined' market."[9] By comparison, {

} They did, however, include Daramic's {

} It was also pointed out that Dr. Simpson's own data showed that Daramic had a {

} (FOFs 1386-1390). Daramic's evidence also showed it lacked monopoly power in any other alleged markets because of low market shares (e.g., Dr. Simpson calculated Daramic's deep-cycle market share at { }), failure of proof (Complaint Counsel failed to make any showing of monopoly power in UPS or motive), the fact of a global market with many producers, Daramic's inability to control prices or exclude competition and the low entry barriers into the PE separator business. (Respondent's Post-Trial Brief at 51-52; Respondent's Post-Trial Reply Brief at 33-37). Moreover, all of Complaint Counsel's claims about monopoly power have nothing whatever to do with the acquisition at issue here since Microporous, not being an SLI producer at the time, added not even a fraction of a percentage point to Daramic's alleged SLI market share. In short, the evidence produced at the trial showed Daramic lacked monopoly power.

The November 12 evidence reinforced and strengthened that conclusion since it showed that, notwithstanding {

[9] IIIB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 801(a)(1) (3rd ed. 2008).

} (Gillespie, Tr. 5870, *in camera*). This evidence produced no statistical revision of the Daramic market share but it established that Daramic's market share will now fall below even Dr. Simpson's 2010 estimate { } a number already too low to support a finding of monopoly power.

In spite of this mountain of evidence, Complaint Counsel now seek to argue that Daramic is refusing to do business { } that such refusal shows that Daramic has monopoly power. They are wrong on both counts.

{

} The story is laid out in detail in Respondent's Post-Trial Brief for Reopened Hearing at 1-3, 4-18 and need not be repeated here. The high points are –

- {
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}

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Moreover, Daramic has not refused {

}

The evidence just recounted does not support Complaint Counsel's claim that Daramic has { } (FTC Br. at 19). Even if it had engaged in such a "refusal," that would not be "dramatic evidence of Respondent's monopoly power in this market." Id. at 19.

In support of this assertion Complaint Counsel rely upon the Areeda/Hovenkamp discussion of Lorain Journal Co. v. United States, 342 U.S. 143 (1951) and United States v. Microsoft Corp., 65 F. Supp.2d 1 (D.D.C. 1999), *aff'd* 253 F.3d 34 (D.C. Cir.). But these authorities do not support the burden Complaint Counsel would impose upon them because the

courts in both cases relied on standard market share evidence as the basis for their conclusions about monopoly power and did not rely upon, and did not need to rely on, inferences based on conduct. Thus, the Supreme Court in Lorain Journal noted "the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families." 342 U.S. at 152-53. Similarly, the district court in Microsoft found that "[e]very year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent." 65 F. Supp.2d at 9.

Findings of monopoly power were easy in those cases and were comfortably in compliance with the 70-75% market share level noted above as otherwise recommended by Areeda/Hovenkamp. Any conduct-based finding would be impossible here where the SLI market share, even as found by Complaint Counsel's own expert, { } and where the refusal to deal, which is the premise of Complaint Counsel's argument, is non-existent. Rather, Daramic's conduct consisting of its attempt to { } is entirely consistent with its modest and declining market position.

V. CONCLUSION

For the reasons set forth above, and more particularly in Respondent's Post Trial Brief, Post-Trial Brief on the Reopened Hearing, Respondent's Findings of Fact and Conclusions of Law, and Respondent's Response to Complaint Counsel's Findings of Fact and Conclusions of Law, Complaint Counsel has failed to prove their claims and each count in their Complaint should be dismissed with prejudice.

Dated: December 11, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2009, I caused to be filed one copy via electronic mail delivery and an original and two copies via hand delivery of the foregoing **RESPONDENT'S POST-TRIAL REPLY BRIEF FOR RE-OPENED HEARING [Public]**, and that a paper copy with an original signature is being filed with:

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I hereby certify that on December 11, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand-delivery of the foregoing **RESPONDENT'S POST-TRIAL REPLY BRIEF FOR RE-OPENED HEARING [Public]** upon:

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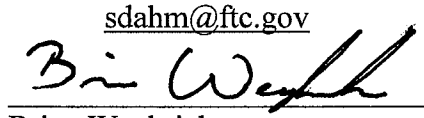

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