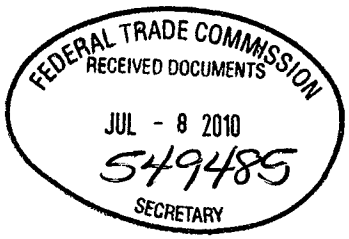
ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT'S THIRD MOTION
TO REOPEN THE HEARING RECORD

Pursuant to 16 C.F.R. § 3.54(a) and 16 C.F.R. § 3.51(e), Respondent, Polypore International, Inc. ("Polypore") submits this motion to reopen the record to permit (1) limited discovery of Entek, Johnson Controls, Inc. ("JCI") and Superior Battery ("Superior"), two customers of Daramic and {

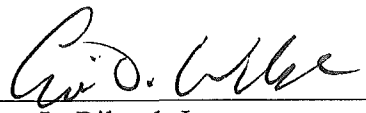
}[1], through narrowly-tailored document subpoenas and depositions on the subjects presented in Respondent's Brief in Support of its Third Motion to Reopen the Hearing Record; and (2) a hearing before the Commission on this matter to permit evidence to be introduced. In support of this motion to reopen the hearing record, Polypore incorporates herein its arguments set forth in its Respondent's Brief in Support of its Third Motion to Reopen the Hearing Record, and the Affidavits of Robert B. Toth, S. Tucker Roe, Randy A. Hanschu, Steve McDonald.

[1] The instant motion and supporting affidavits contain *In Camera* Material pursuant to the Initial Decision of ALJ Chappell dated February 22, 2010. Respondent has designated such *In Camera* Material with "{ }" to indicate the *in camera* status of such evidence and to protect such *In Camera* Material from disclosure on the public record.

For the reasons set forth in and based upon Respondent's Brief in Support of its Third Motion to Reopen the Hearing Record, and the Affidavits of Robert B. Toth, S. Tucker Roe, Randy A. Hanschu, Steve McDonald, Polypore respectfully requests that this Commission issue an Order opening the hearing record to permit (1) limited discovery of Entek, JCI and Superior, and any other customer or third party that may be identified through narrowly-tailored document subpoenas and depositions on subjects presented in Respondent's Brief in Support of its Third Motion to Reopen the Hearing Record; and (2) a hearing before the Commission on this matter to permit evidence to be introduced, and for such further relief as the Commission finds appropriate.

Dated: July 8, 2010

Respectfully Submitted,



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

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

Attorneys for Respondent

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

STATEMENT PURSUANT TO SCHEDULING ORDER

I, Adam C. Shearer, Esq., on behalf of Parker Poe Adams & Bernstein LLP ("Parker Poe") as counsel for Polypore International, Inc. ("Polypore"), hereby represent that Parker Poe has conferred with Complaint Counsel in an effort in good faith to resolve by agreement the issues raised by the instant Motion and have been unable to reach such an agreement. Parker Poe and Complaint Counsel discussed these issues over the telephone on June 30, 2010. As a result of these communications, Polypore and Complaint Counsel are at an impasse with respect to the issue raised in Respondent's Motion.

Dated: July 1, 2010

Adam C. Shearer
PARKER POE ADAMS & BERNSTEIN, LLP
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 372-9000
Facsimile: (704) 335-9689
adamshearer@parkerpoe.com

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

PROPOSED ORDER

Upon consideration of Respondent's Third Motion To Reopen the Hearing Record, it is hereby ORDERED that Respondent's Motion is GRANTED. The parties may engage in limited discovery consisting of depositions and subpoenas for documents and depositions on the following subjects, for the time period following the close of discovery on March 13, 2009: (1) the manufacture, development and marketing of battery separators for deep-cycle and motive applications by any actual or potential competitor of Daramic, including without limitation Entek International LLC, in the United States; (2) the actual or potential purchase of battery separators for deep-cycle or motive applications by Johnson Controls, Inc. ("JCI"), Superior Battery ("Superior"), or any other customer or other third party in the United States; (3) consideration of the actual or potential purchase of battery separators for deep-cycle and motive applications from any actual or potential competitor of Daramic, by JCI, Superior or other customer or other third party, in the United States; (4) testing of battery separators for deep-cycle or motive applications manufactured by any actual or potential competitor of Daramic, in the United States. A further

hearing in this matter will be held on _____ 2010 for purposes of receiving evidence concerning matters stated in Respondent's Third Motion to Reopen the Hearing Record and Respondent's Brief in Support of Respondent's Third Motion to Reopen the Hearing Record.

Dated: July _____, 2010

_____
The Commission

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2010, I caused to be filed via hand delivery and electronic mail delivery an original and twelve (12) copies of the foregoing ***Respondent's Third Motion to Reopen the Hearing Record [Public]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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

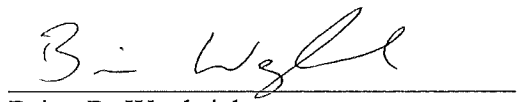
I hereby certify that on July 8, 2010, I caused to be served one copy via electronic mail delivery and two copies via overnight delivery of the foregoing ***Respondent's Third Motion to Reopen the Hearing Record [Public]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on July 8, 2010, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Third Motion to Reopen the Hearing Record [Public]*** upon:

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

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



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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT'S BRIEF IN SUPPORT OF ITS THIRD MOTION TO REOPEN THE HEARING RECORD

INTRODUCTION

Pursuant to 16 C.F.R. § 3.54(a) and 16 C.F.R. § 3.51(e), Respondent, Polypore International, Inc. ("Polypore"), submits this brief in support of its Third Motion to Reopen the Hearing Record. Respondent submits the present motion to bring to the Commission's attention newly-discovered evidence which directly contradicts many of the fundamental findings of fact and conclusions contained in the Initial Decision ("ID") issued by Administrative Law Judge D. Michael Chappell. Specifically, the new evidence shows that a competitor of Daramic LLC ("Daramic"), which Respondent believes to be [

]1.

This evidence is not merely theoretical; Respondent has [

[1] The instant motion and supporting affidavits contain Confidential Material pursuant to the Protective Order Governing Discovery Material entered on October 23, 2008. Respondent has designated such Confidential Material with "[ ]" to protect Confidential Material from disclosure on the public record. In the event Respondent's instant motion is granted, Respondent and/or appropriate 3rd parties intend to move for in camera treatment of such confidential material and/or underlying evidence in support thereof.

].

Evidence of actual market activity is highly relevant. Such evidence is critical to the Commission's *de novo* review of this proceeding, particularly where the new evidence demonstrates that, contrary to the ALJ's findings, no monopoly exists in either the alleged motive or deep-cycle markets. Given the crucial nature of this new evidence, Respondent believes that it would be reversible error to deny the present motion and ignore this vital information.

In the ID, Judge Chappell found four product markets, including deep-cycle and motive[2] separators. Judge Chappell further concluded that Respondent's acquisition of Microporous resulted in a merger to monopoly in these two alleged markets and was "presumptively illegal." ID, p. 251. As Judge Chappell stated:

> In the deep-cycle and motive markets, the dramatic increase in Daramic's market shares caused by the merger and the changes in HHI in these markets, are more than sufficient to create a "presumption that the merger will lessen competition." . . . More importantly, in these two markets, Daramic acquired its *only* competitor. . . . A monopoly market share raises the strongest level of concern that could be associated with a merger. A combination of *the only two* manufacturers "should be viewed" as nothing "other than a merger to monopoly that by definition will have an anticompetitive effect[.]" . . . *Following Daramic's acquisition of Microporous, purchasers of deep-cycle and motive battery separators no longer have an alternative to Daramic.* . . . Thus, Daramic's elimination of its *only* competitor and merger to monopoly in the deep-cycle and motive markets is presumptively illegal. ID, p. 251 (emphasis added and citations omitted).

Only recently, Respondent has become aware of facts which demonstrate that Judge Chappell's findings and conclusions in this regard are erroneous.[3] Respondent has discovered that [

[2] Separators used in motive applications are part of a larger category of "industrial" application separators. (IDFOF 23).

[3] Respondent disagrees with many of Judge Chappell's findings and conclusions in his ID, including with respect to these alleged markets, and has appealed, in part, his decision and order to the Commission. The newly-discovered evidence provides additional basis for Respondent's contention that Complaint Counsel have failed to meet their burden and that the acquisition of Microporous by Respondent does not violate Section 7 of the Clayton Act or Section 5 of the FTC Act.

].[4] This evidence goes to the very heart of Judge Chappell's conclusion that Daramic's acquisition of Microporous eliminated Daramic's *only* competitor in the alleged deep-cycle and motive markets, resulting in *a merger to monopoly* in each. This evidence further contradicts many of Judge Chappell's findings on market share and concentrations, entry issues and, significantly, whether Complaint Counsel even met their burden of proof. For example, Judge Chappell found that:

- "Entek is not a participant in the deep-cycle market because it has no sales and is not an uncommitted entrant under the Merger Guidelines." IDFOF 383.
- "Entek is not currently selling separators in the deep-cycle, motive or UPS markets. . . . Entek has essentially exited the industrial side of the business." IDFOF 1027 (citations omitted).
- "Entek is unlikely to expand to enter these markets in North America within the next two years." IDFOF 1028 (citations omitted). See infra at 6.

This newly-discovered evidence shows, among other things, that:

- Daramic did not acquire its only competitor in the alleged deep-cycle and motive markets, as found by the ALJ.
- Complaint Counsel's evidence does not support that Daramic's acquisition of Microporous is a merger to monopoly in the alleged deep-cycle and motive markets, as found by the ALJ.
- Purchasers of separators for deep-cycle and motive or industrial applications have an alternative today to Daramic, contrary to the conclusion of the ALJ.
- Testing of separators can be expedited and entry can occur timely.

This newly-discovered evidence not only supports Respondent's contention made throughout this matter that {

}[5], but based on other findings and conclusions in the ID, it shows that [

[4] Respondent's assertion that [ ], rather than another competitor, is [ ] is based on the educated assumptions of its sales personnel.

[5] The instant motion and supporting affidavits contain *In Camera* Material pursuant to the Initial Decision of ALJ Chappell dated February 22, 2010. Respondent has designated such *In Camera* Material with "{ }" to indicate the *in camera* status of such evidence and to protect such *In Camera* Material from disclosure on the public record.

].[6] The Commission must conclude on the basis of this evidence that [ ], and must further find, that Complaint Counsel failed to meet their burden of proof by failing to address [ ] presence and significance.[7]

Respondent seeks an order from the Commission to reopen the record to permit the introduction of evidence on the limited topic of [

]. Respondent also seeks an order from the Commission permitting: (1) limited discovery of Entek, Johnson Controls, Inc. ("JCI") and Superior Battery ("Superior"), two customers of Daramic [ ], through narrowly-tailored document subpoenas and depositions on these subjects; and (2) a hearing on this matter to permit evidence to be introduced regarding the foregoing subjects.[8] For the reasons stated herein and in the accompanying Affidavits of Robert B. Toth, Randy A. Hanschu, Steve McDonald and S. Tucker Roe, Respondent respectfully submits that the Commission should grant the present motion.

ARGUMENT

As correctly observed by Judge Chappell previously in reopening the record in this matter, it is imperative that the fact finder "'have all of the facts upon which it can render full justice on

---

[6] The ID found that Microporous was an actual competitor in the UPS market based solely on Enersys' sampling of a Microporous product which was under development. ID, p. 258. The ID also found that Microporous was a competitor in the SLI market based only on a desire to manufacture and market separators for an SLI application, not the actual manufacture and sale of those separators. ID, p. 259.

[7] Conversely, if the Commission were to somehow conclude that [ ], a conclusion which would be erroneous, then the Judge's findings and conclusions that Microporous was a participant in the alleged UPS market must similarly be found to be in error, as Judge Chappell based his conclusion on scant evidence showing nothing more than Microporous testing a non-commercialized product with a customer for possible future use in UPS batteries. See Respondent's Appeal Brief pp. 28-29.

[8] If the limited discovery indicates the presence of another competitor marketing and producing separators for industrial applications, or that another Daramic customer is testing samples of a competitor's industrial separator, Respondent seeks leave for discovery from those entities as well.

the merits' of the action." In the Matter of Polypore International, Inc., Docket No. 9327, Order Granting Respondent's Second Motion to Reopen the Hearing Record and Setting the Hearing Schedule, October 22, 2009 (citing Caracci v. Brother Int'l Sewing Mach. Corp., 222 F. Supp. 769, 771 (E.D. La. 1963), aff'd, 341 F.2d 377 (5th Cir. 1965). This principle applies equally at this stage now that this matter is before the Commission on appeal.

Pursuant to the Commission's Rules of Practice governing this adjudication, Rule 3.54(a) allows that upon appeal, the Commission "will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). These powers include the powers enumerated under Rule 3.51(e)(1) which states: "At any time prior to the filing of the initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence." 16 C.F.R. § 3.51(e).

As Complaint Counsel has previously stated, the applicable standard for reopening the record is: "(1) whether the moving party can demonstrate due diligence (that is, whether there is a *bona fide* explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party." In the Matter of Polypore International, Inc., Docket No. 9327, Complaint Counsel's Response to Respondent's Second Motion to Reopen the Hearing Record, at 2 n. 1, (October 1, 2009) (*quoting* Brake Guard Products, Inc., 125 F.T.C. 138, 248 n. 38 (1998)). Respondent's new evidence meets the standard enumerated in Brake Guard Products, and the record should be reopened to admit this new and probative evidence so that the Commission will have all the relevant facts from which it can make its decision in this matter. Indeed, failure to reopen the record would be reversible error should the Commission affirm the ALJ and Respondent seek further appellate review, since the failure to admit this evidence affects a substantial right of the Respondent. In the Matter of Topps Chewing Gum, Inc., 63 F.T.C. 2223 (Nov. 15, 1963); Winters v. Marina Dist. Development Co., LLC, 317

Fed. Appx. 286, 288 (3rd Cir. 2009); Linkstrom v. Golden T. Farms, 883 F.2d 269, 269 (3rd Cir. 1989).

A. The Proffered Evidence is Probative

Respondent's newly-discovered evidence concerning [

] goes to the heart of significant issues in this matter and bears directly upon the findings and outcome of this case. In the ID, Judge Chappell made numerous findings of fact relevant here. For example, Judge Chappell found that:

- "Entek is not a participant in the deep-cycle market because it has no sales and is not an uncommitted entrant under the Merger Guidelines." IDFOF 383.
- "Neither of Entek's manufacturing facilities currently produces motive power separators." IDFOF 393.
- "Entek is not currently selling separators in the deep-cycle, motive or UPS markets. . . . Entek has essentially exited the industrial side of the business." IDFOF 1027 (citations omitted).
- "Entek is unlikely to expand to enter these markets in North America within the next two years." IDFOF 1028 (citations omitted).
- "{

  }" and thus, Entek was not a participant in the motive market. IDFOF 398, 403.
- "Daramic expected customer qualification of HD for use in deep-cycle batteries to take more than eighteen months." IDFOF 1024.
- Many of Daramic's deep-cycle customers take between eighteen and twenty-four months for testing and qualification. IDFOF 1017, 1023.
- "Full testing of battery separators in motive batteries takes two to three years to complete." IDFOF 1011.

In the ID, and based on the forgoing indings, Judge Chappell reached several conclusions which are again relevant here:

- "[In the alleged deep-cycle and motive markets,] Daramic acquired its only competitor." ID, p. 251.
- "A combination of the only two manufacturers 'should be viewed' as nothing 'other than a merger to monopoly that by definition will have an anticompetitive effect." ID, p. 251.

- "Following Daramic's acquisition of Microporous, purchasers of deep-cycle and motive battery separators no longer have an alternative to Daramic." ID, p. 251.

- "Thus, Daramic's elimination of its only competitor and merger to monopoly in the deep-cycle and motive markets is presumptively illegal." ID, p. 251.

- "[W]hile Entek supplied separators for industrial applications more than a decade ago, it has essentially exited that business." ID, p. 283.

- "Entek is not a participant in any of the relevant product markets except SLI." ID, p. 283.

- "[T]he evidence demonstrates that Entek is unlikely to enter the deep-cycle, motive or UPS battery separator markets within the next two years." ID, p. 283-84.

- "Accordingly, Complaint Counsel has met its burden of proving that the effect of Daramic's acquisition of Microporous may be substantially to lessen competition in the deep-cycle, motive, UPS and SLI separator markets in North America." ID, p. 299.

- "The experience of Daramic and Microporous show that developing a profitable, competitive separator product takes several years, even for established and experienced manufacturers." ID, p. 279.

Respondent's newly discovered evidence of [

] undercuts and contradicts each of the above findings and conclusions, demonstrating that [

]. Respondent believes that discovery will produce evidence, which it would then offer at a hearing in this matter, proving that (1) [

] (Affidavit of Randy A. Hanschu, sworn to on June 29, 2010 ("Hanschu Aff.") ¶ 3, Affidavit of Robert B. Toth, sworn to June 30, 2010 ("Toth Aff."), ¶¶ 2-3), Affidavit of S. Tucker Roe, sworn to on June 30, 2010 ("Roe Aff."), ¶¶ 4-5), (2) [

] (Hanschu Aff., ¶ 3, Toth Aff., ¶¶ 2-3), (3) [

] (Hanschu Aff., ¶ 3, Toth Aff., ¶¶ 2-3, Roe Aff., ¶¶ 4-5), (4) [

] (Hanschu Aff., ¶ 3, Toth Aff., ¶ 3,

Roe Aff., ¶ 4), (5) [

] (Hanschu Aff., ¶ 3, Toth Aff., ¶¶ 2-3, 5, Roe Aff., ¶¶ 4-5), and (6) [

] (Hanschu Aff., ¶ 3, Toth Aff., ¶ 3, Roe Aff., ¶ 4), the very things that Judge Chappell concluded [ ] had not done (and would not do) but would need to do to counter the alleged anticompetitive effects of the merger.

Respondent believes that such newly discovered evidence, presented at a hearing, will also demonstrate that (1) [

], (2) [

], (3) entry is not difficult and can occur timely, (4) the development of separators can be expedited and occur in a matter of months, (5) testing of separators can be expedited and occur in a matter of months, (6) Complaint Counsel's analysis of market shares, concentrations and HHI are erroneous, (7) Complaint Counsel failed to meet their burden, and (8) the merger is not likely to substantially lessen competition in the alleged markets.

The new evidence shows [

]. Judge Chappell's analysis, based upon the findings in the ID, found that "[t]he acquisition was a merger-to-monopoly, increasing Daramic's [deep-cycle] market share to 100% and increasing the HHI by 1,891 to 10,000," which the facts now show is simply not accurate. ID, p. 246. Furthermore, the Initial Decision surmised that Respondent only showed that Entek was "*theoretically* willing to enter the motive market" but Entek was nonresponsive to customers' requests for industrial or motive separators. ID, p. 249 (emphasis added). According to the ID, Entek was not an actual competitor in the motive market and Daramic remained the only U.S. industrial or motive producer. The ID's findings and conclusions that surmised a lack of interest by Entek in providing separators for deep-cycle or industrial or motive applications simply cannot stand as

[

]. In turn, [

]. (Hanschu Aff., ¶ 3, Toth Aff., ¶ 3, Roe Aff., ¶ 4). This new evidence shows that [

].

B. Due Diligence is Demonstrated

The Commission may allow the admission of new evidence where, among other things, the evidence was unavailable at the time of trial. Cf. Chrysler Corp. v. FTC, 561 F.2d 357, 362-63 (D.C. Cir. 1997). Polypore has shown due diligence in procuring this additional new evidence which was not previously available during the hearing. As shown in the Affidavits of Robert B. Toth, S. Tucker Roe and Randy Hanschu, Respondent was unaware of [

] prior to May 4, 2010, nearly a year after the close of the hearing record. Hanschu Aff., ¶ 3, Roe Aff., ¶ 4. No evidence was introduced at trial to show that {

}. In fact, at trial, testimony of at least one third party suggested just the opposite - that {

}. Rodger Hall of JCI testified that JCI was not aware of any separator supplier other than Daramic that could supply separators for deep-cycle batteries:

Q. Are you aware of any other battery separator suppliers out there that could supply a deep-cycle battery separator?

A. We were not aware of any supplier in the United States or Mexico.

Hall, Tr. at 2705.

Polypore also has demonstrated due diligence in the timely filing of this motion. Respondent learned of [ ] only in May 2010. Hanschu Aff., ¶ 5, Toth Aff., ¶ 4, Roe Aff., ¶¶ 3-4. On May 4, 2010, Tucker Roe ("Roe"), Daramic's Vice President of Sales and

Marketing for the Americas & EMEA, and Randy Hanschu ("Hanschu"), a Senior Technical Sales Manager of Daramic, met with Randy Hart ("Hart"), President of Superior at the 2010 BCI Conference. Hanschu Aff., ¶ 3, Roe Aff., ¶¶ 3-4. Hanschu and Roe were informed that [

]. Hanschu Aff., ¶ 3, Roe Aff., ¶¶ 4-5. Hart mentioned that [

]. Hanschu Aff., ¶ 3, Roe Aff., ¶ 5. Hart stated that [

]. Hanschu Aff., ¶ 3, Roe Aff., ¶ 4. Hart further stated that he believed [

]. Hanschu Aff., ¶ 3, Roe Aff., ¶ 4. When asked by Hanschu for a [ ], Hart agreed and thereafter Hanschu called Superior periodically to check on whether they had received [

]. Hanschu Aff., ¶¶ 3-4. Superior received the Separator on or about June 15, 2010 and provided a sample of this Separator to Daramic on June 17, 2010 and Daramic then filed this motion. Hanschu Aff., ¶ 5, Affidavit of Steve McDonald, sworn to on June 28, 2010 ("McDonald Aff."), ¶¶ 2-3.

During this same time period, in a separate conversation that took place on May 20, 2010, with the Vice President of JCI, Polypore's Chief Executive Officer, Robert Toth, was informed that [

]. Toth Aff., ¶¶ 2-3. Mr. Toth was unaware that [ ] prior to this point in time. Toth Aff., ¶ 4. Mr. Toth also understood from the conversation that [

]. Toth Aff., ¶ 5.

The newly-discovered evidence demonstrates that Polypore only recently learned that [ ], that concrete

evidence of the existence of [ ] was not available until June 16, 2010 and that upon receipt of this evidence, Respondent promptly filed this motion. Hanschu Aff., ¶¶ 5-6.

C. The Proffered Evidence is not Cumulative

This new evidence is not cumulative and does not repeat evidence presented by Respondent at trial. This is evident as Respondent was not aware that [ ] prior to May 4, 2010. Hanschu Aff., ¶ 6, Toth Aff., ¶ 4, Roe Aff., ¶¶ 3-4. No evidence has previously been presented by Respondent or Complaint Counsel on this point. Evidence from { } presented at trial suggested that {

}. The Initial Decision itself is silent on { } and concludes that Entek was unlikely to enter these alleged markets, [ ]. [ ]. Hanschu Aff., ¶ 3, Toth Aff., ¶ 5, Roe Aff., ¶ 4. Customers are either [ ]. Hanschu Aff., ¶ 3; Toth Aff., 3, Roe Aff., ¶ 4. [ ] and is in the hands of the Respondent. Hanschu Aff., ¶ 4, Toth Aff., ¶ 3, Roe Aff., ¶ 4. This new evidence shows that [ ], decreasing whatever concentration and unilateral anticompetitive effects that may be claimed.

The new evidence that Respondent seeks to present to the Commission was not available at trial and does not duplicate evidence previously presented at the hearing. The evidence is not

cumulative and is probative of significant issues before the Commission.

D. Reopening the Record will not Prejudice Complaint Counsel

Though reopening the record will give rise to additional requirements that the parties must meet, this responsibility is shouldered equally by both parties—Respondent will have the same briefing and evidentiary requirements that Complaint Counsel will have. Aside from the increased filings, there is no prejudice unique to Complaint Counsel. The Commission's Rules of Practice clearly contemplate situations where new evidence is produced or discovered following the completion of briefing and the submission of findings. Complaint Counsel's previous contention that customers are somehow harmed during this appeal – a contention that one would expect them to resurrect here – is simply without basis in fact and belied by the newly discovered evidence which demonstrates robust competition between Daramic and [ ].

Were the record to remain closed to Respondent's newly-discovered material evidence, Respondent would be severely prejudiced as relevant evidence would be ignored by the Commission, and likely would constitute reversible error. As discussed above, Judge Chappell made many findings of fact and conclusions of law to the effect that Entek was not an uncommitted entrant, { }, in the alleged deep-cycle and motive markets and Respondent's acquisition of Microporous was a merger to monopoly in these alleged markets. Respondent's newly discovered evidence demonstrates [ ] in this regard. "[I]n the interests of fairness and justice," the Commission should grant this motion, reopen the record and permit the introduction of this evidence concerning Entek's new separator for motive and deep-cycle applications. In the Matter of Polypore International, Inc., Docket No. 9327, Order Granting Respondent's Second Motion to Reopen the Hearing Record and Setting the Hearing Schedule, October 22, 2009 (citing Caracci, 222 F. Supp. at 771).

In support of its motion, Respondent submits the following proffer of evidence.

Through testimony of Respondent's witnesses and that of third party witnesses, and other evidence including third party documents, Respondent will show:

1. After the close of the record, [

].

2. Following the close of the record, on May 20, 2010, [

].

3. [

].

4. [

].

5. The new evidence contradicts Complaint Counsel's evidence, and the opinion of Judge Chappell, that Daramic's acquisition of Microporous resulted in a merger to monopoly in the alleged deep-cycle and motive markets and that Respondent acquired the only competitor to Daramic in these alleged markets. [

].

6. The new evidence also shows that testing by customers can be accomplished in a matter of months and timely entry can be made.

7. Complaint Counsel did not meet their burden of proof as Complaint Counsel failed to address [ ]. Thus, Complaint Counsel's analysis of market shares, concentrations and HHI are erroneous.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court grant its motion and reopen the record permitting: (1) limited discovery of Entek, JCI, Superior and any other customer or third party that may be identified through narrowly-tailored document subpoenas and depositions regarding the above subjects; and (2) a hearing on this matter to permit evidence to be introduced regarding the foregoing subjects.

Dated: July 8, 2010

Respectfully Submitted,

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

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

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2010, I caused to be filed via hand delivery and electronic mail delivery an original and twelve (12) copies of the foregoing ***Respondent's Brief in Support of Third Motion to Reopen the Hearing Record [Public]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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

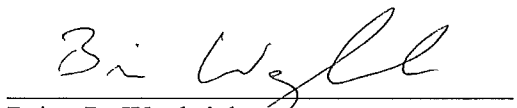
I hereby certify that on July 8, 2010, I caused to be served one copy via electronic mail delivery and two copies via overnight delivery of the foregoing ***Respondent's Brief in Support of Third Motion to Reopen the Hearing Record [Public]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on July 8, 2010, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Brief in Support of Third Motion to Reopen the Hearing Record [Public]*** upon:

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

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



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