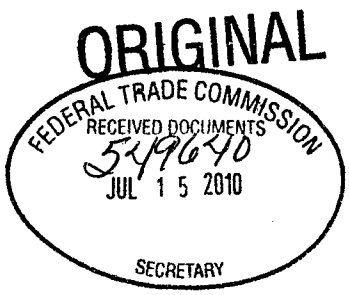
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
THIRD MOTION TO REOPEN THE HEARING RECORD

The Commission should deny Respondent's Third Motion to Reopen the Hearing Record.[1] Its Motion does not raise anything new or material to any of the issues in this case. Nor do its proffers even match what the attached hearsay affidavits assert.

We believe that this Motion proves the point that "justice delayed is justice denied."[2] In its Third Motion to Reopen, Respondent seeks to delay this Commission's opinion by asserting supposedly new facts that are instead the *same* facts that have been litigated in this case for over a year and a half. Any further delay in this case allows Respondent to continue to reap monopoly profits as a result of its illegal acquisition of

[1] This Motion should have been filed in the Commission, not before the Administrative Law Judge. *See* Rule § 3.51(e)(2) ("Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision").

[2] This expression is attributed to William E. Gladstone (29 December 1809 – 19 May 1898); *see In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 578 & n.21 (S.D. Tex. 2005).

Microporous and significantly harm its customers. The entire purpose of this case was to stop and undo the harm caused by Respondent's acquisition of Microporous, which gave Daramic a monopoly in three markets (deep-cycle, motive, and UPS) and a duopoly in the fourth (SLI). Respondent's repeated attempts to reopen the record with old and unproven evidence undermines this entire judicial process.

Respondent's Motion does not have a basis in law or in fact. It's as if Respondent discovered from *Chicago Bridge* that it could delay the proceedings by filing such a motion but skipped over the primary holdings by the Commission in that case: First, one cannot reopen the record with facts that have been previously available in the case; second, evidence of "entry" must show that the entrant has "sufficiently constrain[ed Daramic] and that the competition lost from the acquisition has... been replaced." The Commission further held that the standard to reopen the record requires that Respondent demonstrate (1) 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. *Chicago Bridge & Iron, N.V.*, 139 FTC 533, 583 (2005) (citing *Brake Guard Products, Inc.*, 125 F.T.C. at 248 n.38). Respondent has proved none of these.

Respondent's proffered "new" evidence[3] in its Third Motion to Reopen is that { } is providing samples of deep-cycle (golf cart) separators {

[3] We point out that the argument in Respondent's Third Motion to Reopen does not match what the actual attached affidavits actually say. For example, the affidavits mention only deep-cycle or golf cart battery separators. Respondent's Third Motion to Reopen implies, incorrectly, that the evidence is broader than that.

} (Third Motion to Reopen at 1).[4] This is not new evidence. Nor does it show sufficient entry. The fact that, for nearly two years, samples of golf cart separators from a potential supplier have been sighted in the market, showing at best some interest by a company in making such a separator, is far less than what the Commission rejected in *Chicago Bridge*, in which there had been *actual* bids and sales, none of which have even allegedly occurred here. *In re Chicago Bridge* at 556. Mere samples do not prove the central question of "whether competition has been restored to the pre-acquisition level." *Id.*

None of { } samples are new or surprising. First, in response to Respondent's questions back in January 2009, JCI's Mr. Pfenner, testified at deposition that it was moving forward with testing of an { } separator for { }.[5] This deposition occurred in discovery before trial. Signally, Respondent highlighted { } work in its expert's report at trial. (RX00945-132, *in camera*). Respondent's failure to call Mr. Pfanner as a witness at trial is no excuse for reopening the record now. Respondent cannot now say that { } testing of an { } separator for { } is a newly discovered fact because *it put this information in the record* over a year ago.[6] Second, Respondent's own witness Mr. Balcerzak of Crown Battery

[4] It is impossible for Complaint Counsel to determine what information may or may not be publically stated because Respondent has not yet filed a motion for *in camera* treatment explaining the reasons for its apparently inconsistent redactions. We do not understand why any of this should be *in camera.*

[5] Because this transcript was not put into evidence the ALJ has never ruled that it is entitled to *in camera* treatment. Nevertheless, it was designated as confidential by agreement between JCI and the parties, and should remain so pursuant to the protective order entered in this case.

[6] While Dr. Khawaty's expert report is in the record, it cannot be used as evidence. Dr. Khawaty's report was admitted pursuant to the parties' stipulation that "the expert reports . . . should not be relied on for any factual assertions regarding the parties' or third

testified *at trial* that Crown would be testing an Entek separator for deep-cycle in 2009. (Balcerzak, Tr. 4138-4139). Mr. Balcerzak's testimony was therefore considered by the ALJ. Respondent's hearsay assertion that { }[7] is *considering* testing an { } in 2010 is no more than weak, cumulative evidence.

With regard to its motive separator claims, Respondent has no "newly-discovered evidence" regarding { } providing a motive separator to North American customers. There is no such evidence, period. Rather, Respondent generally uses the term { } to refer to all non-SLI separators (i.e., motive, golf cart, and UPS separators), to claim that JCI and Daramic discussed { } and that this was the first time Polypore heard that { } (Toth affidavit at ¶¶ 3-4). The problem with this claim is that, as JCI testified in open court, JCI does not make motive batteries and does not purchase motive battery separators. (Hall, Tr. 2665). Respondent, who controls 100% of the motive market, is well aware of this fact. (*See* e.g. Roe, Tr. 1274, 1695-1696; Roe, Tr. 1689, *in camera*). Thus, Respondent has no good-faith basis to even make such a suggestion that JCI may buy motive separators from any other supplier. It buys none from anyone.

---

parties' past business conduct or views, or past events." JX2. However, we cite this to show notice of Respondent to these supposed facts.

[7] { } bought only { } worth of HD in 2007, and did not buy any Cell-Force or Flex-Sil that year. (PX0356). These purchases amount to less than 1% of the { } in HD sales that Daramic had in 2007, and less than 0.1% of the total sales of deep-cycle separators in 2007. (See IDF 385).

Nor does any of the proffered evidence relate to any of the other three markets, motive, UPS, or SLI separators. In fact, Respondent's attached evidence deals ***only*** with deep-cycle: (1) the hearsay statement of Alex Molinaroli of JCI that { } is testing an { } separator for { }; (2) the hearsay statement of Mr. Hart of Superior that { } was considering testing a { }; and (3) a piece of separator passed from { } to Daramic that is asserted to be the third party's ({ }) deep-cycle separator.[8] Aside from testing some samples, which is not new, Respondent offers no evidence that { } is actually marketing or selling any deep-cycle (golf cart) battery separators.

Nor can the Commission afford to rely on Respondent's claims that it will produce further, unrevealed evidence. Respondent has shown itself to be unreliable in making evidentiary proffers. As a result of Respondent's last motion to reopen the record, the ALJ permitted Respondent to put on evidence in a second hearing based on proffers Respondent made months after the close of the first hearing in this matter. Respondent failed to prove a single one of its proffers in that hearing. (*See* ID 289-292). What Respondent accomplished, however, was to delay an opinion for several months.

Most importantly, reopening the record to conduct discovery and present any of the "evidence" proffered by Respondent would not show that entry is sufficient or that the remedy should be altered in any way. Even if { }, its entry into this one market would not be sufficient to replace

[8] Respondent's assertion that it needed to wait two months to receive this evidence is unfounded. Daramic could easily have obtained a sample of such materials back before the first Hearing from { } when it knew about the samples long before the trial.

the competition lost in four markets as a result of the merger. Thus, there is no reason to delay this case any further.

ARGUMENT

1. Respondent Does Not Meet the Standard for Reopening the Record to Add New Evidence.

Respondent's request to reopen the record to add new evidence does not meet the requirements of the law. In *Chicago Bridge* the Commission held that in order to present evidence which would form the basis for a reconsideration, the petitioner must first meet the standard enunciated in *Brake Guard Products* for reopening the record:[9] *Chicago Bridge,* 139 F.T.C. at 560, *citing In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 248-51 (1998) (Commission rejected respondent's attempts to add new evidence to the record because it was available before the Initial Decision and because certain of the evidence was "not probative"). The *Brake Guard* test 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.

Brake Guard Products, Inc., 125 F.T.C. at 248 n.38, *citing in re Chrysler Corp.*, 87 F.T.C. at 750 n.38 (admitting materials when evidence was newly discovered and with

---

[9] Complaint counsel agrees with Respondent that the relevant standard with which to determine whether to reopen the record is *Brake Guard.* Respondent's warnings of reversible error are unfounded and the cases cited are inapposite to the matter before the Commission. The Commission need only base its final decision on substantial evidence. 5 USCS § 706(2)(E). The Commission could not be reversed merely for failing to reopen the record for evidence in support thereof since its decision would still be based on the extensive record compiled by the ALJ, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (U.S. 1971), and because the proffered evidence does not meet the requisite standard for reopening the record. *Brake Guard,* 125 F.T.C. at 248-51.

due diligence) (emphasis added). The moving party must satisfy each of the elements in order to prevail.

Respondent cannot meet three of the four prongs of the *Brake Guard* standard. First, it has failed to exercise due diligence, since it had all of the relevant information about { } separators in January 2009, during a deposition of JCI taken prior to the first hearing in this matter. Second, the proffered evidence is cumulative and has already been considered by the ALJ. And third, Complaint Counsel is prejudiced because, as the ALJ correctly held, there is *actual and on-going* consumer harm as a result of this transaction.[10] If all it takes to reopen a hearing is to repeat allegations from the past or state that a company is interested in entering a market, all of Complaint Counsel's and the Commission's process to stop anticompetitive conduct would be in vain. Respondent's proposed discovery and third hearing would significantly delay an opinion in this matter at great cost to Daramic's customers, and thus its request should be denied.

A. Respondent Failed to Exercise Due Diligence

{ } is not new; this evidence was known by *Respondent* for a year-and-a-half, prior to the first trial in this matter. Respondent conducted a Rule 3.33(c)(1) deposition of JCI and learned on January 28, 2009, months before trial, that JCI was { }.[11] In that deposition Respondent elicited the following testimony:

[10] The alleged evidence also may have some probative, yet cumulative, value, but is not probative of whether any potential entry is timely, likely, or sufficient to counter ***all*** the anticompetitive effects of the acquisition. *See* discussion at Part 2 *infra*.

[11] Mr. Pfanner was designated by JCI to testify about the testing of { } separators.

{

}

(Pfanner Dep. 77-80, *confidential*). *See* Attachment A (pp. 77 to 80 of Pfanner deposition transcript).

Respondent thus had these facts prior to trial.[12] Respondent also put this information in its expert report, which is in the record. (RX00945-132, *in camera*; *see also* JX2). Respondent then failed to put Mr. Pfanner on the stand to testify. There can be no bona fide explanation for Respondent's failure to pursue this evidence, and accordingly it should not now be given the opportunity to restart the clock with new discovery and a new trial.

Similarly, since Respondent had full knowledge of the { } separator being tested by { }, it cannot claim that the sample it received from { } is "new" since it could have obtained a sample of { } separator, which it knew about, before trial from { }. Respondent has offered no bona fide explanation for its failure to present this evidence at trial and it should not now be offered a second bite at the apple at the expense of consumers. Indeed, at trial Respondent's witness testified that there would be deep-cycle separator sample testing. (*See* Balcerzak,

[12] Indeed Respondent had this information prior to the close of discovery for the first trial, and also when it moved twice before to reopen the record.

Tr. 4138-4139). Thus, if Respondent wanted to do more discovery about samples or alleged entry into the deep-cycle separator market, it could have sought to long ago.

B. Respondent's "New" Evidence is Cumulative

Respondent's own witness Mr. Balcerzak of Crown Battery testified *at trial* that Crown would be testing an Entek separator for deep-cycle in 2009. (Balcerzak, Tr. 4138-4139). Accordingly, the ALJ considered evidence that a customer expected to receive, and intended to test, an Entek deep-cycle separator in 2009. Respondent's hearsay assertion that { } is *considering* testing an { } separator in 2010 is no more than weak cumulative evidence. Respondent's supposed new evidence that a tiny customer, with { } may be also testing a sample does not change the conclusions reached by the ALJ. Because the hearsay evidence offered by Respondent is cumulative of evidence it actually offered at trial, it cannot now offer more of the same evidence that has already been considered.

It is important to note that Respondent has no "newly-discovered evidence" at all regarding { } providing a motive separator to North American customers. Respondent's Motion, however, is misleading in that it refers to { } separators as an { } and thus includes { } separators. The "new" hearsay evidence that Respondent offers with respect to { } separators all comes from Mr. Toth's conversation with JCI's CEO Alex Molinaroli. Mr. Toth swears that he met with Mr. Molinaroli to discuss {

}. Of course JCI does not make motive batteries or any other "industrial" battery at all. (Hall, Tr. 2665; Attachment B – Declaration of Robert Gruenstern). JCI makes only SLI batteries and

deep-cycle batteries. Yet Respondent cites to Mr. Toth's affidavit as evidence that {

} Third Motion to Reopen

at 10. With this single tenuous link to Mr. Toth's inaccurate affidavit Respondent goes on to refer to "new evidence" relating to "deep-cycle and industrial (or motive)" separators throughout its papers.[13] Respondent's "new" hearsay evidence has absolutely nothing to do with motive separators, and to suggest otherwise is without any good-faith basis whatsoever.

In short, all Respondent's actual hearsay evidence suggests is that one company has produced samples of golf cart, deep-cycle battery separators. This is not new.

C. Complaint Counsel and Customers Will be Prejudiced by Delays in this Case

The Commission has long recognized that "litigation must end at some point, and that decision makers must rule on a finite body of evidence." *Chicago Bridge,* 139 F.T.C. at 557. There are strong policy considerations against the granting of Respondent's Third Motion to Reopen based on little more than hearsay with no new, pertinent facts. New things happen every day in every industry. Granting Respondent's motion would provide a blueprint and an invitation to all respondents to delay proceedings until they can discover some "new" fact from which they can argue that there is a change in the market. Any creative attorney could manufacture such an excuse to reopen the hearing record, forever delaying a resolution.

[13] With regard to Respondent's argument to link all separators for any application into one market, the ALJ found that Respondent's arguments were "more contrived than real." (ID-226).

Meanwhile, in this case, Polypore has raised prices substantially post-acquisition and, until stopped, will continue to reap supra-competitive profits and thus harm competition and customers. In this case the ALJ found that the elimination of Microporous has allowed Polypore to raise prices.[14] (ID-251, 262, 269; IDF-723-729, 856, 861, 867, 880-881; 917-922). Polypore has exerted post-acquisition unilateral market power in the deep-cycle, motive, and UPS markets. (ID-262). The acquisition also "has had unilateral anticompetitive effects in the SLI market," and without Microporous as an SLI competitor, "there are fewer incentives to engage in healthy competition." (ID-264-266).

In sum, Respondent's Third Motion to Reopen fails every element of the *Brake Guard* test and should be denied.

2. Respondent's Request for Additional Discovery And a New Hearing Should be Denied.

Even if the Commission accepted as true what the Respondent's hearsay affidavits say, it should not allow for any additional discovery or a new hearing. Respondent offers no legal support for the notion that it should have a new hearing and further discovery and delay. The evidence does not support a conclusion that entry is sufficient to counter all the effects of the acquisition. The alleged evidence affects only one of the four markets at issue. And there is no basis for causing the prejudice of delay with no countervailing reason for admitting any additional evidence.

First, not only has Respondent failed to explain its lack of diligence in not using facts it has had in its possession for a year and a half, but it proposes to remedy this error

[14] The acquisition eliminated Daramic's planned price reductions, and eliminated Microporous' planned capacity expansion, negatively impacting competition in all four markets. (IDF-766-804, 810-813).

by conducting onerous discovery of its only competitor (in SLI) and of the only two customers who dare to threaten to test a different separator for deep-cycle.[15] It then proposes to parlay this discovery into a fishing expedition of any customer who has sought { }. There is simply nothing new in Respondent's offer, including its renewed effort to delay these proceedings.

Second, the Commission held in *Chicago Bridge* that mere evidence that a company actually competed and sold products in the market was not sufficient entry unless it restored competition to "pre-acquisition level[s]" and puts the entrant on "equal footing" as the acquiring or acquired company. 139 F.T.C. at 565. This is settled law. *See Chicago Bridge & Iron, N.V. v. FTC,* 534 F.3d at 410, 429-30 (5th Cir. 2008). Indeed, "entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers." *Id.* (Citations omitted); U.S. Dep't of Justice and Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41561 (Sep. 10, 1992), at ¶ 3.0 (entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the [anti]competitive effects of concern.") ("Merger Guidelines").

In *Chicago Bridge,* the alleged entrants had made actual sales and had bid on projects. Here, the supposed entrant has done no more than pass out samples. This has hardly countered Daramic's ability to raise prices. Indeed, Respondent Daramic has done so with impunity.

That another company may be sending out samples over the last two years is unsurprising, but in this case there is no evidence of entry sufficient to counter the

[15] It is worth noting that Respondent has already taken extensive discovery of both JCI and Entek and that, although it had listed Mr. Hart from Superior as a witness for trial, it never called Mr. Hart.

anticompetitive effects of the acquisition. As the Commission pointed out in *Chicago Bridge,* "[e]ntry might signal that post-acquisition prices have increased to a level that makes the market attractive to new firms. Whether those new entrants are able to compete at the price that prevailed before the transaction is another matter." 139 F.T.C. at 565. But in this case, there is no evidence of entry at all, much less sufficient entry.

Respondent has offered no evidence that another company is actually marketing or selling a single deep-cycle (golf cart) separator. The evidence is merely that a possible entrant has distributed samples for testing. That's all. As the Commission held, however, "mere interest and intention to compete does not make them competitors sufficient to replace the competition lost." *Id.* at 558-59 (Citation omitted).

Indeed, there is ample evidence in the record that the alleged entrant has no intention to replace the competition lost. Respondent's own proffer proves that point as well. For example, Respondent claims that {

}. The facts that are actually in evidence demonstrate that { } received a { } price increase from Polypore on its deep-cycle HD separator in 2009. (PX0950 at 15). Thus even according to the "evidence" proffered by Respondent { } entry would not return the deep-cycle market to pre-acquisition pricing levels. Indeed Respondent does not proffer any evidence at all that { } entry would be sufficient to replace the competition lost as a result of the merger. Moreover, without Microporous competing against Daramic, lowering prices, this supposed entrant has shown a remarkable lack of interest in competing aggressively against Daramic. Instead, Entek was "not aggressively competing against [Daramic] for business." (Hall, Tr. 2666-2667, 2692). {

}.(

}. In short, there is no evidence that this alleged potential entrant would or could compete at pre-acquisition prices and restore competition to where it was when Microporous was in the market.

Third, Respondent's proffered "evidence" addresses only one of the markets on which the ALJ found liability: deep-cycle (golf cart) battery separators. The hearsay "facts" cited by Respondent do not address the markets for SLI, UPS, or motive separators. A finding by the Commission that the acquisition of Microporous by Polypore is likely to reduce competition in any one of those other markets would necessitate a full divestiture of the former Microporous (especially in Austria, which does not even make golf cart separators).

Finally, because these alleged facts have no bearing on the outcome of this case, Respondent cannot show that its claim for additional discovery and a new hearing can outweigh prejudicial effects of any delay. The ALJ's findings that Respondent has increased prices substantially post-acquisition at the same time that these few alleged samples were in the market proves the point. Thus, more discovery, hearings and delay will do nothing but enable Respondent Daramic to continue to reap monopoly profits from its customers.

CONCLUSION

Accordingly, for the reasons stated above, Complaint Counsel respectfully asks that Respondent's Third Motion to Reopen should be denied and ask that this case be argued and decided without delay.

Dated: July 15, 2010

Respectfully submitted,

By: _____

J. ROBERT ROBERTSON
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2008
Fax: (202) 326-2884

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2010, I filed via hand delivery an original, twelve copies and an electronic copy of the foregoing Complaint Counsel's Response to Respondent's Third Motion to Reopen the Hearing Record with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580

I hereby certify that on July 15, 2010, I served via hand and electronic mail delivery two copies of the foregoing Complaint Counsel's Response to Respondent's Third Motion to Reopen the Hearing Record with:

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 15, 2010, I filed via electronic and first class mail delivery a copy of the foregoing Complaint Counsel's Response to Respondent's Third Motion to Reopen the Hearing Record with:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

By: Linda D. Cunningham

Linda D. Cunningham
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2638
lcunningham@ftc.gov