**No. 11-10375-EE**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**POLYPORE INTERNATIONAL, INC.,**
**Petitioner,**

**v.**

**FEDERAL TRADE COMMISSION,**
**Respondent.**

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**ON PETITION FOR REVIEW OF A FINAL ORDER**
**OF THE FEDERAL TRADE COMMISSION**

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# BRIEF FOR RESPONDENT FEDERAL TRADE COMMISSION

**(PUBLIC VERSION)**

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## CERTIFICATE OF INTERESTED PERSONS

Respondent Federal Trade Commission certifies that, to best of its knowledge, the Certificate of Interested Persons and Corporate Disclosure Statement previously submitted by the petitioner in this case pursuant to 11th Cir. R. 26.1 is complete.

## STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission agrees with the petitioner that oral argument may aid in the Court's resolution of this case.

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## GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

| | |
|---|---|
| Op. | Commission's Opinion |
| IDF | Initial Decision Finding of Fact |
| D- | FTC Document Number |
| PX | Complaint Counsel Exhibit |
| RX | Polypore Exhibit |
| Tr. | Transcript of Trial Testimony before the Administrative Law Judge |
| IH | Investigational Hearing |
| Br. | Brief for Petitioner |
| OE | Original Equipment (also referred to as "OEM") |
| * | In Camera Material |

## PRELIMINARY STATEMENT

Petitioner would have this Court believe that this is a case primarily about potential competition. It is not. This is a case about a merger that eliminated actual competition between rival firms that, until the acquisition, generated lower prices for customers in three relevant markets. Though petitioner accuses the Federal Trade Commission ("FTC" or "Commission") of ignoring evidence, in fact, it is petitioner that omits mention of significant record evidence – including petitioner's own regular course-of-business documents, testimony of its own employees, and testimony of all of the major customers – that strongly supports the Commission's conclusions that the acquisition was reasonably likely to harm competition in these markets. While petitioner clearly would have preferred that the Commission reach a different conclusion, it has not shown that the Commission erred. To the contrary, substantial evidence supports the Commission's decision on liability, and the divestiture order was well within the Commission's discretion to fashion a remedy to restore the competition lost through this unlawful acquisition.

## STATEMENT OF JURISDICTION

This is a petition to review a Final Order of the Commission, entered pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b)

of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(b). This Court has jurisdiction to review the Order pursuant to 15 U.S.C. §§ 21(c) and 45(c).

## STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Commission's findings that the acquisition was likely substantially to lessen competition in the deep-cycle and motive battery separator markets.

2. Whether the Commission properly analyzed the likely anticompetitive effects of the acquisition in the SLI battery separator market.

3. Whether the Commission's final divestiture order is within the bounds of its discretion.

## STATEMENT OF THE CASE

### A. Nature of the Case, Course of Proceedings, and Disposition Below

This is a petition to review a final divestiture order that the Commission issued following an administrative adjudication under Section 5 of the FTC Act, 15 U.S.C. § 45. It involves the acquisition by Polypore International, Inc. ("Polypore") of Microporous L.P. ("Microporous"), Polypore's only competitor in two relevant markets and a significant competitive threat in a third market.

The Commission issued its administrative complaint on September 9, 2008, charging that: (i) Polypore's acquisition of Microporous may substantially lessen

competition or tend to create a monopoly in relevant markets for several types of battery separators, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45 (Count I); (ii) Polypore entered into an unlawful joint marketing agreement with manufacturer Hollingsworth & Vose ("H&V") to forestall H&V's entry into a separator market in violation of Section 5 of the FTC Act (Count II); and (iii) Polypore monopolized the alleged relevant markets, in violation of Section 5 of the FTC Act, by executing contracts with large customers that would preclude or deter Microporous from competing effectively (Count III). D-1.

An Administrative Law Judge ("ALJ") presided over a four-week evidentiary hearing, producing a record including 5,590 pages of trial testimony and over 2,100 exhibits. The record was later reopened and a hearing conducted to receive additional evidence proffered by Polypore. On February 22, 2010, the ALJ issued a 376-page Initial Decision, holding that the acquisition was reasonably likely to substantially lessen competition in four relevant markets, and that the noncompete provisions in Polypore's joint marketing agreement with H&V constituted an unlawful market allocation agreement. The ALJ concluded that Complaint Counsel had failed to establish their claims of monopolization and attempted monopolization in any of the four relevant markets, and therefore

dismissed Count III. As a remedy for Count I, the ALJ ordered complete divestiture of all the acquired assets. In connection with Count II, the ALJ ordered Polypore to terminate the noncompete provisions of its marketing agreement with H&V and to cease and desist from entering into other such unlawful agreements. D-341.

Polypore appealed the ALJ's decision on Count I to the Commission, but did not appeal any aspect of the ALJ's decision on Count II. After full briefing and argument, and based on its *de novo* review of the record, the Commission unanimously affirmed liability in three of the alleged battery separator markets – deep-cycle, motive, and starter-lighter-ignition ("SLI") – but reversed the ALJ's ruling that the acquisition was unlawful in one market – that for uninterruptible power source ("UPS") separators. The Commission issued a Final Order containing a modified divestiture order and a cease and desist provision regarding Polypore's unlawful agreement with H&V. D-368.

### B. Statement of Facts

#### 1. The battery separator industry.

This case involves a consummated merger of two of the only three firms that produce and sell battery separators for flooded lead-acid batteries in North America. Polypore, through its Daramic division, manufactures battery separators

– microporous membranes incorporated into batteries to prevent electrical short circuits, D-341 at 22 (IDF 81) – used for a variety of applications, including (i) deep-cycle batteries for products such as golf carts, floor scrubbers, and scissor lifts, *id*. at 13 (IDF 19); (ii) motive power batteries for mobile industrial products such as forklifts, *id.* at 14 (IDF 25); (iii) SLI batteries for automotive applications such as cars, trucks, buses, boats, and jet skis, *id.* at 15 (IDF 32); and (iv) UPS products such as backup stationary batteries for computer and telecommunication systems, *id.* (IDF 35). Prior to the acquisition of Microporous, Daramic produced a variety of PE separators for these applications, and operated two plants in the United States and five foreign plants. *Id.* at 14, 16 (IDF 28, 38-39, 41).

Microporous (previously known as Amerace) manufactured two products for deep-cycle and motive applications: Flex-Sil, a rubber separator for deep-cycle batteries, and CellForce, a PE-based separator with a rubber additive to improve performance, sold primarily for motive batteries but also for deep-cycle applications. *Id.* at 17, 67, 69 (IDF 45, 372, 387). Microporous also developed and was marketing a PE separator for use in SLI applications.[1] *Id.* at 73-74 (IDF 429-33). At the time of the acquisition, Microporous operated one plant in Piney

[1] The rubber additive in CellForce is ground-up Ace-Sil, which is another Microporous separator typically used in high-end industrial products not at issue here. D-341 at 17 (IDF 45).

Flats, Tennessee, and had completed construction of a plant in Feistritz, Austria. *Id.* at 17, 125 (IDF 43-44, 778).

Daramic and Microporous were the only North American suppliers of deep-cycle battery separators, with market shares of approximately 10% and 90% respectively. *Id.* at 66, 68 (IDF 371, 385). They were also the only North American suppliers of motive battery separators, with market shares of approximately 90% and 10% respectively. *Id.* at 68, 71 (IDF 386, 410). The only other firm that supplied flooded-lead acid battery separators to customers in North America, Entek, sold only SLI separators. *Id.* at 73 (IDF 428). Entek had previously sold motive separators, but exited that business a decade ago. *Id.* at 95, 165 (IDF 578, 1040).

Battery separators are sold to firms that manufacture flooded lead-acid batteries. Some customers are large companies with multinational operations, while other are relatively small. Four of the largest customers are Exide (primarily SLI and deep-cycle batteries), JCI (primarily SLI but also deep-cycle batteries), EnerSys (industrial, including motive, batteries), and East Penn Battery (batteries for all four applications). *Id.* at 18-20 (IDF 49-59, 65-66). Other customers include Trojan Battery (deep-cycle batteries), U.S. Battery (primarily deep-cycle batteries), Crown Battery (batteries for all four applications), Douglas Battery

(deep-cycle and motive batteries), and Bulldog Battery (motive batteries). *Id.* at 19-22 (IDF 60-64, 67-80).

### 2. Daramic and Microporous competed in the deep-cycle market.

Daramic worked for many years to develop a separator to compete with Microporous's Flex-Sil in the deep-cycle market. Daramic introduced its first deep-cycle separator in 2002, then, in 2005, introduced an improved deep-cycle separator, Daramic HD, that provided the same "rubber effect" as Flex-Sil. *Id.* at 77-80 (IDF 457-61, 472-76, 481-82); PX1791-001.[2] Deep-cycle customers initially used Daramic HD in a limited way, but expanded their use over time. D-341 at 85 (IDF 512); Tr. 1209-13 (Roe). U.S. Battery, for example, tested Daramic HD in 2005, and indicated a desire to switch "four (4) new product lines . . . away from rubber [*i.e.*, Flex-Sil]," to Daramic HD, including a "mid-level" golf cart battery. PX0557-002; D-341 at 80 (IDF 480). U.S. Battery later increased its purchases of Daramic HD and continued to extend its use of Daramic

[2] Due to the uniquely high levels of antimony in deep-cycle batteries, separators used in these batteries must have the ability to suppress antimony migration from the positive to the negative plates in order to prevent cycle reduction and, ultimately, battery failure. Separators that are made of rubber or include a rubber additive are the most effective in preventing the transfer of antimony between the lead plates and, therefore, in reducing antimony poisoning. D-341 at 30-31 (IDF 136-40).

HD to additional battery models. D-341 at 85 (IDF 514-15); Tr. 369-70 (Gillespie).

Exide also began switching from Flex-Sil to Daramic HD for its deep-cycle batteries in 2005, and continued to convert additional batteries from Flex-Sil to Daramic HD. D-341 at 83, 85 (IDF 502-03, 513, 517-18); Tr. 368-79 (Gillespie). Exide now uses both Flex-Sil and Daramic HD as substitutes in its most common golf cart battery, which accounts for 80% of Exide's deep-cycle sales. Tr. 2941-44 (Gillespie). In December 2007, Daramic submitted a comprehensive supply proposal to Exide, proposing that Exide completely switch from Flex-Sil to Daramic HD for its golf cart batteries, including its original equipment batteries. Tr. 1788-89* (Roe). Shortly thereafter, Daramic reported that Exide was "looking to convert another size from Amerace to Daramic." PX0222-001*.

Trojan Battery, Microporous's biggest deep-cycle customer, also recognized the potential of using Daramic HD as a "second source to ensure supply and competitive pricing." PX1651; Tr. 181-84 (Godber); D-341 at 87 (IDF 531). Trojan Battery tested Daramic HD and qualified it for its batteries in its Pacer line of golf-carts, in which it had been using Flex-Sil, and has determined that 25% of its deep-cycle batteries could use Daramic HD. D-341 at 88, 90 (IDF 534, 546); Tr. 171-73 (Godber).

Microporous responded to this competition from Daramic by reducing the price of Flex-Sil. D-341 at 79, 86, 88-89 (IDF 470, 520-29, 535-42). The three largest purchasers of deep-cycle separators – Trojan, U.S. Battery, and Exide – repeatedly used the threat of switching to Daramic HD to get better prices from Microporous. Tr. 379, 406 (Gilchrist). In 2005, for example, the possibility that U.S. Battery would shift some of its purchases from Flex-Sil to Daramic HD prevented Microporous from discontinuing a material rebate program that U.S. Battery enjoyed. PX0509; Tr. 3912-13 (McDonald). On three occasions between 2006 and 2007, Exide used the availability of Daramic HD as leverage to get lower prices for Flex-Sil from Microporous. Tr. 2945-53(Gillespie). Trojan Battery also repeatedly used the threat of switching to Daramic HD as leverage to obtain price reductions from Microporous. Tr. 190-92, 199-207, 212-15 (Godber). Competition from Daramic HD also caused Microporous to begin offering its customers deep-cycle separators made from CellForce as a lower-cost alternative to Flex-Sil. D-341 at 89 (IDF 543-44); Tr. 1953-54 (Wallace); Tr. 3949 (McDonald).

**3. Daramic and Microporous competed in the motive market**.

Daramic and Microporous were also vigorous competitors in the motive market, resulting in lower prices for customers. In 2003, Daramic reported, "we

have a new polyethylene competitor entering the North American market. Micro-Porous Products (Amerace) . . . have attacked all the large manufacturers and to keep from losing business, we have adjusted prices as needed which has eroded our margins." PX0153-002. Daramic responded to this competition from Microporous by lowering the prices of its motive separators to East Penn, EnerSys, and others. D-341 at 96-98 (IDF 583-95); PX0243-001* (Daramic lowered prices "to fight the aggressive offers of Amerace"); Tr. 1254-67 (Roe); Tr. 2121-22, 2164-66* (Axt). Competition from Daramic likewise prompted Microporous to lower the price (or refrain from increasing the price) of its motive separators. D-341 at 98-100 (IDF 597, 607-08); RX0210-001; Tr. 2313-14 (Burkert); Tr. 3516-17 (Benjamin).

Daramic continued to feel the pressure of competition from Microporous up until the time of the merger. In the fall of 2007, Daramic responded to this competition by developing what it called the "MP Plan," the goal of which was to secure long-term agreements with customers that Daramic identified as at risk of shifting sales of separators, including motive separators, to Microporous. Daramic offered these customers contracts that would freeze prices in 2009 and limit future price increases. D-341 at 131-32 (IDF 820-22); PX0258; PX0255*; Tr. 1285-94 (Roe). In November 2007, EnerSys responded to Daramic's announcement of

price increases for its motive separators by stating that, because of the availability of Microporous, "[u]nfortunately for Daramic, these types of ploys will have no success in future negotiations with EnerSys." RX0768-001*; Tr. 2342-44* (Burkert) ("banking on having Microporous as a supplier, . . . I could just walk away and say no, I'm not signing a contract, I don't need to buy from you"); D-341 at 98 (IDF 598-99).

Where Daramic did not face competition from Microporous, however, it insisted on higher prices. In an internal email regarding Exide (which was bound by an exclusive contract with Daramic until 2010, Tr. 2966 (Gillespie)), a Daramic sales executive wrote to his colleague that Daramic should be prepared to push for a price premium, noting that "[s]ince they can't go to Amerace, we can negotiate a little tougher." PX0843-001.

**4. Microporous was bidding for SLI business**.

Daramic and Entek had long been the only two suppliers of SLI battery separators in North America, with sales split evenly between the two. D-341 at 73, 75 (IDF 426, 439). In 2003, JCI approached Microporous about supplying SLI separators, because it felt that Daramic and Entek "needed competition to improve their pricing and their performance." Tr. 2698-99 (Hall); D-341 at 106-07 (IDF 655-56, 660-61). When Daramic learned that Microporous was bidding on a

portion of JCI's SLI business, it used the threat of cutting off supply to JCI in Europe to secure a [redacted] supply contract with JCI. D-341 at 107-10 (IDF 663, 667, 677-78). JCI continued to work with Microporous, however, to develop an SLI separator and qualified Microporous's PE SLI separators for its batteries in 2007. *Id*. at 111 (IDF 684-90). JCI ultimately entered into a supply contract with Entek for its SLI requirements after its exclusive contract with Daramic expired in 2008.[3] D-341 at 117-18 (IDF 734, 736).

In 2007, Exide began working with Microporous to develop Microporous as an SLI supplier in North America and Europe. D-341 at 112-14 (IDF 694-710); Tr. 2965-79 (Gillespie). Microporous and Exide entered into a memorandum of understanding ("MOU"), in which Microporous represented that it would supply substantial volumes of SLI separators to Exide beginning in 2010. PX1080. Microporous sent SLI separator samples to Exide for testing, exchanged drafts of a supply agreement with Exide, and continued to meet and consult with Exide regarding a supply contract for SLI separators. Tr. 443-49* (Gilchrist); Tr. 2973-76 (Gillespie). The MOU expired at the end of 2007, and the parties renewed the

[3] JCI's decision had little to do with Microporous's development or manufacturing capabilities, but instead reflected its concern that Daramic might acquire Microporous and that a trade dispute between Daramic and Microporous could delay Microporous's installation of necessary capacity by the end of 2008. D-341 (IDF 691-93); Tr. 2697-2701 (Hall).

agreement in February 2008. RX0403; PX0392-001. Exide "had full intention that we were going to be buying Microporous [SLI] separators in 2010." Tr. 2976 (Gillespie).

In the fall of 2007, East Penn Battery also approached Microporous and indicated that it was interested in entering into a long-term contract with Microporous for the supply of SLI separators. D-341 at 115 (IDF 717-19); Tr. 4006-18 (Leister). Microporous's work with East Penn was brought to a halt by the acquisition. Tr. 3722-23 (Trevathan).

Microporous's activities in the SLI market did not go unnoticed by Daramic and Entek. D-341 at 74, 110, 129-30 (IDF 435-36, 681, 805-09). In 2006, Entek identified the possibility that Microporous would receive JCI's support to become a third SLI supplier as one of the things it most feared its competitors would do to change the competitive landscape. PX1832-026-27*; Tr. 4517* (Weerts). By 2007, Daramic believed that Microporous was a serious competitive threat and had the potential to capture as much as 20 to 25 million square meters ("msm") of Daramic's SLI business in 2009 and an even larger share in 2010. PX2078. Daramic's head of sales warned that, "unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes." PX0238-001; Tr. 1301-08 (Roe).

The competitive threat from Microporous influenced Daramic's SLI pricing. Estimating that it was at risk of losing to Microporous 1 msm of automotive and 500,000 square meters of motive separator sales at East Penn Battery, Daramic (as part of its "MP Plan") offered East Penn a contract that would freeze 2009 prices and limit future price increases. PX0258-002; D-341 at 131-32 (IDF 820-22). A market share chart prepared by Daramic assigned Microporous an initial 4% market share for SLI. PX0264-003. Microporous itself projected that it would gain a 6% share of the SLI market by 2010. PX0080-060*.

**5. Microporous was expanding.**

Before the acquisition, Microporous was in the process of expanding its production capacity in both the United States and Europe. D-341 at 123-27 (IDF 769-790). Microporous built a new plant in Feistritz, Austria, with two PE lines that could produce either CellForce separators or pure PE SLI separators. PX0742-007; Tr. 330-32 (Gilchrist); Tr. 4558-60 (Gaugl); Tr. 3714 (Trevathan). The Feistritz plant was scheduled to commence operating in March 2008 (and, indeed, did commence operations in March 2008, one week after the acquisition closed). D-341 at 195 (IDF 1266); PX0078-025*; Tr. 333-35 (Gilchrist); Tr. 4603 (Gaugl). Microporous was also planning to install an additional PE line at its Piney Flats plant, which could likewise produce either CellForce or pure PE separators for SLI.

Tr. 3722, 3731-32 (Trevathan). Microporous ordered the long-lead time equipment for that line, but the equipment had not been installed at the time of the acquisition, and subsequently remained uninstalled (thus, it is referred to in this case as the "line in boxes"). D-341 at 195 (IDF 1268-69); Tr. 4561-65 (Gaugl).

This expansion would remedy capacity constraints at the Piney Flats plant, both because it would add a new line at Piney Flats, and because Microporous was going to shift the production of CellForce for its foreign customers from Piney Flats to the Feistritz plant, thereby freeing up additional capacity for North American customers. D-341 at 126-27 (IDF 788, 795); Tr. 3774 (Trevathan). As a result of this planned expansion, Microporous was able to commit additional North American CellForce sales to EnerSys, Trojan Battery, and U.S. Battery, and had entered into discussions with other customers to sell additional volumes of CellForce. D-341 at 127 (IDF 796-97); PX1741-004; PX0080-011*; Tr. 224-27 (Godber); Tr. 344, 401-03 (Gilchrist).

**6. Daramic acquired Microporous to eliminate competition.**

For years, Daramic executives had viewed Microporous as a competitive threat that was harming Daramic's margins. D-341 at 96, 98, 120-21 (IDF 582, 596, 750-59). In 2003, the President of Daramic put Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic as "[e]liminate price

competition." PX0932. In March 2005, Daramic's head of sales sent a memorandum to Daramic's then-CEO explaining the advantages and disadvantages of acquiring Microporous. He warned that, if Daramic did not acquire Microporous, Microporous "may continue their plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins." PX0433-004.

When Polypore's new CEO arrived in mid-2005, Daramic's Vice President advised him that Microporous "represent[s] a threat to Daramic for the future (construction of a second line, former discussion they had with JCI . . . ). Their first line cost us [redacted] year, in price concession and loss of business. The second line could cost us another [redacted]." PX2242-001*. Internal Daramic emails from 2005 also show that Daramic executives were concerned about Microporous's expansion plans and more vigorous competition in both the motive and SLI markets. PX0168-002 ("Amerace is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts expire."); PX0694-001 ("The bottom line is that Amerace can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth."). In August 2006, Daramic's departing CEO wrote to his successor that Microporous

"will be a problem for Daramic. They have acquired momentum and it will be very difficult to stop them unless the BOARD will approve its purchase at any price. . . ." PX0167.

In October 2007, Daramic presented its due diligence for a proposed acquisition of Microporous to Polypore's Board of Directors. An analysis prepared for the Board shows that Daramic continued to view the acquisition as a profitable alternative to competition in the motive and SLI markets. D-341 at 136-42 (IDF 853-85). Daramic projected that, without the acquisition, its volume would fall by [redacted] in 2008, [redacted] in 2009, and [redacted] in 2011. PX0738-004*. Daramic also projected that, absent the acquisition, it would lose [redacted] in 2008, [redacted] in 2009, and [redacted] in 2010 from competition with Microporous. *Id.* at 8*. Daramic estimated that it faced a "5-year EBITDA[4] loss of [redacted] by fighting against MP Phase III; "[e]xcess supply and market price erosion;" and "Daramic market share loss of [redacted]." PX0738-010*. Daramic's General Manager and Vice President wrote in his notes for the presentation that, without the acquisition, Daramic would have to "[l]ower prices by [redacted] beginning in 2008 on [redacted] of IND [industrial] volume to avoid MP phase 3." *Id.* at 4*. The Board presentation also described benefits and synergies

[4] "EBITDA" refers to earnings before interest, taxes, depreciation, and amortization. Tr. 1398-99 (Toth).

from the acquisition. These included "[i]mplement [redacted] price increase to non-contract customers on industrial products in 2010 – generating [redacted] incremental EBITDA." *Id.* at 7*. With respect to the deep-cycle market, the stated benefits included "increase in market price." *Id.** Daramic's 2008 budget also projected that, absent the acquisition, Daramic would lose increasing amounts of business to Microporous and would be forced to reduce prices, but with the acquisition, Daramic could increase the price of Microporous's CellForce and industrial products. PX0823-013*.

Microporous's assessment of its value to Polypore was more succinct:

> Any offer must take into account the significant strategic implications of what Daramic gains by owning MPLP:
> - Total control of deep cycle markets (no competitor)
> - Total control of industrial markets (no competitor)
> - Regains complete upper hand in automotive with no new competitor being introduced
>
> * * *
>
> This is a "strategic" play on Daramic's part . . . based on . . . the prospects of taking Daramic's most dangerous competitor out of play.

PX1104-001.

Consistent with the price increases projected in Daramic's documents, approximately six months after Polypore acquired Microporous, it began to announce broad-based price increases [redacted]. D-341 at 91-93, 100-01, 145-47

(IDF 552-63; 611-15, 897-916). Daramic's announced price increases were as high as [redacted]. *Id*. at 147 (IDF 913-915). As a representative for Bulldog Battery, a motive customer, testified, "[t]here was no way to try to negotiate a lower price. There was no place to go." Tr. 3522, 3525-26 (Benjamin).

### C. The Commission's Decision and Order

The Commission affirmed liability on the deep-cycle, motive, and SLI markets, but reversed liability in the UPS market. The Commission agreed with the ALJ that the evidence supports defining four distinct relevant product markets because, due to differing functionality and performance characteristics, separators made for one of the four end uses are not reasonably interchangeable with separators made for another end use. D-368 (Op. 11-18). With regard to the deep-cycle market, the Commission rejected Polypore's argument that Flex-Sil constitutes its own relevant market, based on evidence showing that, before the acquisition, Daramic HD competed with, and constrained the price of, Microporous's Flex-Sil separators. *Id*. at 14-15. The Commission also agreed with the ALJ that the relevant geographic market is North America, based on evidence showing, among other things, that separator suppliers are able to price discriminate based on a customer's geographic location, and that North American

customers do not consider foreign supply a reasonable competitive alternative to local supply due primarily to higher costs and quality concerns. *Id*. at 18-19.

The Commission also found that Daramic and Microporous were the sole participants in the deep-cycle and motive markets. The Commission rejected Polypore's argument that Entek is an uncommitted entrant in those markets, because the evidence does not show that Entek is in a position to provide a rapid and effective supply response to the exercise of market power by Daramic in the deep-cycle or motive markets.[5] D-368 (Op. 23-25).

In addition, the Commission found that Microporous was competing for SLI business, seeking to challenge Daramic's and Entek's hold on that market. Not only was Microporous actively bidding for SLI business, but it had made meaningful progress toward a supply agreement with Exide, which fully intended to purchase SLI separators from Microporous. The Commission also found that Daramic itself (and Entek as well) perceived Microporous as a serious competitive

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[5] The term "uncommitted entrant" comes from the U.S. Department of Justice and FTC Horizontal Merger Guidelines § 1.0 (1992, rev. 1997), available at http://www.justice.gov/atr/public/guidelines/hmg.pdf, which state that "[u]ncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times." The Horizontal Merger Guidelines were revised in 2010 and no longer use that terminology, see *infra* at 43 n.9, but the analysis is the same under either version. D-368 (Op. 9 n.17).

threat in the SLI market. *Id*. at 20-22.

The Commission did not agree, however, with the ALJ's conclusion that Microporous was a participant in the UPS market because, unlike in the SLI market, Microporous had not developed a commercially viable separator to offer North American customers, no customer had come close to qualifying a Microporous UPS separator, and there is no indication that Daramic perceived Microporous as a competitive threat in the UPS market. *Id*. at 22-23.

The Commission concluded that the acquisition was a presumptively unlawful merger to monopoly in the deep-cycle and motive markets. It also held the acquisition presumptively unlawful in the SLI market, because it eliminated an actual participant that was actively competing for business and constraining Daramic's prices, and returned the highly-concentrated SLI market to a duopoly controlled by long-term incumbents. The Commission found that liability in the SLI market could be premised in the alternative on the elimination of actual or perceived potential competition. *Id*. at 26-27.

The Commission did not rest on a presumption of illegality, however, but also found that direct evidence of anticompetitive unilateral effects in the deep-cycle and motive markets, and unilateral and coordinated effects in the SLI market, strengthened Complaint Counsel's already compelling *prima facie* case. Among

other things, the evidence showed that pre-acquisition competition between Daramic and Microporous resulted in lower prices and that Daramic was motivated to acquire Microporous at least in part to eliminate competition. The Commission also found that, following the acquisition, Daramic promptly announced post-acquisition price increases that were consistent with those projected in its pre-acquisition documents. In addition, the Commission found that anticompetitive coordinated effects in the SLI market are likely, based both on the presumption of coordination in a merger to duopoly in a market with high barriers to entry and evidence showing pricing transparency in that market. *Id*. at 27-32.

Turning to Polypore's rebuttal evidence, the Commission concluded that the record does not support Polypore's argument that entry by Entek or others (including Asian firms referenced by Polypore) would counteract any potential anticompetitive effects from the acquisition. The Commission found that there are substantial barriers to entry in the relevant markets. With regard to Entek, the Commission found that it has shown little interest in re-entering the motive market; even if it did re-enter the motive market, cost and price considerations make it unlikely that it would be in a position to constrain Daramic's pricing; and the lengthy time required to test and qualify motive separators make it even less likely that entry by Entek would alleviate the anticompetitive effects of the acquisition in

that market. *Id*. at 33-35.

To restore the competition lost through the acquisition, the Commission ordered Polypore to divest all of the assets it acquired from Microporous, including the plant in Feistritz, Austria, and granted ancillary relief. The Commission found that divestiture of the Feistritz plant, although located outside the North American market, is necessary to provide the acquirer of the divested assets the ability to compete effectively within the North American market, by relieving capacity constraints that Microporous remedied by constructing the Feistritz plant, and by giving the acquirer the same advantages of a global supply that Microporous was able to offer its customers once it constructed the Feistritz plant. The Commission also required Polypore to terminate the noncompete provisions of its marketing agreement with H&V and to cease and desist from entering into other such unlawful agreements. *Id*. at 36-42; D-368 (Final Order).

### D. Standard of Review

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). Reviewing courts may not "make [their] own appraisal of the [evidence], picking and choosing … among uncertain and conflicting inferences." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2015 (1986) (internal quotation marks omitted); *accord Schering-*

*Plough Corp. v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005)) ("we do not review the record to draw our own conclusions that we measure against an administrative agency"). Rather, "the court must accept the Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Indiana Fed'n of Dentists*, 476 U.S. at 454, 106 S. Ct. at 2015-16 (internal quotation marks omitted).

Review of the Commission's legal analysis and conclusions is *de novo*, "although even in considering such issues the courts are to give some deference to the Commission's informed judgment." *Indiana Fed'n of Dentists*, 476 U.S. at 454, 106 S. Ct. at 2016; *accord Colonial Stores, Inc. v. FTC*, 450 F.2d 733, 740 n.14 (5th Cir. 1971) ("even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable").

Remedial provisions are subject to an abuse of discretion standard, because "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 66 S. Ct. 754, 760 (1946). The Commission is "the expert body to determine what remedy is necessary," and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428, 77

S. Ct. 502, 509 (1957) (quoting *Jacob Siegel*, 327 U.S. at 612-13, 66 S. Ct. at 760).

## SUMMARY OF THE ARGUMENT

Despite Polypore's efforts to characterize this as a case primarily about potential competition, this is a case about the loss of actual competition between Daramic and Microporous in the deep-cycle, motive, and SLI markets that produced lower prices for customers in each of those markets. Polypore seeks to sustain its fiction by relegating its discussion of the deep-cycle and motive markets – markets in which Daramic and Microporous were indisputably current (and the only) participants – to the back end of its brief, and by mischaracterizing the Commission's analysis of competitive effects in the SLI market. We do not accept Polypore's invitation to distort the Commission's analysis and, therefore, address the issues in the sequence that the Commission's Opinion did – addressing first the deep-cycle and motive markets in which Microporous was an established, vigorous, sole competitor to Daramic, then addressing the SLI market where recent entry by Microporous was beginning to disrupt an entrenched duopoly.

Substantial evidence supports the Commission's finding that the acquisition eliminated competition between Microporous and Daramic in the deep-cycle market. Polypore argues that the Commission should be reversed because it ignored evidence that Polypore believes supports a Flex-Sil-only relevant product

market. But, in fact, it is Polypore that ignores evidence in this case. Polypore makes little mention, for example, of the evidence showing that customers viewed Daramic's deep cycle separator (Daramic HD) and Microporous's Flex-Sil as substitutes for each other. Nor does Polypore mention the considerable evidence showing that customers repeatedly used the availability of Daramic HD to get lower prices for Flex-Sil. This evidence firmly supports the Commission's conclusion that the acquisition likely substantially lessened competition in the deep-cycle market in violation of Section 7. (Part I.A.)

Substantial evidence also supports the Commission's conclusion that the acquisition likely substantially lessened competition in the motive market in violation of Section 7. Although Polypore argues that entry by Entek will constrain Daramic's exercise of market power, the record shows otherwise. The Commission did not, as Polypore contends, base its conclusion on subjective assertions by Entek concerning its interest in entering the motive market, but instead based its decision on objective considerations, including evidence showing that, even if Entek did enter, its pricing is unlikely to be competitive with Daramic's pricing. (Part I.B.)

The Commission also properly concluded that the acquisition harmed competition in the SLI market by eliminating a significant competitive threat to

Daramic's and Entek's long-standing duopoly in that market. Contrary to Polypore's argument, controlling legal authority and substantial evidence support the Commission's finding that Microporous was an actual competitor in the SLI market. The evidence shows, among other things, that Microporous was bidding for SLI business, Microporous was on the verge of securing an SLI supply agreement with Exide, and the threat of losing SLI business to Microporous led Daramic to lower prices to East Penn battery, one of its SLI customers. The Commission correctly recognized that liability in the SLI market could, in the alternative, be premised on the loss of potential competition. (Part I.C.)

Finally, the Commission's order of divestiture follows textbook Section 7 principles, is fully supported by the record, and is well within the bounds of the Commission's discretion. Although Polypore questions the Commission's authority to require divestiture of the plant in Feistritz, Austria, it is well established that the Commission, in the exercise of its broad remedial authority, may order divestiture of assets outside the relevant market if divestiture of those assets is necessary to restore competition within the relevant market – which the Commission found is the case here. (Part II.)

## ARGUMENT

### I. THE COMMISSION PROPERLY FOUND A SECTION 7 VIOLATION IN THE DEEP-CYCLE, MOTIVE, AND SLI BATTERY SEPARATOR MARKETS.

Section 7 of the Clayton Act is "designed to arrest in its incipiency … the substantial lessening of competition from the acquisition by one corporation" of the stock or assets of a competing corporation. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589, 77 S. Ct. 872, 875 (1957). Section 7 does not require certainty, but instead prohibits acquisitions that create a "a reasonable probability that the proposed transaction would substantially lessen competition in the future." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *see Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred at the time of trial. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505-06, 94 S. Ct. 1186, 1197-98 (1974).

The government can establish a presumption of liability by defining a relevant product and geographic market and showing that the acquisition will lead to undue concentration in that market. *Univ. Health*, 938 F.2d at 1218. The

government can bolster a *prima facie* case based on market structure with evidence showing that anticompetitive effects are likely, including the ordinary course of business documents of the merging parties recognizing the pre-acquisition competition between them and anticipating that the merger will end it. *H.J. Heinz*, 246 F.3d at 717. Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects. *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983) ("[e]vidence of intent is highly probative . . . because knowledge of intent may help the court to interpret facts and to predict consequences").

Substantial evidence in this case supports the Commission's findings that there is a reasonable probability that Polypore's acquisition of Microporous substantially lessened competition in the deep-cycle, motive, and SLI separator markets. The Commission's decision was based not only on presumptions drawn from market share and concentrations levels (though those by themselves support a finding of liability), but also on strong evidence showing a likelihood of competitive harm, including the loss of pre-acquisition competition as well as post-acquisition price increases.

### A. Substantial Evidence Supports the Commission's Finding that the Acquisition Eliminated Competition Between Microporous and Daramic in the Deep-Cycle Market.

In this appeal, Polypore does not dispute that Daramic and Microporous were the only suppliers of deep-cycle battery separators in North America before the acquisition, and that, as a result of the acquisition, Daramic now controls 100% of the supply of deep-cycle separators. Nor does Polypore dispute that, before the acquisition, Daramic HD competed with Microporous's CellForce for deep-cycle applications, which competition has now been eliminated. Instead, Polypore argues that the Commission's decision that the acquisition lessened competition in the deep-cycle market should be reversed because the Commission "largely ignored" or failed to give "adequate weight" to evidence that Polypore believes supports a Flex-Sil-only relevant product market, and because the competition between Daramic HD and CellForce was (Polypore claims) "insubstantial" "niche competition." Polypore's arguments have no basis in law or fact.

As this Court has observed, "[d]efining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) (internal quotation marks

omitted). Products are properly considered to be in the same relevant market if evidence shows that customers view them as substitutes and could switch from one to the other in response to a small but significant price increase. *See United States v. Engelhard Corp.*, 126 F.3d 1302, 1305-08 (11th Cir. 1997). Substitution for the purpose of defining a relevant market does not, however, require complete interchangeability between products – a point that Polypore concedes. Br. 45 (stating that this is a "legal truism"); D-368 (Op. 14). Furthermore, because "[t]he definition of a relevant market is essentially a factual question," the factfinder's determinations on this issue "are accorded great deference." *Engelhard*, 126 F.3d at 1305 (internal quotation marks omitted).

In this case, ample evidence – including the merging parties' ordinary course of business records, testimony of Polypore's own employees, and testimony of the customers – supports the Commission's (and the ALJ's) findings that Daramic HD, Flex-Sil, and CellForce were functionally interchangeable, that Daramic HD competed against both Flex-Sil and CellForce in the deep-cycle separator market, and that this competition caused Microporous to reduce its prices.

Tucker Roe, Daramic's Vice-President of Worldwide Sales and Marketing, made the point clearly in an internal 2007 e-mail: "HD is for deep cycle

application. This is golf cart, marine and floor scrubber. This is the market of Amerace's Flex-Sil." PX0316-002; D-341 at 81 (IDF 489). Daramic held itself out to customers as an alternative to Flex-Sil, advertising that HD matched the antimony poisoning retardation of Flex-Sil, and Daramic's product testing supported this claim. D-341 at 80-82 (IDF 483, 490-93); PX0423-002; Tr. 1202-03 (Roe); Tr. 4839* (Whear). Customers such as U.S. Battery and Exide concurred that HD and Flex-Sil are substitutes for each other. D-341 at 84-84 (IDF 502-05); Tr. 1971-72 (Wallace) (testing by U.S. Battery showed "comparable" results for Flex-Sil and HD); Tr. 2062-63 (Qureshi) ("they are identical in performance"); Tr. 2932-33 (Gillespie) (Exide regards HD and Flex-Sil as "substitutes for each other").

As discussed in detail above, the evidence shows that deep-cycle customers switched ever-increasing amounts of their separator purchases from Flex-Sil to Daramic HD. *See supra* at 7-8. With regard to U.S. Battery, for example, Daramic reported, "[w]e should continue to see more of their deep-cycle business headed our way. [U.S. Battery] appreciates that we developed a competing product for rubber . . . [and] sees their benefit as having two suppliers in order to manage costs while maintaining product performance. Meanwhile, we benefit by continuing to gain incremental volume (and taking it away from Microporous Products) in a

market where we are relatively new entrants." PX0557-003; *see* PX1710-001 ("Amerace found out that we are taking their market share with our Daramic HD, for the golf cart business. . . . Exide is switching already half a million sqm from the Flexil [sic] to us"); PX0321-002 ("Daramic expects to increase sales of Daramic HD separators by 63% over prior year and meet or exceed 2007 budgeted sales volume").

There is also ample evidence that Daramic HD repeatedly constrained Microporous's pricing of Flex-Sil (evidence that Polypore omits mention of in its brief). *See supra* at 9. Daramic itself recognized that HD was constraining Microporous's prices, writing in 2007, "We know we can price the product where we want to either get business or cause Amerace to reduce theirs." PX0329-001. At the same time, Daramic recognized that "[w]e must continue to improve our service on HD or we stand a good chance of losing golf car business back to Amerace FlexSil." PX0413-005.

Disregarding this evidence, Polypore argues that the Commission's decision must be reversed because the Commission "largely ignored" evidence that Flex-Sil was generally viewed as a higher-quality product, and customers purchased only limited quantities of Daramic HD despite Flex-Sil's significantly higher price. But the Commission did not ignore this evidence. Rather, the Commission carefully

considered whether these factors warrant separate relevant markets and determined (as did the ALJ) that they do not, in light of the considerable evidence showing that Daramic HD competed against and constrained Microporous's pricing of Flex-Sil. D-368 (Op. 14-15, 27-28); D-341 at 227-30. Contrary to Polypore's contention, Br. 42, *U.S. Anchor* does not stand for the broad proposition that evidence of perceived quality differences and pricing disparities between otherwise interchangeable products warrants defining separate relevant markets. In that case, the Court's decision finding separate relevant markets was driven by the total absence of evidence that the demand for or pricing of "premium" anchors was in any way influenced by the availability of lower-priced "generic" alternatives. *U.S. Anchor*, 7 F.3d at 996-99.[6] That is not the case here.

There is likewise no merit to Polypore's characterization of Daramic HD as a product suitable for only a small segment of the deep-cycle market. Even if one were to accept Polypore's contention that HD is categorically unsuitable for any OE application – notwithstanding evidence to the contrary, Tr. 1934-35 (Wallace); Tr. 1788-89* (Roe) – OE is a far smaller segment of the deep-cycle battery market

[6] The Court observed: "Simpler evidence of supply and demand substitution, like proof that producers in the submarket had actually increased or decreased their sales in response to corresponding price changes in the broader market, would also suffice. As we have pointed out, however, U.S. Anchor failed to meet its burden of proving interdependent market behavior by this method as well." *U.S. Anchor*, 7 F.3d at 998-99.

than replacement batteries. Tr. 357-58, 608-09 (Gilchrist) (replacement batteries are approximately 85% of the market); PX0433-002 (Daramic estimated that the split is 70% replacement, 30% OE); Tr. 3091-92 (Gillespie) (Exide's batteries are 90 % aftermarket, 10% OE). Exide's VP of global procurement testified that the reason Exide has not yet sought to qualify Daramic HD for its OE batteries is that it takes time to qualify a new separator and "we go for the biggest bang for the buck first" – *i.e.*, its replacement batteries – "not go for the smallest volume with the littlest bang first." Tr. 3090-91 (Gillespie). Polypore's contention that Daramic HD is suitable only for an insignificant "niche" of the deep-cycle market is further belied by its 2007 budget, which targeted a [redacted] share for Daramic HD at Trojan Battery in 2009, complete conversion of Exide's replacement batteries to HD and qualification for Exide's OEM batteries, and an increase of its market share at U.S. Battery to [redacted]. PX0263-008*.

Nor is there merit to Polypore's attempt to dismiss the elimination of competition between HD and CellForce as involving too insubstantial an amount of commerce to matter. Br. 46. Not only does this proposition lack legal support, it is factually inaccurate as well. Competition from Daramic HD led Microporous to begin offering the less expensive CellForce to its customers for deep-cycle applications. D-341 at 89 (IDF 543-44); Tr. 1953-54 (Wallace). Because of

capacity constraints, however, Microporous was able to provide only limited amounts of CellForce to deep-cycle customers. D-341 at 88 (IDF 537); Tr. 193-95 (Godber). At the time of the merger, that capacity constraint was about to end, with the completion of Microporous's Austrian plant (which would immediately free up capacity at its Piney Flats plant for North American customers), and the planned installation of an additional PE line at Piney Flats. *See supra* at 14-15.

The record shows that Trojan Battery had plans to move a considerable amount of its Flex-Sil batteries to CellForce once the Austrian plant began operating, and had determined that Daramic HD could be used in all applications that used CellForce. D-341 at 90 (IDF 546-48); PX0080-011*; Tr. 173, 224-27 (Godber). Prior to the acquisition, JCI was also engaged in discussions with Microporous to supply CellForce separators for its golf cart batteries to have an alternative to Daramic HD, because JCI wanted to "see competition." Tr. 2704-07 (Hall); D-341 at 84 (IDF 506). This is significant competition, eliminated by the acquisition, that Polypore ignores.

This evidence firmly supports the Commission's conclusion that the acquisition likely substantially lessened competition – including competition between Daramic HD and Flex-Sil – in the deep-cycle market.

### B. Substantial Evidence Supports the Commission's Finding that Entry by Entek Would Be Unlikely to Alleviate the Anticompetitive Effects of a Merger to Monopoly in the Motive Market.

With regard to the motive market, Polypore does not dispute that Daramic and Microporous were its only participants, that Daramic's and Microporous's products competed with each other and this competition led to lower prices, or that the acquisition eliminated this competition and gave Daramic a monopoly. The anticompetitive effects of such an acquisition are obvious, and the only defense that Polypore offers is that entry by other firms (specifically, Entek) will constrain Daramic's exercise of market power.

For entry to counteract the likely harm from a merger that enhances market power, such entry must be of a sufficient scale to constrain the merged entity's prices. *Chicago Bridge*, 534 F.3d at 429. "The more concentrated the market and the greater the threat posed by the challenged practice, the more convincing must be the evidence of likely, timely and effective entry." Phillip E. Areeda, Herbert Hovenkamp & John Solow, IIB *Antitrust Law* ¶ 422, at 91 (3d ed. 2006); *see United States v. Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990) ("[i]f the totality of . . . [the] evidence suggests that entry will be slow and ineffective, then the . . . court is unlikely to find the prima facie case rebutted"). The Commission carefully considered Polypore's arguments and the evidence relating to this issue

and agreed with the ALJ that entry – either new entry or expansion by Entek – is unlikely to constrain the anticompetitive effects of the acquisition. D-368 (Op. 33-35); D-341 at 270-87. Substantial evidence supports the Commission's finding.

Although Polypore makes passing reference to small separator manufacturers that "spring up around the world from time to time," Br. 48 (referencing Asian firms), it makes no real effort to dispute the Commission's findings that there are substantial barriers to entry in the relevant markets, *see* D-341 at 148-56 (IDF 924-30, 932-63, 973-75), and that these barriers are even greater for Asian firms due, among other factors, to higher production and transportation costs and supply chain risks, *see id*. at 52, 57-58, 62, 167-68 (IDF 288-89, 314-19, 349, 1057-63). Rather, Polypore challenges the Commission's conclusion that entry by Entek is not likely to alleviate the anticompetitive effects of this merger to monopoly in the motive market, arguing that the Commission did not properly consider "objective economic realities." Br. 50.

Contrary to Polypore's contention, however, the Commission did not base its conclusion regarding the prospects of entry by Entek on subjective assertions by Entek concerning its interest in entering the motive market. The Commission instead based its decision on objective factors, including cost and price considerations, Entek's strategic decision to focus on SLI production, and its past

actions in declining numerous opportunities to re-enter the motive market. D-368 (Op. 24-25, 35); *see Mercantile Texas Corp. v. Bd. of Governors of Fed. Reserve Sys*., 638 F.2d 1255, 1269 (5th Cir. 1981) ("objective" evidence regarding likelihood of entry includes "evidence of a market's profitability or of the previous behavior of a firm").

The record shows, for instance, that Entek has pursued a strategy of [redacted] D-341 at 70 (IDF 398). An Entek representative testified that the thicker industrial (*i.e.*, motive) separators are more costly and difficult to produce, and that [redacted] Tr. 4503-04*, 4515-16* (Weerts); D-341 at 163 (IDF 1029-30). Since exiting the motive separator market, Entek has repeatedly declined customer requests that it supply non-SLI separators. D-341 at 69-70, 164 (IDF 395-97, 1032-34). While Entek has had some recent discussions with customers about the possibility of providing motive separators, Entek does not even have such products available, much less tested, and it has indicated that if it did produce industrial separators, [redacted] *Id*. at 165-65 (IDF 1035-37, 1041-43); PX1902-001*; Tr. 4508-09* (Weerts); Tr. 3040, 3129-30* (Gillespie); Tr. 2350-55, 2446-48 (Burkert). The evidence also shows that the time

required to test and qualify motive separators is particularly lengthy, lasting from two to three years. D-341 at 161, 164-65 (IDF 1011-14, 1038, 1044); PX0568*, Tr. 2490-91, 2522-23* (Gagge); Tr. 3037-39* (Gillespie).

On this record, the Commission properly found that Entek is unlikely to enter the motive market and that, even if it did, entry would not be sufficient to constrain Daramic's post-acquisition pricing. The Commission's finding that entry would not likely offset the anticompetitive effects of the acquisition is further supported by the fact that, at the time of the administrative proceedings (more than two years after the acquisition), and after Daramic's imposition of substantial price increases for its separators, see *supra* at 18-19, neither Entek nor any other firm had entered the motive market. Nothing cited by Polypore remotely justifies reversing the Commission's findings on this issue.

### C. The Commission Properly Analyzed the Competitive Effects of the Acquisition in the SLI Market.

Polypore's various arguments as to why this Court should reverse the Commission's analysis of the acquisition's anticompetitive effects in the SLI separator market hinge on its contention that the Commission improperly treated Microporous as a current participant in the SLI market, rather than merely a

potential competitor. Polypore is wrong.[7]

### 1. Legal authority supports the Commission's analysis of Microporous as an actual competitor.

Polypore contends – without citing any legal support for the proposition – that the reasons given by the Commission for treating Microporous as a participant in the SLI market, D-368 (Op. 20-22), are not relevant to the question of whether it was a current competitor. Br. 21. Controlling legal authority demonstrates otherwise. In *United States v. El Paso Natural Gas Co.*, the Supreme Court found that a merger violated Section 7 where, prior to the acquisition, the acquired firm had made efforts to sell in the relevant market and those efforts, even though unsuccessful, had induced the acquiring firm to reduce its prices in that market. 376 U.S. 651, 659, 84 S. Ct. 1044, 1048-49 (1964) ("We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State."). As the Court later explained in *United States v. Marine Bancorporation, Inc.*, "[t]he merger declared unlawful in *El Paso*

[7] Polypore goes particularly far afield in claiming that its arguments about the SLI market somehow warrant reversal of the Commission's decision in its entirety, including its independent conclusions that the acquisition substantially lessened competition in the deep-cycle and motive markets in violation of Section 7. Br. 40-41. As demonstrated above, the Commission properly found an unlawful merger to monopoly in each of those markets, and nothing in Polypore's arguments regarding the SLI market has any bearing on those findings.

removed not merely a potential, but rather an actual, competitor." 418 U.S. 602, 625 n.24, 94 S. Ct. 2856, 2871 n.24 (1974) (internal quotation marks omitted).[8]

In *Grumman Corp. v. LTV Corp*., 665 F.2d 10 (2d Cir. 1981), the Second Circuit followed *El Paso* in affirming the grant of a preliminary injunction that prevented a merger between LTV and Grumman, manufacturers of aircraft products, even though the Defense Department had not ordered any A-7 aircraft for two years and had no plans to purchase any from LTV. The court observed that "[w]hether or not [LTV] will sell more A-7's to the Defense Department, the fact remains that it was properly found to be competing." *Id*. at 12. The court held that the fact that LTV's recent efforts had not resulted in any sales "does not lessen the competitive significance of [LTV's] capacity and desire to make it. 'Unsuccessful bidders are no less competitors than the successful ones.'" *Id*. at 13 (quoting *El Paso*, 376 U.S. at 661, 84 S. Ct. at 1049).

As the Areeda and Hovenkamp treatise explains:

> [T]he distinction between "actual" and "potential" competition is readily exaggerated. For example, a firm

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[8] *See* Phillip E. Areeda & Herbert Hovenkamp, V *Antitrust Law* ¶ 1123a, at 60 (3d ed. 2006) ("Just before the acquisition, Pacific Northwest . . . had made strenuous efforts to obtain certain contracts to supply natural gas to meet new demands in the California market. Although Pacific Northwest failed to win those contracts, El Paso secured them only by substantially reducing its previously quoted price and by improving its service. Thus, the acquisition of Pacific Northwest removed not merely a potential but also an actual competitor.").

> that has submitted bids against the dominant firm but loses is clearly an "actual" competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder.

Phillip E. Areeda & Herbert Hovenkamp, IV *Antitrust Law* ¶ 912a, at 59 (3d ed. 2006).[9] Contrary to Polypore's contention, the facts found by the Commission concerning Microporous's participation in the SLI market (discussed in the following section) fit squarely within these legal authorities' conception of actual competition.

There is likewise no merit to Polypore's contention that a market structure-based presumption of illegality applies only to mergers that "significantly increase concentration" in an already concentrated market. Br. 26. Acceptance of that argument would mean that elimination of a new rival – who may not yet have many, or any, sales, despite a present effect on the market – cannot, as a matter of law, be deemed presumptively unlawful. Contrary to Polypore's assertion, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 83 S. Ct. 1715 (1963), provides no support for such a rule. The Court there spoke of a "significant increase in

[9] The U.S. Department of Justice and FTC Horizontal Merger Guidelines § 5.1 (2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf, state that the agencies will analyze as current market participants "firms that currently supply products in the relevant market, as well as firms not currently selling in the market that are likely to provide rapid and effective supply responses to the exercise of market power by current sellers without incurring significant sunk costs."

concentration" because that was the factual scenario before it. But the Court made clear that, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." 374 U.S. at 365 n.42, 83 S. Ct. at 1742 n.42. The Areeda & Hovenkamp treatise addresses this point as well:

> The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly. . . . [T]he acquisition eliminates an important route by which competition could have increased in the immediate future. It thus bears a very strong presumption of illegality that should rarely be defeated.

Areeda & Hovenkamp, IV *Antitrust Law* ¶ 912a, at 59-60; *see also Grumman*, 665 F.2d at 15 ("In a concentrated market expected to see . . . the share of the dominant firm decrease, the District Court was properly concerned with maintaining small aggressive competitors in the market.").

Polypore's argument that the Commission improperly relied on a presumption of illegality fails in another important respect: contrary to Polypore's contention, the Commission's decision did not rest solely on a presumption of competitive harm based on market structure. Instead, the Commission found that other evidence of anticompetitive effects (including evidence showing that Daramic responded to Microporous's activities in the SLI market by offering price concessions to a customer it deemed at risk, see *supra* at 14) supports a conclusion

that the acquisition likely substantially lessened competition in the SLI market. D-368 (Op. 27-32).

### 2. Substantial evidence supports the Commission's factual findings that the acquisition eliminated an actual competitor and harmed competition in the SLI market.

Polypore's criticisms of the Commission's conclusions about the acquisition's effects in the SLI market boil down to disagreements with the way in which it resolved factual disputes on the record before it. That the Commission took a different view of the evidence than that urged by Polypore does not, however, demonstrate error that warrants reversal.

Substantial evidence supports the Commission's finding that Microporous was a participant in the SLI market. As discussed above, not only was Microporous competing for SLI business, it had made meaningful progress toward supply arrangements with JCI and Exide, two of the largest SLI battery manufacturers in the world with significant manufacturing facilities in North America. The record shows that Microporous developed and qualified an SLI separator for JCI, after JCI approached Microporous about becoming a third SLI supplier for the specific purpose of making the market more competitive. *See supra* at 11-12. Although Polypore, in this appeal, adamantly refuses to deem these activities "bidding" for SLI business, see Br. 22-23, its own officials viewed

the matter differently. At trial, Daramic's head of sales testified unequivocally that he learned "Microporous was bidding on a portion of JCI's SLI business." Tr. 1237, 1248-50 (Roe); PX0244. Mr. Roe further testified that he viewed Microporous as a viable competitor for SLI separators and a threat for JCI's business. Tr. 1307-08 (Roe). In fact, Microporous did not merely bid for SLI business; it actually made some (albeit limited) sales of SLI separators. PX0131-067 ("[i]n 2005, MPLP sold approximately 500,000 square meters of separators to U.S.-based automotive SLI customers"); Tr. 3795-96 (McDonald) (Microporous sold SLI separators developed for JCI to Voltmaster). Although Microporous's efforts to supply SLI separators to JCI did not, ultimately, result in a supply contract, "[u]nsuccessful bidders are no less competitors than the successful ones." *El Paso*, 376 U.S. at 661, 84 S. Ct. at 1049.

The evidence also establishes that, from 2007 up until the time of the acquisition, Microporous and Exide were in serious discussions for an SLI supply contract. *See supra* at 12-13. Contrary to Polypore's claim that these discussions had "stalled," Br. 23, Microporous and Exide had renewed their MOU shortly before the acquisition, RX0403, and Exide's representative at trial made it clear that Exide "had full intention that we were going to be buying Microporous separators in 2010," Tr. 2976 (Gillespie) – referring specifically to SLI separators

(and contravening Polypore's claim that it is unclear what types of separators Exide was planning to purchase from Microporous, Br. 24).

There is likewise no merit to Polypore's attempt to dismiss Microporous's discussions with East Penn Battery in the fall of 2007 as relating to "unspecified applications." Br. 24. The evidence clearly shows that East Penn Battery approached Microporous specifically about the possibility of a contract "for the supply of PE SLI separators." Tr. 4016-17 (Leister); D-341 at 115 (IDF 717-19). Although Microporous did not commit to supplying East Penn Battery at that time because of "the uncertainty with the Daramic transaction," PX2300-029* (Heglie IH at 188), the threat of losing SLI business to Microporous nonetheless induced Daramic to offer more favorable pricing terms. D-341 at 131-32 (IDF 820-22); PX0258.

Polypore is also incorrect in asserting that Microporous's Board of Directors ordered Microporous's CEO not to pursue SLI business. Br. 25. Both Michael Gilchrist, former CEO and President of Microporous, and Eric Heglie, former owner and Board member of Microporous, testified that nothing in the document referenced by Polypore (RX0401)[10] prevented Microporous from pursuing

[10] RX0401 (also in evidence as PX0092) was not a Board document at all, as Polypore suggests, but rather was a letter from Mr. Heglie to Mr. Gilchrist that was never adopted by the full Board. Tr. 433-434* (Gilchrist).

economically attractive SLI opportunities, and that, absent the acquisition, Microporous intended to supply SLI separators to Exide. D-341 at 128 (IDF 799-803); PX2300-023, 25, 31* (Heglie IH at 153-54, 183, 197); Tr. 454-55* (Gilchrist); Tr. 3753 (Trevathan).

This evidence amply supports the Commission's findings that Microporous was a current competitor in the SLI market. It shows that Microporous had a plan to enter the SLI market, had the capability to do so, was bidding for SLI business (indeed was on the verge of securing a supply agreement with Exide), and that these factors constrained Daramic's pricing for at least one SLI customer. Not only does the scant evidence cited by Polypore fail to show otherwise, but its argument that the Commission erred by treating Microporous as an actual competitor is belied by the testimony of its own economic expert, who agreed at trial that Microporous was an uncommitted entrant – *i.e.*, properly analyzed as a current participant – in the SLI market.[11] Tr. 5413-14* (Kahwaty); D-341 at 104 (IDF 638).

### 3. The Commission properly concluded that the acquisition eliminated a potential competitor in violation of Section 7.

In its ruling, the Commission further recognized that the factors that supported its conclusion that Microporous was a vital new actual competitive force

[11] *See supra* at 20 n.5 (explaining the term "uncommitted entrant").

in the SLI market also showed that, even if not deemed an actual competitor, Microporous was, at the very least, uniquely poised as a potential competitor in the SLI market. D-368 (Op. 27 n.41). Contrary to Polypore's insinuations, this was not a recognition of "weakness," Br. 29, but an acknowledgment of the close relationship between actual and potential competition. *See* Areeda & Hovenkamp, IV *Antitrust Law* ¶ 912a, at 59. In any event, the potential competition doctrine provides a solid alternative basis for the Commission's ruling, as Microporous easily satisfies the established elements as both a perceived and actual potential entrant to the SLI market.

Polypore does not dispute the validity of the perceived potential competition theory. In *Marine Bancorporation*, the Supreme Court identified the elements of a Section 7 claim based on the perceived potential competition theory:

> [A] merger may be unlawful [1] if the target market is substantially concentrated, [2] if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and [3] if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market.

418 U.S. at 624-25, 94 S. Ct. at 2871.

There is no dispute that the first of these elements is satisfied here. Nor can there be any doubt that the second element is satisfied. As discussed above,

Daramic's own documents show that it viewed Microporous as a potential – indeed, an all but certain – entrant in the SLI market and a serious competitive threat to its SLI business.[12] The potential threat from Microporous was such that, in 2005, Daramic's then-CEO warned Polypore's and Daramic's management: "The bottom line is Amerace can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth." PX0694-001. By 2007, it had become clear to Daramic that the competitive threat from Microporous imperiled Daramic's SLI business. PX2078 (projecting that Microporous would capture as much as 20 to 25 million square meters of Daramic's SLI business in 2009 and more in 2010); Tr. 1301, 1307-08 (Roe). As Daramic's head of sales wrote in November 2007, "unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes." PX0238-001; *see* D-341 at 74, 129-30 (IDF 435, 809). There is also no question that the prospect of losing SLI business to Microporous prompted Daramic to offer more favorable pricing terms to East Penn Battery – satisfying the third element of the perceived potential competition theory. D-341 at 131-32 (IDF

[12] Polypore's claim that Microporous lacked sufficient experience or reputation in the production of SLI separators, Br. 33, is contravened by testimony from JCI's representative that JCI was "comfortable with the capability of Microporous to develop SLI separator production capability" becaue Microporous was producing separators with a proven technology. Tr. 2872-73* (Hall).

820-22).[13] Polypore suggests in this appeal that its concern about the potential loss of East Penn's "automotive" business to Microporous might not have related to SLI separators after all. Br. 34. This contention is belied, however, by testimony that Daramic offered these price concessions after learning of Microporous's visit with East Penn Battery – a visit that involved discussions about "a long-term contract for the supply of PE SLI separators." Tr. 4016-17 (Leister); Tr. 1289-90 (Roe).

Thus, substantial evidence supports the Commission's conclusion that the acquisition eliminated perceived potential competition in the SLI market, in violation of Section 7. This being so, Polypore's arguments about the Commission's purported errors in applying the actual potential competition theory are beside the point. Moreover, these claims of error are also wrong.

Although the Supreme Court has not conclusively ruled on whether a merger may violate Section 7 under the actual competition theory,[14] other courts –

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[13] Contrary to Polypore's contention, Br. 34-36, the Commission never suggested that Daramic's price concessions to Crown Battery and Douglas under the "MP Plan" related to SLI separators.

[14] The Supreme Court in *Marine Bancorporation* did not, as Polypore claims, "refuse to approve" the actual potential competition doctrine. The Court did not reach that question because it found that preconditions for application of that theory were not present. *Marine Bancorporation*, 418 U.S. at 633, 638-39, 94 S. Ct. at 2875, 2878. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1234 (8th Cir. 2010) (noting that the Supreme Court has identified actual potential competition as

including the Fifth Circuit before the circuit split – have accepted that theory. *See Mercantile Texas Corp.*, 638 F.2d at 1265 ("We believe that the doctrine has logical force and is consonant with the language and policy of the Clayton Act."); *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981). Under this doctrine, there must be proof that: (1) Microporous had "available feasible means for entering" the SLI market without the acquisition, and (2) "those means offer[ed] a substantial likelihood of producing deconcentration of that market." *Marine Bancorporation*, 418 U.S. at 633, 94 S. Ct. at 2875.

The first of these elements has already been amply demonstrated. The second is also satisfied by evidence showing, among other things, that Exide intended to commence purchases of SLI separators from Microporous by January 1, 2010 (*i.e.*, immediately after expiration of Exide's exclusive contract with Daramic), Tr. 2966, 2968-69, 2976 (Gillespie), and that both Daramic and Microporous projected market share gains by Microporous in the SLI market. PX0264-003; PX0080-060*. Polypore's claim that Microporous's projection of a 6% share of the SLI market by 2010 is not sufficiently deconcentrating to warrant liability is squarely at odds with the Supreme Court's statement in *Philadelphia Nat'l Bank* that, "if concentration is already great, the importance of preventing

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a "plausible theor[y] of § 7 liability").

even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." 374 U.S. at 365 n.42, 83 S. Ct. at 1742 n.42.

The record thus amply supports the Commission's findings that Polypore's acquisition of Microporous, at the very least, eliminated a significant potential competitor poised to disrupt Daramic's and Entek's long-standing duopoly in the SLI market.

## II. THE COMMISSION'S FINAL ORDER OF DIVESTITURE IS PROPER AND SHOULD BE ENFORCED.

The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8, 92 S. Ct. 1142, 1149 n.8 (1972). Complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-29, 81 S. Ct. 1243, 1251-52 (1961) ("*DuPont*"); *Chicago Bridge*, 534 F.3d at 441. "[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *DuPont*, 366 U.S. at 334, 81 S. Ct. at 1254 (footnote omitted); *see Ford Motor Co*, 405 U.S. at 573, 92 S. Ct. at 1149; *Chicago Bridge*, 534 F.3d at 441.

The manner and scope of divestiture orders are subject to the Commission's

discretion. *See* 15 U.S.C. § 21(b) (granting the Commission the power to order divestiture "in the manner and within the time fixed by said order"); *Jacob Siegel* 327 U.S. at 611, 66 S. Ct. at 760 (Commission has "wide discretion in its choice of a remedy"). In the exercise of that discretion, the Commission may order divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market. *See Chicago Bridge*, 534 F.3d at 441-42; *RSR Corp. v. FTC*, 602 F.2d 1317, 1326 n.5 (9th Cir. 1979).[15]

To restore competition lost through the acquisition, the Commission properly exercised its broad discretion and ordered Polypore to divest all the assets it acquired from Microporous, including the plant in Feistritz, Austria, that Microporous built before the acquisition. D-368 (Op. 36-41). Polypore objects only to the divestiture of the Feistritz plant, arguing that this requirement is "logically incompatible" with the Commission's finding of a North American geographic market and "bears no reasonable relation" to restoring competition in the relevant markets. Br. 53. Polypore's arguments do not withstand scrutiny.

The Commission explained in great detail why, based on the record

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[15] Polypore's arguments for limiting divestiture are not aided by the cases it cites. Br. 52, 57. In none of those cases did the court disturb the Commission's order of complete divestiture, but modified only ancillary provisions found to be overbroad. *See Beatrice Foods Co. v. FTC*, 540 F.2d 303, 313-14 (7th Cir. 1976); *Seeburg Corp. v. FTC*, 425 F.2d 124, 129-30 (6th Cir. 1970); *Abex Corp. v. FTC*, 420 F.2d 928, 933 (6th Cir. 1970).

evidence, divestiture of the Feistritz plant, although located outside the North American market, is necessary to restore the competition eliminated by the acquisition and provide the acquirer of the divested assets the ability to compete effectively within the North American market. D-368 (Op. 38). The Commission found that, when Microporous produced CellForce for its foreign customers at its Piney Flats plant, capacity constraints limited its ability to compete for additional business in North America. *See* Tr. 2126-27 (Axt); Tr. 276 (Godber). Once the Feistritz plant was under construction, Microporous became a more vigorous competitor in North America, because it was able to commit to additional North American CellForce sales to customers. D-341 at 126-27, 196-97 (IDF 787, 795-97, 1277, 1280); PX1741-004*; Tr. 224-27 (Godber); Tr. 401-03 (Gilchrist). The Commission found that, absent the divestiture of the Feistritz plant, an acquirer is likely to face the same capacity constraints that Microporous faced before it constructed the Feistritz plant. D-368 (Op. 38-39). The Commission considered whether a divestiture package consisting of Piney Flats plus the "line in boxes" would suffice to provide the acquirer with enough capacity to compete effectively, but determined that it would not. *Id*. at 39.[16]

[16] Polypore asserts that the passage of time since the Commission issued its decision renders "unfounded" the Commission's concerns about the length of time it would take for the "line in boxes" to become operational and to qualify material produced on that line. Br. 55-56 n.10. But it is not at all apparent why this would

The Commission also found that a divestiture package that includes the Feistritz plant is necessary to allow the acquirer to offer customers benefits that are important to them, including multiple plants as insurance against supply disruptions and, of particular importance, the ability to provide a local supply for customers' global operations. *See* D-341 at 196 (IDF 1272-79); Tr. 225-26 (Godber); Tr. 309-10 (Gilchrist); Tr. 2108-09, 2129-31 (Axt); Tr. 2969-70 (Gillespie); Tr. 4602 (Gaugl). With construction of the Feistritz plant, Microporous was able to offer its customers the insurance of multiple plants and the cost advantages associated with global operations, and this, the Commission found, made Microporous a more a effective competitor for North American customers. D-368 (Op. 39-40). The Commission determined that divestiture of the Piney Flats plant alone, even with the "line in boxes," would not restore the more attractive competitor lost through the unlawful acquisition. *Id*. at 40.

It is readily apparent from this discussion that, contrary to Polypore's contention, inclusion of the Feistritz plant in the package of assets to be divested is reasonably related to the remedy's purpose of restoring the competition lost through this unlawful acquisition, and thus is well within the Commission's broad

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be so. At the time of trial, equipment purchased for that line had not been installed and was sitting in boxes in Austria and Piney Flats. D-341 at 130 (IDF 813). Moreover, the Commission also found divestiture of the "line in boxes" to be insufficient for reasons other than timeliness.

remedial authority. The Fifth Circuit recently reaffirmed the breadth of the Commission's authority to fashion a divestiture package sufficient to restore competition that has been eliminated by a merger in *Chicago Bridge*, 534 F.3d at 441-42. In that case, the court affirmed a Commission order requiring the divestiture of assets for building water tanks, although the relevant product market was cryogenic tanks, because cryogenic tank sales were irregularly timed and water tank sales would provide the regular income stream needed for the divestiture buyer's viability. Here, the relationship between the divestiture of the Feistritz plant and the goal of fully restoring competition is even more direct, because the Feistritz plant is itself an asset that made Microporous a more attractive supplier, and therefore a more effective competitor, for customers in the relevant markets.

Polypore argues, as it did before the Commission, that divestiture of Piney Flats alone should be an adequate divestiture package because Microporous was an effective competitor with just the Piney Flats plant and because the Piney Flats plant currently has excess capacity. The Commission rejected these arguments, however, finding that divestiture of the Piney Flats plant alone would not provide the acquirer with the same competitive strength that Microporous had once it constructed its Feistritz plant. Polypore fails to show that the Commission's

judgment in this regard amounts to an abuse of discretion. Moreover, contrary to Polypore's contention, Br. 55, the Commission did not ignore the additional capacity provided by the "line in boxes," but expressly considered whether a divestiture package consisting of Piney Flats plus the "line in boxes" would suffice to provide the acquirer with enough capacity to compete effectively, and found that it would not. D-368 (Op. 39-40).

There is also no merit to Polypore's argument that the Commission erred in failing to explain why selling the Piney Flats plant to a foreign separator manufacturer with expertise in the relevant product markets would not be a fully adequate remedy. Br. 56. Polypore never raised that issue when opposing divestiture of the Feistritz plant in the proceedings before the agency, either during the trial before the ALJ or in its appeal to the Commission. Having failed to raise this argument in the administrative proceedings, Polypore should not be allowed to raise it now as a basis to attack the Commission's divestiture order. *See Vidiksis v. EPA*, 612 F.3d 1150, 1158-59 (11th Cir. 2010) (court refused to consider arguments challenging penalty imposed by EPA that were not raised before the agency); *Mahon v. USDA*, 485 F.3d 1247, 1254-55 (11th Cir. 2007) ("Under ordinary principles of administrative law, a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative

agency.") (quoting *Simms v. Apfel*, 530 U.S. 103, 113, 120 S. Ct. 2080, 2087 (2000)).

More problematic, however, is that limiting the pool of eligible acquirers would undermine at the outset the Commission's objective to provide "the greatest likelihood that the asset package will restore competition and be sufficiently viable to readily attract an acceptable buyer." D-368 (Op. 37). There is no evidence in the record (due largely to the fact that this argument was not raised below) indicating whether existing Asian or European manufacturers would be interested in acquiring the Piney Flats plant.[17] In addition, eliminating candidates without overseas plants from consideration (because, with Piney Flats alone, they would not have the global operations that customers desire) could, among other things, foreclose motivated and acceptable buyers that might otherwise have been interested in acquiring the entire divestiture package.

The merits of Polypore's proposition, and the suitability of any particular acquirer for the Microporous assets, are more appropriately examined when Polypore submits an application for Commission approval of a proposed divestiture in accordance with the agency's established procedures. *See* 16 C.F.R.

[17] Contrary to Polypore's claim that Amer-Sil is one such European manufacturer with experience in the relevant product markets, Br. 56, Amer-Sil does not manufacture PE or rubber battery separators. It manufactures PVC separators. D-341 at 166 (IDF 1051-52).

§ 2.41(f). The Commission's divestiture process assures that all necessary facts regarding the specific acquirer to which Polypore proposes to divest are considered at a time contemporaneous with any such proposal. If Polypore can demonstrate that a proposed acquirer does not need the full asset package to restore the competition lost as a result of the acquisition, it has the option of seeking reopening and modification of the Final Order, pursuant to the Commission's established process for doing so. *See* 15 U.S.C. § 45(b); 16 C.F.R. § 2.51. At this juncture, it is impossible to predict which buyers might ultimately emerge for the divestiture assets. It is therefore reasonable to require Polypore to offer the divestiture package to the broadest possible pool of candidates, as provided by the terms of the Final Order.

Elsewhere in its brief, Polypore argues that the errors it asserts justify reversal of the Commission's Final Order and Opinion in its entirety. As demonstrated above, however, the Commission properly concluded that the acquisition likely substantially lessened competition in the deep-cycle, motive, and SLI markets, warranting a divestiture order. Indeed, the Commission's findings that the acquisition violated Section 7 in the deep-cycle and motive markets independently justify full divestiture, including divestiture of the Feistritz plant, because the evidence regarding the importance of having a supplier with multiple

plants and a global presence came from Microporous's pre-acquisition deep-cycle and motive customers.

In any event, under no circumstances would it be appropriate to reverse Paragraph VII of the order, which requires Polypore to undo the agreement with H&V found to be unlawful in connection with Count II of the complaint, and to refrain from entering into similar agreements. D-368 (Final Order at 24-25). Polypore did not appeal to the Commission the ALJ's ruling that the conduct alleged in Count II violated Section 5 of the FTC Act, 15 U.S.C. § 45, nor did it appeal that aspect of the remedy. D-345. Accordingly, Polypore is precluded from seeking reversal of this part of the Final Order in this appeal.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's Final Order affirmed and enforced.

Respectfully submitted,

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June 17, 2011

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 13,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R 32-4.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, the original and six copies of the foregoing Brief for Respondent Federal Trade Commission were sent to the Clerk of the Court by overnight courier service, and one copy was served upon petitioner Polypore International, Inc. by first class mail to:

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