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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**RESPONDENT'S REPLY MEMORANDUM IN SUPPORT OF SECOND MOTION TO REOPEN THE HEARING RECORD**

Respondent, Polypore International, Inc. ("Polypore"), respectfully submits this Reply Memorandum in Support of Second Motion to Reopen the Hearing Record ("Reply") pursuant to this Court's Order Requiring Reply Brief, dated October 2, 2009 ("Order").

**INTRODUCTION**

In their opposition to Respondent's Second Motion to Reopen the Hearing Record, Complaint Counsel mischaracterizes Respondent's argument and wholly ignores a central point of Respondent's motion: namely, that due to {

} No where in its opposition does Complaint Counsel even mention {  
}. Instead, Complaint Counsel creates the baseless argument that Respondent's motion is intended to delay a ruling by this Court, ignoring the fact that all that Respondent seeks is a half-day hearing to receive additional facts regarding

the state of Daramic's business.<sup>1</sup> But certainly {  
} must have relevance even to Complaint  
Counsel's "market structure, concentration, or entry." Opp. p. 2; see Affidavit of Harry Seibert,  
sworn to October 6, 2009 ("Seibert Aff."), ¶ 15. And certainly Respondent's proffered facts,  
which show that { }, have relevance to  
Complaint Counsel's claim that Daramic is a monopolist.

For the reasons stated in Daramic's motion and herein, Daramic's motion should be  
granted to permit the Court to receive additional evidence regarding {  
}.

#### ARGUMENT

In its proffer, Respondent states that it intends to present evidence at a half-day hearing of  
(1) {  
}; (2) {  
}; (3) {  
}; (4)  
{  
}, all of which is  
new evidence that Daramic does not have market power. Although Complaint Counsel

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<sup>1</sup> Complaint Counsel attempts to create its "delay" argument out of whole cloth by arguing, without any justification, that it would need the "opportunity to gather evidence of ongoing anticompetitive conduct by Respondent." Opp. p. 3. The issue before this Court is a narrow one: whether the record should be reopened to permit the introduction of evidence at a half-day hearing regarding Exide's recent conduct with Daramic and the effect on Daramic's business resulting from this conduct and the continuing recession. Daramic is not asking to reopen the record to permit the introduction of evidence as to other aspects of Complaint Counsel's case and Complaint Counsel should not be permitted to conjure up a delay argument by advancing a specious argument that it must be permitted the opportunity to gather evidence as to Daramic's business conduct. Complaint Counsel needs no such discovery; indeed, they have done just fine without it as demonstrated by their submission of Mr. Gillespie's declaration in opposition to this motion.

selectively picked which aspects of the proffer to discuss – ignoring the central issue regarding { } – each of these proffered facts is relevant and admissible under Commission Rule 3.43, constituting evidence which was not known at the time of the hearing.<sup>2</sup>

**A. Respondent's Proffer is Relevant and Admissible**

Each part of Respondent's proffer is relevant to the issues in this case.

Complaint Counsel claims that Respondent is a monopolist in a North America market for PE separators used in automotive, deep cycle, UPS and motive batteries. *See e.g.* Complaint ¶ 21-24, 39. Complaint Counsel has offered testimony to this Court regarding Daramic's share of certain of these alleged North America markets, directly implicating Daramic's production capacity and customer demand for its products in North America. *See e.g.* Complaint Counsel Proposed FOF 273, 288, 291, 305, 306. Here, Respondent's proffered evidence goes directly to the issue of Daramic's share of the alleged North America market as well as the demand for those products. In addition, with this decline in demand for separators for SLI applications in North America, {

},

Moreover, Complaint Counsel alleges that Daramic exercises monopolistic power in its pricing. *See e.g.* Complaint ¶ 39. Even in its opposition to this motion, Complaint Counsel again accuses Daramic of charging customers "monopoly prices." Opp. p. 2. Certainly, Daramic's proffer, which will demonstrate that {

}, is relevant to Complaint Counsel's case and its

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<sup>2</sup> Complaint Counsel suggests that the standard for reopening the record here is set forth in *Brake Guard Products, Inc.* 125 F.T.C. at 248, n. 38. Complaint Counsel is incorrect. *Brake Guard Products* involved a motion to reopen under 3.54(a) of the Commission's rules, not Rule 3.51(e) as here. Even under Rule 3.54(a), courts have reopened the record to admit supplemental evidence not available at the time of the hearing before the Administrative Law Judge. *See e.g.* *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362-63 (D.C. Cir. 1977) (upholding the reopening of the record by the Commission to admit supplemental evidence which was not available at the time of the trial before the ALJ in *Chrysler Corp.*, 87 F.T.C. 719, 750 n.38 (1976)). In any event, the facts here more than demonstrate good cause.

unsupported rhetoric.<sup>3</sup> While Complaint Counsel takes a lackadaisical view of {

}, Daramic does not and this Court should be permitted to consider all of these relevant facts in addressing Complaint Counsel's claims and remedy.

Complaint Counsel argues that Respondent's proffer {

"} Complaint Counsel is incorrect. As demonstrated here, Daramic has ample evidence that {

} Seibert Aff. ¶ 6. And {

} Gillespie Declaration ¶ 6. Again,

this evidence directly refutes a highly relevant issue in this case: Daramic's supposed monopoly power.

Complaint Counsel has offered evidence to this Court regarding the supposed need for local separator supply. *See e.g.* Complaint Counsel Proposed FOF 174-198. Respondent's proffered evidence, showing {

}, is relevant evidence to further refute Complaint Counsel's contention. The fact that {

} should not be held against Respondent.

Complaint Counsel contends that entry cannot occur in less than two years in this alleged North America market. *See e.g.* Complaint Counsel Proposed FOF 817-1043. Certainly,

{

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<sup>3</sup> Complaint Counsel's answer to this motion is to say dismissively that if {" argument is absurd and completely ignores the great import of the proffered facts. {

"}



}, (2) {

}, (3) {

}.  
}

Evidence is excludable as being cumulative only when the evidence is unnecessarily duplicative of other evidence already in the record. *See In the Matter of Rambus, Inc.*, 2006 FTC 110 n. 11 (2006). For the reasons stated herein, this is certainly not the case here.

**B. Exide's Declaration Skirts the Issues**

In its Order, this Court specifically ordered Respondent to address “[w]hether Respondent possesses evidence disputing the assertions of fact in the Declaration of Douglas Gillespie, submitted with the Opposition as Attachment A.” Respondent has requested that Complaint Counsel permit Respondent to review Mr. Gillespie’s declaration, which was previously submitted *in camera*. Complaint Counsel has refused this request, greatly impeding Respondent’s ability to respond to the Court’s order and prejudicing it in this proceeding.<sup>4</sup>

Complaint Counsel relies heavily on Mr. Douglas Gillespie’s declaration to {  
} In light of the fact that Respondent’s motion was filed under seal, the fact that Mr. Gillespie submitted a declaration in response to a motion largely filed *in camera* raises many serious questions. Indeed, Complaint Counsel should explain to this Court how it was Mr. Gillespie was able to respond to Respondent’s Motion when it was largely confidential and filed in this Court under seal and *in camera*. At a minimum, though, it suggests that Complaint Counsel and Exide continue their highly orchestrated presentation to this Court.<sup>5</sup> Gillespie’s declaration is most notable for what it does not say:

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<sup>4</sup> Respondent has filed with this Reply a motion to permit Respondent to see Mr. Gillespie’s declaration.

<sup>5</sup> At the hearing, Mr. Gillespie offered completely rehearsed and coached testimony in response to Complaint Counsel’s questions regarding the nature of the relief that should be provided by this Court. Respondent’s Proposed FOF ¶602. Unfortunately, the highly orchestrated nature of Exide’s testimony to this Court continues with Complaint Counsel’s opposition.

• {  
}. Seibert Aff. ¶¶ 8-9.

• {  
}. Seibert Aff.  
¶ 12.

• {  
}. Seibert Aff. ¶ 7.

• {  
}

• {  
}. Seibert Aff. ¶¶ 5-6.

• {  
}. Seibert Aff. ¶¶

¶¶ 5-6, 14-15.  
}. Seibert Aff.

• {  
}. Respondent's Proposed Findings of Fact ¶ 526. Mr. Gillespie's  
statement in his declaration is not accurate and is not based on personal  
knowledge and therefore must be stricken.

Mr. Gillespie's declaration is wholly incomplete and inaccurate and Respondent possesses ample evidence to offer this Court in support of its proffer if the record were reopened.

**C. Respondent Became Aware of the Facts Asserted in the Proffer After the Hearing**

As discussed in Respondent's Motion, {

} Motion pp. 2-3;

Seibert Aff. ¶ 7. Respondent was {

} Seibert Aff. ¶ 10.

Respondent has been struggling with its business in light of the recession and its loss of its largest customer, JCI. This was in fact known during the hearing. What was not known, and could not have been known, however, was the impact to Daramic's business in North America caused by the continuing effect of a prolonged recession and {

} {

} Seibert Aff. ¶¶ 14-15. {

}

Seibert Aff. ¶ 15. {

} Seibert Aff. ¶ 15.

Respondent did not know and could not have known of these facts as they had not yet occurred at the time of the hearing. The import of these facts, however, is clear and should be received in evidence for this Court to consider in making its weighty decisions in this matter.

**D. Respondent Will be Prejudiced if this Court Denies this Motion**

This Court currently has before it a complaint seeking a finding from this Court that Respondent is a monopolist and that its acquisition of Microporous Products LP violates the antitrust laws and should be unwound. Respondent denies these allegations, submitting evidence as to its defenses and to refute Complaint Counsel's claims, including its evidence of {

}. This Court's decision has serious ramifications for Respondent's business which is struggling today. This Court should be permitted to have all of the relevant and most current facts in making its determinations as to whether Complaint Counsel met its burden and, if so, what relief is necessary and appropriate. To deny the current motion would severely prejudice Respondent as this Court would not be able to consider the evidence showing (1) {

}, (2)

{ }, (3) {

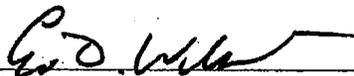
}, and (4) {

antitrust analysis here is forward

looking. This Court must consider this current evidence in making its decision.

Dated: October 7, 2009

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing *Respondent's Reply Memorandum In Support of Second Motion to Reopen the Hearing Record [Public]*, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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

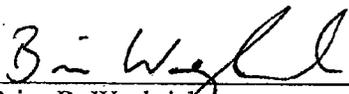
I hereby certify that on October 7, 2009, I caused to be served one copy via electronic mail delivery and two copies via overnight delivery of the foregoing *Respondent's Reply Memorandum In Support of Second Motion to Reopen the Hearing Record [Public]* upon:

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

I hereby certify that on October 7, 2009, I caused to be served via electronic mail delivery and one copy via First Class mail delivery of the foregoing *Respondent's Reply Memorandum In Support of Second Motion to Reopen the Hearing Record [Public]* upon:

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