I. Introduction

Complaint Counsel has proven that the acquisition of Microporous by Daramic has significantly reduced competition in four markets. Complaint Counsel has also proven its monopolization counts; although, such proof is not necessary for either a Section 7 claim or for any of the relief requested. Signally, Respondent's counsel, Mr. Welsh, admitted in his closing that Respondent failed to put "[s]ignificant evidence to rebut these charges . . . before the court at the time during this hearing last summer." (11/12/09 Tr. 5874) Mr. Welsh is correct. Indeed, Respondent has not rebutted Complaint Counsel's case at all.

In its second attempt to add evidence post trial, Respondent still does not offer any evidence to challenge Complaint Counsel's prima facie case.[1] Respondent claimed that it had "new" evidence for a "power-buyer" argument. However, Respondent has failed to prove its four proffers of evidence. On the other hand, Complaint Counsel has offered evidence that affirmatively disproves the proffers.

Respondent has failed to prove any of its proffers, but even if the proffers were true, it would not change the outcome of this case. This is because (1) the "power buyer" argument is a weak defense, which should not be relevant in such highly concentrated markets; (2) the proffers, even had they turned out to be true, would not support a power buyer argument; (3) events and evidence subject to Respondent's manipulation are

[1] In fact, all of the evidence in the second hearing supports Complaint Counsel's product and geographic market definitions, market participant and concentration evidence, as well as proving that there is no entry occurring or likely to occur. When the "Government's prima facie case anticipates and addresses the respondent's rebuttal evidence, as in this case, the prima facie case is very compelling and significantly strengthened. Under these conditions, the respondent's burden of production on rebuttal is also heightened. *Chicago Bridge & Iron Co., N.V. v. FTC,* 534 F.3d 410, 426 (5th Cir. 2008) (citing *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).

entitled to little or no weight; and (4) Complaint Counsel's prima facie case remains extraordinarily strong.

Respondent has also failed to put forward any evidence contradicting Complaint Counsel's proof that Respondent possesses monopoly power. The evidence presented in the second hearing demonstrates that Daramic's coercive behavior in negotiations with Exide has not changed. Daramic's pattern of punishing a customer who tries to do business with another supplier continues, just as it was before Daramic acquired Microporous. (*See* CCPTB at 49-63). The bare fact that Exide has asked repeatedly for { ,} which Daramic has consistently refused, shows nothing but Daramic's power in this relationship. If Exide and other battery manufacturers only had a choice of another supplier – *i.e.*, Microporous – they would have some power through competition, which is what the law is intended to promote. Finally, the supposed new evidence is related solely to automotive ("SLI") battery separators and has no bearing on the merger's resulting in a monopoly in flooded lead-acid battery separators for UPS, motive, and deep-cycle applications. This entire case and the entire proposed remedy, including the divestiture of both the Tennessee and Austrian facilities (both of which make primarily these other products) is not undermined by this baseless detour offered by Respondent.

II. The Facts Do Not Support Any of Respondent's Proffers

The evidence demonstrates that each of Respondent's four proffers is false. Respondent's first proffer states that

> [a]fter the close of the record, Exide decided to move { } its PE separator purchases for { } to another supplier, and in the span of less than three months, Exide has placed orders from Daramic in excess { } of PE separators, all requested to be delivered

by { }. This amount exceeds any reasonable forecast provided by Exide, is inconsistent with past order patters an, based on Exide's { }, amounts to approximately {]} worth of PE separator[s]. Douglas Gillespie of Exide has admitted to Respondent that Exide's recent purchase orders equate to {]} worth of PE separator purchases from Daramic.

Complaint Counsel has proven that this proffer is baseless. First, *to this day* Exide has not made any decision to move { } its PE separator[2] purchases for { } to another supplier. (CCFOF ¶¶ 1252-1257, 1278-1280). Second, the evidence demonstrates that Exide provided Daramic with its plans to place these orders in April, *before* the first hearing in this matter even began and placed its first order in June, during the hearing on this matter, certainly not *after* the close of the record as Respondent asserts. (CCFOF ¶¶ 1261-1266). Third, { } (CCFOF ¶¶ 1267, 1277). Fourth, despite Respondent assertion that the orders { } less than { } under its contract with Daramic. (CCFOF ¶¶ 1269, 1271). Indeed, Exide informed Daramic on a number of occasions that it intended to { } (CCFOF ¶ 1268). Fifth, these purchase orders are consistent with { .} (CCFOF ¶¶ 1273-1274). Sixth, the asserted { '} worth of PE separators is not based on { } but on Exide's past { .} (CCFOF ¶ 1260). Those { } occurred during the worst of

[2] The "PE separator purchases" discussed in Respondent's proffer are limited to SLI separators only. (CCFOF ¶¶ 1258-1259). Daramic continues to be the sole supplier available to Exide for motive, UPS and deep-cycle separators. (CCFOF ¶¶ 1251, 1256-1257, 1340).

the recession and cannot reliably be used to predict the next { }. (CCFOF ¶ 1260). Seventh, Mr. Gillespie does not admit that Exide's recent purchase orders equate to { } worth of PE separator purchases from Daramic, and in fact denies it. (CCFOF ¶ 1260). Respondent's only evidence to the contrary is its own self-serving and unreliable "state of mind."

Respondent's second proffer is contradicted by the actual facts. This proffer states that

> [w]ith Exide's purchase orders for more than { } of PE separators from Daramic, Exide does not intend to and will not purchase any additional PE separators from Daramic in either { }.

Complaint Counsel has proven that this proffer is untrue. The evidence indisputably demonstrates that {

.} (CCFOF ¶¶ 1252-1257, 1278-1280). Indeed,

{ }

(CCFOF ¶¶ 1281-1282). Ignoring the fact that {

} (CCFOF ¶¶ 1256-1257). This proffer could only be true if Daramic actually fills all of Exide's purchase orders in 2009 and the { } are accurate (i.e. that Daramic actually supplies Exide with { } worth of separators by the end of the year). The evidence demonstrates that the { } used by Respondent understate Exide's { } and that Daramic {

} (CCFOF ¶ 1260; CCFOF ¶¶ 1283-1287).

---

[3] { }

Respondent's third proffer is also contradicted by the actual facts. This proffer states that

> [i]n light of Exide's apparent decision not to purchase PE separators from Daramic in { }, Daramic will likely have to {

Complaint Counsel has proven that this proffer is without any basis. First, as discussed above, Exide has made no such decision. (CCFOF ¶¶ 1252-1259). Second, {

.}[4]

(CCFOF ¶¶ 1292-1308). In fact, Respondent's documents demonstrate that it will {

} (CCFOF ¶¶ 1304-1306). Third, Respondent has been evaluating { } for more than a year, not just recently "in light of Exide's apparent decision." (CCFOF ¶ 1292).

Respondent's final proffer is also contradicted by the actual facts. This proffer states that

> [i]f Daramic is able to retain any small amount of business from Exide in { }, or thereafter, which appears unlikely, Daramic will only be able to obtain such sales through a { }.

Complaint Counsel has also proven that this proffer is untrue. First, it appears *likely* that { } in { }. (CCFOF ¶¶ 1252-1257, 1278-1282, 1309-1311). Daramic anticipates a {

}, and no probability that it will have none. (CCFOF ¶¶ 1310). Second, {

} and has no idea what such a { } would be. (CCFOF ¶¶ 1312-1315). Daramic has never offered a { } to Exide for anything {

[4] Respondent appears to use the terms "close" and "idle" interchangeably. However, Mr. Toth's deposition testimony makes it clear that { } (PX5075 (Toth, Dep. at 12), *in camera*).

}, which is currently {

} (CCFOF ¶¶ 1316-1322, 1325; CCFOF ¶¶ 1326-1327). Third, Daramic has not offered a { } on any amount of motive, UPS, or deep-cycle separators. (CCFOF ¶¶ 1321).

Complaint Counsel may demonstrate its prima facie case by showing that the acquisition would lead to "undue concentration in the market for a particular product in a particular geographic area." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). This evidence creates a "'presumption' that the transaction will substantially lessen competition." *Id.* Upon such a showing, the burden shifts to Respondent to rebut the presumption with evidence that "'shows that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997). As Complaint Counsel has demonstrated, the facts do not support *any* of Respondent's proffers and in fact contradict them. Respondent has failed to provide any facts that rebut Complaint Counsel's prima facie case.

III. A Power-Buyer Argument Alone is not Sufficient Rebuttal to Complaint Counsel's Prima Facie Case

No court has permitted an otherwise anticompetitive merger based solely on the presence of powerful buyers.[5] *Chicago Bridge*, makes this point clear, "courts have not considered the "sophisticated customer" argument as itself independently adequate to

[5] In *Baker Hughes,* along with accepting the district court's finding of buyer power, the circuit court noted "compelling evidence on the ease of entry." 908 F.2d 981, 987. In *Country Lake* "Significant efficiencies" were noted by the court as well as other "commercial realities" which defeated the government's *prima facie* case. 754 F. Supp. 669, 674-75.

rebut a prima facie case." 534 F.3d 410, 440 (5th Cir. 2008). In evaluating the argument, the Fifth Circuit held that in a case where structural presumptions apply, "the economic argument for even partially rebutting a presumptive case, because the market is dominated by large buyers, is weak. *Id.* at 440. As the Court pointed out, "it would be inappropriate to give formal recognition to buyer concentration and related factors in the ordinary run of merger cases." *Id.* at 440 (quoting 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: an Analysis of Antitrust Principles and their Application P 943c (2nd Ed. 2000)). This must be the case where a merger results in a monopoly or duopoly. *See Heinz*, 246 F.3d at 724 n.23 ("[i]n a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.")

A. The Power-Buyer Argument is Only Credited Where There are Other Significant Factors that Alone Defeat the Government's Prima Facie Case

In the rare cases where courts have entertained a "buyer power" argument, the courts have noted other significant factors, which would be relevant to a defense against the government's prima-facie case. In *Archer-Daniels-Midland*, the court highlighted the importance of buyers' ability to switch orders among various alternative producers saying,

> Buyers continually play suppliers off against one another, cutting back or discontinuing purchases from sellers as a means of obtaining the lowest possible prices. As a result, purchaser-supplier relationships are highly unstable, with suppliers, including ADM, frequently losing business, regaining it, and losing it again on price grounds—sometimes within the same quarter year.

United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1419 (S.D. Iowa 1991). What was critical in *Archer-Daniels-Midland* was the existence of multiple supply alternatives. There simply are none here. The notion behind the "power buyer" theory,

as explained in the Merger Guidelines, is that in some cases, large buyers tie up the market with "long-term contracting" so that collusion by the sellers would be difficult. Merger Guidelines § 2.12. That scenario does not apply here. Indeed, the evidence shows that { }

Similarly, in *Baker Hughes*, the DC circuit relied upon the findings of the district court regarding the buyer's sophistication and large order sizes, coupled with their ability to "closely examine available options" while "typically insist[ing] on multiple, confidential bids for each order," as convincing evidence of bargaining power which would allow customers to resist anticompetitive price increases that might result from the merger. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 986-87 (D.C. Cir. 1990).

In *Country Lake*, the court focused on two primary elements in approving the power-buyer argument: the sophistication of the buyers, and the existence of alternative fluid milk producers just outside of the relevant market. *Unites States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 672-73 (D. Minn. 1990). Noteworthy was the testimony of five purchasers who asserted that in the event of a large price increase they would either aggressively negotiate a reduced price, or "seek a substitute or replacement supplier of fluid milk" be they in or outside of the alleged geographic market. *Id.* at 673. Evidence was presented concerning the lack of entry barriers and the industry's recognition of fluid milk producers' ability to cheaply and rapidly expand in order to supply milk to a new market. *Id.* at 672-74. The court held that the purchasers of fluid milk within the MSP/MSA[6] "could and would immediately challenge increases in fluid milk prices not related to normal market conditions, and could and would quickly seek

[6] Minneapolis-St. Paul Metropolitan Statistical Area

milk suppliers outside of the MSP/MSA if their current suppliers attempted to increase their prices." *Id.* at 674.

But the fundamental reason why the power-buyer factor has no relevance here is that Exide does not have market power itself. Exide has only a small part of the market and its position has been dropping significantly. (Siebert Tr. 5673, 5716, *in camera*; PX5076 (Seibert, Dep. at 24), *in camera*; Toth, Tr. 5737, *in camera*; RX01726 at 004 (Exide's "lower aftermarket sales are the result of the previously announced transition of two accounts to competitors."). For the power-buyer factor to have any relevance, the alleged buyer must be very large or colluding with other very large buyers ***and*** there cannot be any other smaller buyers (like Bull Dog Battery, etc.); otherwise, the so-called power buyer may get a slightly better deal for itself, but the market will still have to pay higher prices. *United States v. United Tote*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (Rejecting argument because it left smaller buyers "unprotected"). As the leading treatise explains, the "case for giving explicit recognition" to power buyers in a merger case "is weak." 4 Areeda & Hovenkamp, at ¶ 943b, and followed by *Chicago Bridge,* 534 F.3d at 440. Indeed, "one cannot reason from the premise that the post-merger suppliers face highly concentrated and sophisticated buyers to the conclusion that monopoly pricing is impossible." *Id.*

In any case, the evidence in this case is that Exide and certainly other customers lack the kind of buyer power that the cases consider. The markets for flooded lead-acid battery separators are characterized by extremely limited alternative supply sources. In the SLI market, as a direct result of the merger, there are but two suppliers, Daramic and

Entek. The prospect of shuffling suppliers and playing them "off against one another"[7] is meaningless in such a highly concentrated market with only two suppliers and high switching costs.[8] This negates one of the foundational requirements for effective buyer power—alternative sources of supply. Respondent has failed to show that Exide has ever had an ability to secure lower prices, let alone a history of "consistently" being able to do so.

The evidence on the still on-going negotiations between Daramic and Exide provides very little useful information for Respondent's claims. Its efforts to characterize Exide's proposals and counterproposals as "demands" fall flat since Daramic has not agreed to any of them. (CCFOF ¶¶ 1323-1324). Likewise, Daramic's { } "concessions" are all conditioned on { } that Exide has communicated it is unwilling to accept. (CCFOF ¶¶ 1316-1320, 1325). The outcome of these negotiations is uncertain.

Nevertheless, Daramic does not behave as one would expect if Exide truly was a power-buyer able to resist Daramic's market power. {

.} (CCFOF ¶¶ 1283-1290, 1328-1333). For the orders that Daramic has accepted, it also {

} (CCFOF ¶¶ 1337-1339). This

} (RX01693 at 001, *in camera* October 20, 2009 letter from Harry Siebert to Douglas Gillespie). Daramic is using the { } as a means of coercing a favorable

[7] An ability noted by the court in *Archer-Daniels*. 781 F. Supp. 1400, 1419
[8] This is particularly true where the buyer { }

contract from Exide and locking up { } of Exide's business. As Mr. Seibert wrote, {"

"} (RX01693 at 001, in camera).

Daramic now {

.} (CCFOF ¶¶ 1334-1336). {

} {

.}

(CCFOF ¶¶ 1256-1257). As Mr. Gillespie testified, {"

"} (Gillespie, Tr. 5867, *in camera*).

Despite all this evidence that {

.} (CCFOF ¶¶ 1328-1331). Exide's "incremental" orders would seem to call for increased, rather than decreased production. {

}

suggests that Exide holds no power over Daramic at all.

These facts do not present a picture of the type of relationship that courts have viewed as dominated by the purchaser. It is clear from the evidence that Daramic continues to wield far greater power.

In the markets for motive, UPS, and deep-cycle separators, after the acquisition of Microporous, {

} (CCFOF ¶¶ 1256-1257). {

.} *Id.*

Therefore, under any reasonable reading of the law, the power buyer argument is meritless in the North American, flooded lead-acid battery separator markets.

IV. Events and Evidence Subject to Respondent's Manipulation are Entitled to Little or No Weight

The events and evidence presented in this hearing are subject to manipulation by Respondent. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *In re Chi. Bridge & Iron Co. N.V.*, 139 F.T.C. 553, 583 n.97 (F.T.C. 2005) *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial . . . constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior."); *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *B.F. Goodrich Co.,* 110 F.T.C. 207, 341 (1988) (same). *See also FTC v. Consolidated Foods Corp.,* 380 U.S. 592, 598 (1965) (finding that the court of appeals gave too much weight to post-acquisition evidence that, among other things, showed a declining share).

Daramic is involved in a negotiation with Exide. Daramic is able to take any position in that negotiation that it believes will be beneficial to the outcome of this proceeding. Daramic can also manipulate other events. For example, Mr. Seibert testified at 12:51 pm at the offices of Parker Poe on October 27 that he had {

.} (CCFOF ¶ 1346). At the end of the deposition, after a lengthy break and under redirect, Mr. Seibert testified that Daramic had "{

}" (CCFOF ¶ 1346). When Respondent produced its exhibits to Complaint Counsel it included RX01719, a letter from Tucker Roe, dated October 27, 2009, the same date as Mr. Seibert's deposition, to { }. (CCFOF ¶ 1347). The timing of this letter, in view of Mr. Seibert changing his testimony that day is extraordinarily suspicious.

Just as RX1719 is suspicious, all of the post-transaction, post-hearing "new" evidence proffered by Respondent cannot be trusted because it is subject to manipulation by Respondent. This is particularly true of documents created after Respondent decided to move this Court for a second hearing on or before September 25, 2009. This is because Respondent can write any self-serving statement it believes might be helpful to it in this litigation in its correspondence or its documents. *See e.g.* RX01707 at 003, *in camera* (example of unlikely internal PowerPoint presentation: "{ }").

Respondent has produced a large number of documents for this second hearing that appear to have been created for the purpose of this, or subsequent, litigation with Exide. *See e.g.* RX01679, *in camera* {

}; Many of these documents appear to have been generated from Daramic's AFS database on October 9 (after the reopening of the Hearing Record) rather than something that would normally exist in the ordinary course of business. Such post-transaction documents were likely created for the purpose of this litigation, are subject to manipulation by Respondent, and should be entitled to little, if any, weight.

V. Attempted Monopolization

The evidence introduced at the hearing on November 12, 2009 confirms that Daramic has violated Section 5 of the FTC Act by attempting to monopolize the North American SLI market. The purported "facts" proffered by Respondent are false. (*See* Section II, above.). The post trial evidence demonstrates that Daramic continues to exercise market power that it achieved through the merger and its exclusionary conduct.

The Complaint alleges, among other things, that prior to the acquisition of Microporous, "Daramic attempted through anticompetitive means to maintain monopoly power against a challenge from Microporous" in four relevant markets in North America. (Complaint ¶ 39). Only one of those markets – the automotive battery separator market – was addressed by Respondent at the November hearing. (Seibert, Tr. 5667, *in camera* {(

)} and 5701, *in camera*; RX01679 at 001, *in camera* {(

)}; Gillespie, Tr. 5791, 5795, 5807; *in camera*). No new information was proffered or presented by Respondent to show that Daramic lacks monopoly power in the North American markets for flooded lead-acid battery separators for UPS, motive and deep-cycle applications, particularly since the acquisition of Microporous. There simply are not any other suppliers for these products in North America. Furthermore, evidence concerning Daramic's prior anticompetitive activities – including the acquisition itself – was not at issue in the second hearing, which was "strictly limited to the proffered evidence" enumerated in the Court's Order of October 15, 2009. (*See* Order Denying Complaint Counsel's Motion to Compel Discovery Responses, October 22, 2009).

{

} (Gillespie, Tr. 5855, {(

)}, *in camera*; *see also* Gillespie, Tr. 5823, 5829, *in camera*; CCFOF ¶¶ 1256, 1321, 1340). After the acquisition of Microporous, no competition remains in these three markets. (*See* CCPTB at 14-16, 19, 21-24). Moreover, since the first hearing concluded, Daramic's coercive behavior in negotiations with Exide has not changed. Daramic still seeks to coerce Exide to purchase at least { } of its PE separators from Daramic. (Gillespie, Tr. 5801, 5803, 5805, 5821-5823, *in camera*; PX5076 (Seibert, Dep. at 71-72), *in camera*). Thus, the pattern of punishing any customer who tries to do business with another supplier continues, just as it was before Daramic acquired Microporous. (*See* CCPTB at 49-63).

At the hearing in May and June, Complaint Counsel established each element of the attempted monopolization offense in the SLI market: (1) Daramic possesses monopoly power; and (2) has engaged in anticompetitive conduct with (3) a specific intent to monopolize, and (4) a dangerous probability of success. (*See Lorain Journal Co. v. United States,* 342 U.S. 143, 153-54 (1951)). The evidence at the second hearing again shows that Daramic has engaged in conduct with the purpose and likelihood of maintaining monopoly power in the North American SLI market.

Respondent asserts that after the first hearing, {

} (Respondent's October 7, 2009 Reply Memorandum at 2, *in camera*). The legal conclusion Respondent would have the Court draw from these purported facts is that "Daramic does not have market power." (*Id.*). Respondent, however, failed to prove what it promised.

Respondent put forward no evidence showing what its share of the North American SLI market was in 2009, or whether its share has changed at all since the first hearing (or even since the beginning of this year). The self-serving testimony of Mr. Seibert that { } does not address whether Daramic's share of the SLI market has changed. (Seibert, Tr. 5648, 5660, *in camera*). If anything, this testimony, coupled with the evidence that {

} indicates that

Daramic's 2009 market share is growing. (Gillespie, Tr. 5798, *in camera*; CCFOF ¶¶ 1261-1262, 1265-1266, 1332-1333).

In his closing argument, Respondent's counsel stated that {

} (Welsh, Tr. 5881, *in camera*). This empty speculation, of course, is disproven by Daramic's internal planning documents and the testimony of its own witnesses. (*See* CCFOF ¶¶ 1309, 1311). Even if this unfounded claim were true, however, it would have no bearing on the determination of whether Respondent violated the prohibition against attempted monopolization in 2009 or before. (*See, e.g., HDC Medical, Inc. v. Minntech Corp.,* 474 F.3d 543, 550 (finder of fact looks to defendant's market share at the time the challenged conduct occurred in assessing dangerous probability of success); *Taylor Pub. Co. v. Jostens, Inc.,* 216 F.3d 465 (5th Cir. 2000) (outcome of challenged conduct is not dispositive; rather, court examines likelihood that monopoly would be created, measured from the time the conduct occurred)).

Not surprisingly, Daramic's conduct with respect to Exide during 2009 is similar to its behavior in 2007, when {

}. (CCFOF ¶¶ 1064-1065; *see generally* CCFOF ¶¶ 1059-1078). First, {

} (Gillespie, Tr. 5798-5799, *in camera*). Moreover, {

.} (Gillespie, Tr. 5799, *in camera*). Second, in October 2009, Daramic's General Counsel, Mr. Bryson, {

} (Gillespie, Tr. 5817-5818, *in camera*; CCFOF ¶¶ 1341-1342). The threat is real; { } (CCFOF ¶¶ 1334-1336). Third, {

} (CCFOF ¶¶ 1338-1339).

A supplier that threatens to reduce output and withhold supply from a customer unless that customer agrees to purchase a particular volume of its future requirements from that supplier would be acting irrationally in a competitive market. Daramic's tactics would appear all the more irrational, because {

.} (CCFOF ¶¶ 1334-1336; 1326). What makes Daramic's actions rational, and plainly anticompetitive, is its possession of substantial market power. (*See, e.g., United States v. Microsoft Corp.*, 65 F. Supp. 2d 1, 18 (D.D.C. 1999), *aff'd* 253 F.3d 34, 57-58 (D.C. Cir.); *see also* Areeda ¶ 807b3, ("[I]n the absence of power, the only payoff to the refusal to deal would have been loss of customers.").

Perhaps even more telling is Daramic's failure to provide evidence that its contract negotiations {

.}

(Seibert, Tr. 5648-5649, 5662-5664, 5703, 5705-5706, *in camera*; Gillespie, Tr. 5814-5815, 5865-5866, *in camera*; RX01667 at 002, *in camera* ({

}). Even Mr. Toth admitted that, after a lengthy recital concerning {

} (Toth, Tr. 5754-5759, *in camera*).

As noted above, Daramic predicts that it has a {

.} (CCFOF ¶ 1305). The company's posturing during negotiations with Exide, and the self-serving testimony of its executives at the second hearing, cannot overcome this objective evidence of Daramic's market power. Daramic's conduct in 2009 toward Exide is evidence of its monopoly power in the North American SLI market, and together with the evidence of its anticompetitive actions at the first hearing, has created the dangerous probability that its monopoly power will continue. (CCFOF ¶¶ 1330-1331). A strong likelihood of durable monopoly power exists if Daramic's conduct is not enjoined. The market in question is characterized by high entry barriers (CCPTB at 34-41; CCFOF ¶¶ 817-888, 905, 909-917, 935-945, 960-965, 991-1036). Daramic's refusal to offer to { } is dramatic evidence of Respondent's monopoly power in this market. (CCFOF ¶¶ 1254-1255).

VI. Conclusion

For the reasons stated above, as is fully supported by the evidence both at the initial trial and the second hearing in this matter, Daramic's acquisition of Microporous and its

anti-competitive conduct are illegal. The public deserves a complete remedy to restore competition and prevent further harm to competition.

Dated: December 1, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Post-Trial Brief on the Reopened Record with:

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

I hereby certify that on December 1, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Post-Trial Brief on the Reopened Record with:

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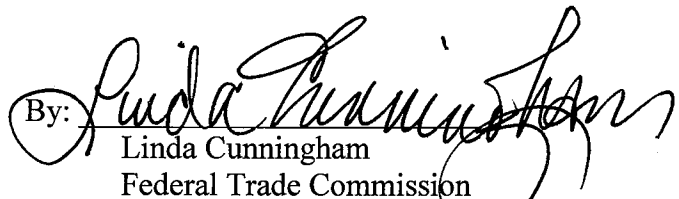
By: 

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