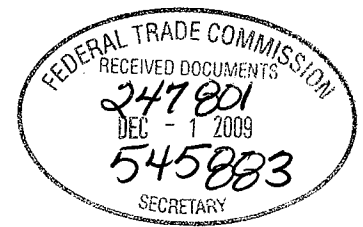


ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
)
Polypore International, Inc.,)
a corporation.)

Docket No. 9327

PUBLIC

**COMPLAINT COUNSEL'S POST-TRIAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW ON REOPENED HEARING**

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DECEMBER 1, 2009

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

DOCKET NO. 9327

**IN THE MATTER OF
POLYPORE, INTERNATIONAL, INC.**

**COMPLAINT COUNSEL'S POST-TRIAL
PROPOSED FINDINGS OF FACT
ON REOPENED HEARING**

| | | |
|---|-------|----|
| { | | 4 |
| • Respondent’s allegation in the first proffer that Exide’s { } are “inconsistent with past order patterns” is not accurate because Exide { | | 6 |
| B. Proffer #2 is not true | | 7 |
| • Respondent’s allegation in the second proffer that “Exide does not intend to and will not purchase any additional separators from Daramic in either { }” is not accurate because Exide intends on purchasing separators from Daramic in { } | 7 | 7 |
| • Respondent’s allegation in the second proffer that “Exide does not intend to and will not purchase any additional separators from Daramic in either { }” is not accurate because Exide offered | | 7 |
| • Respondent’s allegation in the second proffer that Exide will have { } of separators is not accurate because Daramic { } to Exide | 8 | 8 |
| C. Proffer #3 is not true | | 10 |
| • Respondent’s allegation in the third proffer that Exide has decided not to purchase PE separators from Daramic in { } is not accurate because Exide { | | 10 |
| • Respondent’s allegation in the third proffer that Daramic’s decision to { } is based on Exide’s “apparent decision not to purchase PE separators from Daramic in { }” is not accurate because Daramic has been | | 10 |
| D. Proffer #4 is not true | | 13 |
| • Respondent’s allegation in the fourth proffer that it “appears unlikely” that Daramic will “retain any small amount of business from Exide in { }, or thereafter” is not accurate because Daramic anticipates supplying Exide in { } with or without a contract | 13 | 13 |

- Respondent’s allegation in the fourth proffer that for Daramic to “retain any small amount of business from Exide in { }, or thereafter” it “will only be able to obtain such sales through a { }” is not accurate because Daramic has never offered Exide { } 14

- Respondent’s allegation in the fourth proffer that for Daramic to “retain any small amount of business from Exide in { }, or thereafter” it “will only be able to obtain such sales through a { }” is not accurate because Daramic has never offered { } 15

- Respondent’s allegation in the fourth proffer that for Daramic to “retain any small amount of business from Exide in { }, or thereafter” it “will only be able to obtain such sales through a { }” is not accurate because Daramic has not offered a { } on motive, UPS, or deep-cycle separators 16

II. Exide is not a power buyer: 16

- { } 16

- Daramic has refused to provide Exide { } 17

- Daramic’s proposed { } 17

- { } 17

- Daramic has reneged on a commitment to Exide to { } 18

- Daramic is refusing to { } 18

- Daramic has reneged on 19

- { } 20

- Daramic has threatened 20
- Daramic is attempting to { 20

III. Other (Credibility): 21

PROPOSED CONCLUSIONS OF LAW.....23

”} PX5076 (Seibert, Dep. at 48-49), *in camera*).
What Mr. Seibert does know is that
}. (PX5076 (Seibert, Dep. at 74),
in camera).

1254. Mr. Gillespie testified that while Exide intends on purchasing
} (Gillespie, Tr. 5826, 5838, *in camera*). Moreover, Exide has
} (Gillespie, Tr. 5868, *in camera*). Additionally, Exide would not {
} (Gillespie, Tr. 5826-5828, *in camera*).

1255. Because today Exide has
} (Gillespie, Tr. 5823, 5833,
in camera; CCFOF1254).

- Respondent’s allegation in the first proffer that “Exide decided to move {
} its PE separator purchases for { } to another
supplier” is not accurate because Exide has {
}.

1256. Exide {
for such products. (Gillespie, Tr. 5829, *in camera*).

1257. Exide has informed Daramic that it intends to {
. (Gillespie, Tr. 5810, *in camera*, 5864-5865, *in camera*). In fact,
Mr. Gillespie testified that Exide expects to {
. (Gillespie, Tr. 5825-5826, *in camera*).

- Respondent’s allegation in the first proffer that Exide’s purchase orders of {
} of PE separators “amounts to approximately { } worth
of PE separators” is not accurate because Exide’s

-

1258. Exide has not placed any {
}. (Gillespie, Tr. 5798, *in camera*). Mr. Seibert admitted that
{ (Seibert, Tr.
5701, *in camera*). With respect to his conversations with Mr. Gillespie prior
to Mr. Seibert's testimony in June, Mr. Seibert admits that {"
"}
(PX5076 (Seibert, Dep. at 12), *in camera*).

1259. Neither is Exide in any way {
}. (Gillespie, Tr. 5800, 5832, *in camera*).

- Respondent's allegation in the first proffer that Exide's purchase orders of {
} of PE separators "amounts to approximately { }
worth of PE separators" is not accurate even as to Exide's { } separator
needs because it is not based on a {
} needs

1260. {
(Gillespie, Tr. 5862, *in camera*). It is unrealistic to use
Exide's

} (Gillespie, Tr. 5862, *in camera*).
}
(Gillespie, Tr. 5862, *in camera*).

- Respondent's allegation in the first proffer that Exide's {
} exceeded any reasonable forecast provided by Exide is not accurate because
Exide informed Daramic of {

1261. Exide provided a {
(Gillespie, Tr.
5791-5792; Seibert, Tr. 5695-5696, *in camera*). Exide's

(Gillespie, Tr. 5792, *in camera*; Seibert, Tr. 5695-
5696, *in camera*).

1262. Exide's

ear}.

¹ {

} . Complaint Counsel's Findings of Fact use the term incremental orders in all instances for the sake of consistency.

(Gillespie, Tr. 5792, 5860, *in camera*). Thus, Exide informed Daramic {

. (RX01715, *in camera* ({

)). Mr. Seibert admitted that

. (Seibert, Tr. 5697, *in camera*).

1263. Exide's

. (PX5076 (Seibert, Dep. at 6, 9), *in camera*).

1264. Mr. Seibert wrote a letter to Mr. Gillespie on June 2, 2009, two days before he testified in the previous hearing, acknowledging that Daramic

. (PX5076 (Seibert, Dep. at 10, *in camera*)). Mr. Seibert confirmed that {

(PX5076 (Seibert, Dep. at 10-11), *in camera*).

1265. Exide began

. (Gillespie, Tr. 5795, 5845-5846, *in camera*).

1266. Exide placed {

. (Gillespie, Tr. 5844-5845, 5860, *in camera*).

- Respondent's allegation in the first proffer that Exide's { } are a result of a decision to move { } of its business to another supplier is not accurate because Exide

1267. The only reason that Exide

. (Gillespie, Tr. 5795-5796, *in camera*). In fact, but for the

(Gillespie, Tr. 5813, 5832, *in camera*).

² Mr. Seibert attempted to evade this question at trial, insisting that he "would have to see a communication." (Seibert, Tr. 5699, *in camera*). Complaint Counsel was forced to impeach him with his deposition testimony. (Seibert, Tr. 5699-5701, *in camera*).

1268. Moreover, Mr. Gillespie informed Mr. Seibert and Mr. Roe that
(Gillespie, Tr. 5796, *in camera*). Indeed, Daramic admitted that it

(RX01679 at 002, *in camera*). }

1269. {

. (Gillespie, Tr. 5789-5790, 5859, *in camera*; see also RX01720 at 19-
20, *in camera* {

(Gillespie, Tr. 5791, *in camera*). {
} (Gillespie, Tr. 5793, *in camera*).

1270. Exide's concern about a potential

. (Gillespie, Tr. 5793, 5831, *in camera*).

1271. {

} (Gillespie, Tr. 5798, 5837, *in camera*; RX01720 at 019, *in
camera*). Mr. Seibert agreed that all of Exide's
. (Seibert, Tr. 5699, *in
camera*). Despite this, Daramic is

. (Gillespie, 5803-5805, *in camera*).

1272. Mr. Gillespie testified that Exide is not {
}. (Gillespie, Tr. 5832, *in camera*). Mr. Gillespie
testified that if Exide was

separators. (Gillespie, Tr. 5832, *in camera*).

- Respondent's allegation in the first proffer that Exide's { }
are "inconsistent with past order patterns" is not accurate because Exide
{

-

1273. 2009 was not the first year that Exide {
}. (Gillespie, Tr. 5806, 5833, *in camera*). In 2008, Exide

. (Gillespie, Tr. 5806, *in camera*). The reasoning for Exide's
{
}. (Gillespie, Tr. 5806, 5833, *in camera*). Just as Exide

}. (Gillespie, Tr. 5806, *in camera*).

1274. Mr. Seibert admitted that Exide's

(Seibert, Tr. 5734, *in camera*).

1275. As the findings above show, Exide's decision to
} was
adopted long before the close of the record on June 22, 2009. (CCFOF 1249 -
1251). {

} (CCFOF 1252 - 1255).

Exide will also {

. (CCFOF 1256 - 1257).

1276. Exide has not placed orders for { } worth of PE separators from
Daramic because

. (CCFOF 1258 - 1259).

Nor has it placed orders for { } separators from
Daramic because Daramic's

. (CCFOF 1260). Moreover, Exide's

placement of

} before the close of the record on June 22, 2009. (CCFOF 1261 -
1266).

1277. Exide's decision to place

Daramic . (CCFOF 1267 - 1272). Exide told
. (CCFOF 1268).

(CCFOF 1273-1274). }

B. Proffer #2 is not true

- Respondent's allegation in the second proffer that "Exide does not intend to and will not purchase any additional separators from Daramic in either { }" is not accurate because Exide intends on purchasing separators from Daramic in { }

1278. Exide has informed Daramic that it intends to {

. (Gillespie, Tr. 5810, *in camera*). In fact, Mr. Gillespie testified that Exide expects to

. (Gillespie, Tr. 5825-5826, *in camera*).

1279. Exide has consistently informed Daramic that it

. (Gillespie, Tr. 5864-5865, *in camera*). Between July and October 2009, Mr. Gillespie {

. (Gillespie, Tr. 5864, *in camera*; RX01669 at 002, *in camera* ({ }); RX01687 at 002, *in camera*). Moreover, on September 30, 2009, Exide's CEO, Mr. Gordon Ulsh, informed Mr. Toth that {

(RX01704 at 001, *in camera*).

1280. {

(RX01687 at 002, *in camera*; Gillespie, Tr. 5812-5813, *in camera*). }

- Respondent's allegation in the second proffer that "Exide does not intend to and will not purchase any additional separators from Daramic in either { }" is not accurate because Exide offered

-

1281. In October 2009, after Daramic {

. (Gillespie, Tr. 5815, *in camera*). A purchase order is a “firm commitment” and “by definition” is also a contract. (Gillespie, Tr. 5815, 5865-5866, *in camera*). Mr. Gillespie testified that Exide {

. (Gillespie, Tr. 5815-5816, *in camera*). According to Mr. Gillespie, Daramic’s immediate response was that it {

. (Gillespie, Tr. 5865-5866, *in camera*).

1282. Mr. Seibert later wrote to Mr. Gillespie on October 20, 2009, that {

(RX01693 at 002, *in camera*).

Mr. Seibert confirmed that Mr. Gillespie had

. (Seibert, Tr. 5712, *in camera*). Mr. Seibert’s letter to Mr. Gillespie {

. (Gillespie, Tr. 5870-5871, *in camera*; RX01693 at 002, *in camera*).

- Respondent’s allegation in the second proffer that Exide will have {
} of separators is not accurate because Daramic {
} to Exide

1283. Exide will not have

(Gillespie, Tr. 5860, *in*

camera). Daramic has not agreed to {

. (Gillespie,

Tr. 5799, 5860, *in camera*). Daramic has not even {

(Seibert, Tr. 5707, *in camera*). To date, Exide has {

. (Seibert

Tr. 5707-5708, *in camera*; PX5076 (Seibert, Dep. at 51), *in camera*; Gillespie, Tr. 5799, *in camera*).

1284. The total amount of {

. (Gillespie, Tr. 5799, *in camera*).

1285. Mr. Seibert testified that it would be

(Seibert, Tr. 5714-5715, *in camera*; RX01685 at 001, *in camera*). Mr. Seibert confirmed at his deposition that it would be {
}. (PX5076 (Seibert, Dep. at 38), *in camera*).

1286. Mr. Seibert did not know whether or not Daramic would

(Seibert, Tr. 5720, 5722, *in camera*). When asked at his deposition whether {
} (PX5076 (Seibert, Dep. at 53), *in camera*).

1287. On October 20, 2009, Daramic reiterated that it

(RX01693 at 001-002, *in camera*). ”}

1288. {

} (Seibert, Tr. 5672-5673, 5707, *in camera*).

1289. As the findings above show, Exide has told Daramic it intends to {

(CCFOF 1254 – 1257, 1278-1280). Exide also
(CCFOF 1281 - 1282). {
(CCFOF 1281 - 1282). }

1290. Exide will not receive

(CCFOF 1283 - 1287). Daramic has agreed to
{
(CCFOF 1283, 1286-1288). The
{
(CCFOF 1284).

} (CCFOF 1288).

C. Proffer #3 is not true

- Respondent's allegation in the third proffer that Exide has decided not to purchase PE separators from Daramic in { } is not accurate because Exide { }

1291. { } (See CCFOF 1252 – 1257).

- Respondent's allegation in the third proffer that Daramic's decision to { } is based on Exide's "apparent decision not to purchase PE separators from Daramic in { }" is not accurate because Daramic has been

-

1292. Polypore, through its corporate finance personnel and its Daramic business unit, has been . (PX5075 (Toth, Dep. at 8-9), *in camera*; Toth, Tr. 5775-5777, *in camera*). Mr. Toth, Polypore's CEO recalled discussing that with Complaint Counsel a year and a half earlier. (PX5075 (Toth, Dep. at 9), *in camera*; Toth, Tr. 5775-5777, *in camera*).

1293. Daramic is . (Seibert, Tr. 5692-5693, *in camera*).
{ } (Seibert, Tr. 5693, *in camera*).

1294. Polypore was always } (RX01692 at 001-002, *in camera*). In analyzing its options (Seibert, Tr. 5693, *in camera*).

1295. The assessment of { } (Toth, Tr. 5777, *in camera*). Daramic has two large North American separator plants – Corydon and Owensboro – (Toth, Tr. 5737, *in camera*). (Toth, Tr. 5737, *in camera*).

1296. With regard to the former Microporous facility located in Piney Flats, TN, Daramic's third North American separator facility, that plant is operating { }. (Toth, Tr. 5777-5778, *in camera*). Mr. Toth had

{

. (Toth, Tr. 5777, *in camera*).

1297. Neither Mr. Toth nor Mr. Seibert ever testified that the reason {

.} (See generally,

Toth, Tr. 5737-5782, *in camera*; Seibert Tr. 5643-5735, *in camera*).

} (Toth, Tr. 5748, *in camera*; see also Polypore

Opening Statement, Tr. 5610 {

}

1298. {

} (Toth, Tr. 5747-5748, *in*

camera). {

(Toth, Tr. 5748,

in camera).

} (Toth, Tr. 5748-5749, *in camera*).

1299. Mr. Seibert testified that Daramic

(Seibert, Tr. 5694, *in camera*).

{

} (Seibert, Tr. 5645, *in camera*).

{

(Seibert, Tr. 5694,

in camera). This is, as Mr. Seibert confirmed on the stand, because Daramic
needed to {

} (Seibert, Tr. 5718-5719,

in camera).

1300. Regardless of Exide's

. (Seibert, Tr. 5718-5719, *in camera*). When asked what

the {

³ That Mr. Seibert singles out Daramic's

}

⁴ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5717-5719, *in camera*).

(PX5076, Seibert Dep.

at 84-85, *in camera*).

1301. When asked at his deposition whether Daramic might decide not to

(PX5076 (Seibert, Dep. at 81), *in*

camera).

1302. Mr. Toth confirmed that even if

. (PX5075 (Toth, Dep. at 58-59), *in*

camera).

1303. Moreover, Daramic refused to even consider

. (RX01693 at 002, *in camera*; Seibert,

Tr. 5712, *in camera*).

1304. Polypore's internal documents reiterate that {

. (RX01692 at

001-002, *in camera*).

1305. Polypore anticipated a

. (RX01692 at 002, *in camera*).

Polypore believes that there is {

}. (RX01692 at 002, *in camera*). Yet, under all scenarios,

{

(RX01692 at 002, *in camera*).

1306. In fact, even under the

. (RX01692 at 002, *in*

camera).

1307. As the findings above make clear, Exide's PE separator purchasing decision
for {

. (CCFOF 1292 – 1295, 1297 - 1306).

} (CCFOF 1292). The reasons Polypore decided to {

} (Toth, Tr. 5737; 5747-5748, *in camera*).

1308. {
1253 – 1255, 1305 – 1306, 1309-1311). {
} (CCFOF
} (CCFOF 1304 - 1305).
} (CCFOF 1304 - 1306).

D. Proffer #4 is not true

- Respondent’s allegation in the fourth proffer that it “appears unlikely” that Daramic will “retain any small amount of business from Exide in { }, or thereafter” is not accurate because Daramic anticipates supplying Exide in { } with or without a contract

1309. Polypore expects that Exide will continue purchasing PE separators from Daramic in 2010, after the NASA expired. {

Rather, Mr. Toth, reported to Polypore’s investors, to whom he has a duty to be truthful, that Daramic anticipates maintaining a supply position with Exide with or without a contract. (Toth, Tr. 5769, *in camera*; Seibert, Tr. 5724). When confronted with the statement, Mr. Toth testified that it “sounds like something I would have said.” (Toth, Tr. 5769, *in camera*).

1310. {
} (Seibert, Tr. 5729-5730, *in camera*). {
} (RX01692 at 002, *in camera*). {
} (RX01692 at 002, *in camera*).

1311. Moreover, Exide has informed Daramic that they intend on {
} (Gillespie, Tr. 5810, *in camera*; see also PX5076 (Seibert, Dep. at 74), *in camera*).

- Respondent's allegation in the fourth proffer that for Daramic to "retain any small amount of business from Exide in { }, or thereafter" it "will only be able to obtain such sales through a { }" is not accurate because Daramic has never offered Exide { }

1312. {

} (See generally, CCFOF 1069-1078).

1313. Mr. Seibert was unable to testify as to {
 . (Seibert, Tr. 5722, *in camera*). Mr. Seibert could not testify as to

{ (PX5076 (Seibert, Dep. at 101), *in camera*). Mr. Seibert confirmed at trial that he did not know what {
 }. (Seibert, Tr. 5726, *in camera*). Mr. Seibert was unable to even confirm that Daramic would
 }. (Seibert, Tr. 5725, *in camera*). Mr. Seibert could not testify about anything less than
 } (Seibert, Tr. 5725, *in camera*).

1314. Mr. Seibert testified that Daramic had not even resolved whether it would {
 . (PX5076 (Seibert, Dep. at 101), *in camera*).

1315. Daramic has not considered what {
 . (Seibert, Tr. 5723, *in camera*). If Exide does not {
 (PX5076 (Seibert, Dep. at 96), *in camera*). Mr. Seibert testified that the possibility that Exide would {
 (PX5076 (Seibert, Dep. at 96), *in camera*). While Mr. Seibert testified that {

(Gillespie, Tr. 5814-5815, *in camera*).

⁵ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5725-5726, *in camera*).

- Respondent's allegation in the fourth proffer that for Daramic to "retain any small amount of business from Exide in { }, or thereafter" it "will only be able to obtain such sales through a { }" is not accurate because Daramic has never offered { }

1316. { } (See e.g., RX01713-003, in camera {(})); see also RX01666 at 002, in camera; RX01667 at 002, in camera; RX1668 at 02, in camera; RX01683 at 001, in camera; RX01718 at 002, in camera; RX01714 at 002, in camera).

1317. As recently as October 1, 2009, Daramic understood that { } (Toth, Tr. 5749-5750, in camera). Despite that understanding, Daramic, { } (Toth, Tr. 5750-5751, in camera; Seibert, Tr. 5663-5664, in camera; see also RX01714 at 001-003, in camera ()).

1318. Mr. Seibert testified at trial that Daramic has not { } (Seibert, Tr. 5725, in camera). Mr. Seibert testified that { } (Seibert, Tr. 5663-5664, in camera).

1319. Mr. Seibert testified that all of the { } (PX5076 (Seibert, Dep. at 33-34), in camera). When challenged at his deposition that Daramic had never { } (PX5076 (Seibert, Dep. at 30-31), in camera).

1320. Mr. Gillespie testified that Exide has

⁶ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, in camera).

}. (Gillespie, Tr. 5814, *in camera*). Mr. Gillespie testified Daramic has never

. (Gillespie, Tr. 5814, *in camera*).

- Respondent's allegation in the fourth proffer that for Daramic to "retain any small amount of business from Exide in { }, or thereafter" it "will only be able to obtain such sales through a { }" is not accurate because Daramic has not offered a { } on motive, UPS, or deep-cycle separators

1321. Daramic has not offered { }. (Gillespie, Tr. 5808-5810, *in camera*). Daramic has also not offered to {

} (RX01667 at 002, *in camera*).

1322. As evidenced in previous findings, Daramic expects to . (CCFOF 1253 - 1255, 1305 - 1306). However, Daramic has never {

. (CCFOF 1312 - 1315).

To this day, Daramic has only

. (CCFOF 1312, 1316-1320). However, because Daramic is

. (CCFOF 1321).

II. Exide is not a power buyer:

- {

1323. {

} (Seibert, Tr. 5645, *in camera*).

1324. Daramic has been unwilling to { }. (Gillespie, Tr. 5817, *in camera*). {

5690, 5715, *in camera*). }

"} (Seibert, Tr. 5716, *in camera*).

- Daramic has refused to provide Exide {
}

1325. Daramic has never offered

(CCFOF 1316 – 1318, 1320; Toth Tr. 5750, *in camera*).

} (Gillespie, Tr. 5814-5815, *in camera*).

- Daramic's proposed {

1326. Exide currently pays { } for SLI separators in North America. (Gillespie, Tr. 3018-3020, 3059, *in camera*). {

(Gillespie, Tr. 5807-5808, *in camera*). This fact is well-known by both companies, and is the result of {

}. (Gillespie, Tr. 5807, *in camera*).

} (Gillespie, Tr. 5807-5808, *in camera*).

1327. Notwithstanding the fact that Exide is Daramic's

(PX5076 (Seibert, Dep. at 75-76), *in camera*).

- {

1328. { (PX5076 (Seibert, Dep. at 58), *in camera*). {

(RX01685 at 001, *in camera*) ”}

1329. Daramic has only agreed to { } (Seibert, Tr. 5707, *in camera*). Mr. Seibert testified that the

}. (PX5076 (Seibert, Dep. at 58), *in camera*).

1330. {

(Toth, Tr. 5766, *in camera*; see also Seibert, Tr. 5694-5695, *in camera*).

1331. Mr. Seibert testified at his deposition that Daramic has not

. (PX5076 (Seibert, Dep. at 27), *in camera*).

- Daramic has reneged on a commitment to Exide to
}

1332. On August 13, 2009 Mr. Seibert informed Mr. Gillespie that {

(RX01670, *in camera*).

1333. Mr. Gillespie testified that in August 2009, Daramic confirmed

. (Gillespie, Tr. 5800, *in camera*). Later, Daramic
reneged on this

. (Gillespie, Tr. 5800-5801, *in camera*).

- Daramic is refusing to {

1334. In recent months, Daramic has been

(Gillespie, Tr. 5821-5822, *in camera*). On October 20, 2009, Mr. Seibert
wrote to Mr. Gillespie notifying him that {

002, *in camera*).

} (RX01693 at

1335. {

} (Gillespie, Tr. 5822, *in camera*).

(Gillespie, Tr. 5822, *in camera*). Mr. Gillespie testified that {

}

Tr. 5867, *in camera*).

} (Gillespie,

1336. Daramic's refusal to {

(Gillespie, Tr. 5805, *in camera*). Daramic is the only one of Exide's 15,000 suppliers that has {

}

}.

(Gillespie, Tr. 5822, *in camera*). Daramic's refusal to {

. (Gillespie, Tr. 5822-5823, *in camera*).

- Daramic has reneged on

-

1337. In September 2009 Daramic had agreed to

camera).

(RX01685 at 001, *in*

1338. However, by October 20th, when {

. (RX01693 at 001, *in camera*). Daramic informed Exide that the {
}. (RX01693 at 001, *in camera*).

1339. {
5801, *in camera*). In response to the question whether Daramic would give {

} (PX5076 (Seibert, Dep. at 71-72), *in camera*).

- {

1340. {

} (Gillespie, Tr. 5829, *in camera*). Mr. Gillespie testified that Exide expects to {

. (Gillespie, Tr. 5825-5826, *in camera*).

- Daramic has threatened

1341. During discussions about a

(Gillespie, Tr. 5817-5818, *in camera*). Mr. Gillespie understood Mr. Bryson's comment to be

} (Gillespie, Tr. 5818, *in camera*).

1342. Exide believes that

(Gillespie, Tr. 5829-5830, *in camera*). Mr. Gillespie testified that if Exide were

} (Gillespie, Tr. 5818, 5829, 5867, *in camera*). Moreover, Exide's industrial battery manufacturing facilities accounted for more than 35% of Exide's net sales in its most recent quarter. (RX01726 at 006, 015).

- Daramic is attempting to {

1343. Daramic has attempted to link any {

. (Gillespie, Tr. 5819, *in camera*). Polypore's general counsel explained to Mr. Gillespie that Daramic's reasoning for linking the {

} (Gillespie, Tr. 5820, *in camera*). Exide understood from these comments that Daramic was attempting to

} (Gillespie, Tr. 5820, *in camera*).

1344. As the above findings indicate Exide is not a power buyer. {

{ (CCFOF 1326 - 1327). Moreover, Daramic's refusal to
provide Exide { } (CCFOF
1320, 1325), along with Exide's inability to {
} (CCFOF 1317, 1324); its inability to have
{
(CCFOF 1328 - 1330, 1332 - 1336);
its inability to have
(CCFOF
1337 -1339); its inability to {
} (CCFOF 1256, 1340); its inability to {
(CCFOF 1341 - 1342); and
its inability to
(CCFOF 1343), all indicate
that Exide is not a power buyer.

III. Other (Credibility):

1345. At trial, when Mr. Seibert was asked {

(Seibert, Tr. 5701, *in camera*). At his
deposition, Mr. Seibert gave the following testimony:

{

}

(PX5076 (Seibert, Dep. at 27), *in camera*).

1346. Mr. Seibert testified in his deposition that he had not

(PX5076
(Seibert, Dep. at 27), *in camera*). The deposition began at 12:51 pm at the

offices of Parker Poe on October 27. (PX5076 (Seibert, Dep. at 3), *in camera*). At the end of the deposition, after a lengthy break and under redirect, Mr. Seibert testified that {

(PX5076 (Seibert, Dep. at 102), *in camera*). In his deposition testimony, Mr. Seibert made no mention of { }. At trial, Mr. Seibert testified that

(Seibert, Tr. 5703, *in camera*). Mr. Seibert's testimony at trial, that he had communicated at his deposition that Daramic had

(Seibert, Tr. 5703, *in camera*; PX5076 (Seibert, Dep. at 102), *in camera*).

1347. When Respondent produced its exhibits to Complaint Counsel it included a letter from {

(RX01719, *in camera*). The timing of this letter, { is extraordinarily suspicious. (RX01719, *in camera*; Seibert, Tr. 5703, *in camera*).

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

DOCKET NO. 9327

**IN THE MATTER OF
POLYPORE, INTERNATIONAL, INC.**

**COMPLAINT COUNSEL'S
PROPOSED CONCLUSION OF LAW**

1348. A *prima facie* violation of Section 7: (1) the “line of commerce” or product market; (2) the “section of the country” or geographic market; and (3) the transaction’s probable effect on concentration in the product and geographic markets. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).
1349. Finding a *prima facie* violation of Section 7 creates a rebuttable presumption of anticompetitive effects and shifts the burden of going forward with evidence to Respondent. Respondent have the burden of producing evidence that shows that the market share statistics supporting the *prima facie* case give an inaccurate account of the acquisition's probable effects on competition. *Baker Hughes*, 908 F.2d at 982-83; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998).
1350. The appropriate lines of commerce within which to evaluate the probable competitive effects of the acquisition are separators for flooded lead-acid batteries in the following markets: (1) deep-cycle; (2) motive; (3) Automotive (“SLI”); and (4) uninterruptable power supply stationary (“UPS”).
1351. The appropriate geographic area within which to evaluate the probable competitive effects of the acquisition is North America.
1352. A merger that significantly increases market shares and market concentration beyond already high levels is so inherently likely to lessen competition substantially that it is presumptively unlawful under Section 7 of the Clayton Act. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (U.S. 1963); *Baker Hughes*, 908 F.2d at 982-83; *PPG*, 798 F.2d at 1502-03; *Cardinal Health*, 12 F. Supp. 2d at 52 (“under Section 7 of the Clayton Act, a *prima facie* case can be made if the government establishes that the merged entities will have a significant percentage of the relevant market - enabling them to raise prices above competitive levels”).
1353. The Herfindahl-Hirschman Index (“HHI”) is an appropriate measure of market concentration. *E.g.*, *University Health*, 938 F.2d at 1211 n.12 (HHI is “most prominent method” of measuring market concentration); *FTC v. Staples*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997); *Ivaco*, 704 F. Supp. at 1419.
1354. Complaint Counsel established its *prima facie* case by showing that the acquisition produces a firm controlling a percentage share and HHI concentration levels in each of the four relevant markets that make the merger inherently likely to lessen competition substantially, which means that the merger is presumptively unlawful under Section of 7 of the Clayton Act. *Brown Shoe*, 370 U.S. at 343.

1355. Complaint Counsel established that Daramic and Microporous were the number one and two competitors in the deep-cycle, motive, and UPS markets and that no other company provides effective competition. Complaint Counsel established that Microporous was at least the third best alternative for customers in the SLI market. The acquisition of Microporous by Daramic significantly increased concentration in the relevant product markets in North America, and resulted in highly concentrated markets.
1356. Having established a *prima facie* case, the burden of production and proof shifts to the defendants to rebut this presumption of anticompetitive harm. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (U.S. 1974); *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83. “The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.” *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). Respondent has not demonstrated that the market share statistics give an inaccurate prediction of the acquisition’s probable effects on competition. “To meet their burden, the defendants must show that the market-share statistics . . . ‘give an inaccurate prediction of the proposed acquisition’s probable effect on competition.’” *Cardinal Health*, 12 F. Supp. 2d at 54 (quoting *Staples*, 970 F. Supp. at 1083); see *Baker Hughes*, 908 F.2d at 991.
1357. The power buyer argument is not itself independently adequate to rebut a *prima facie* case. *Chicago Bridge & Iron Co. N.V.*, 534 F.3d 410, 440 (5th Cir. 2008); *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 61 (D.D.C. 1998).
1358. The presence of powerful buyers can be considered “along with other such factors as the ease of entry and likely efficiencies.” *Chicago Bridge & Iron Co. N.V.*, 534 F.3d 410, 440 (5th Cir. 2008) (quoting *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 58 (D.D.C. 1998)).
1359. The presence of multiple supply alternatives is a critical factor in establishing the applicability of a power buyer argument.
1360. In order to show precompetitive impact of power buyers Respondent must show that buyers continually play suppliers off against one another to establish a defense. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1419 (S.D. Iowa 1991).
1361. When the presence of powerful customers with the ability to protect themselves from anticompetitive price increases has been established, the presence of smaller, less powerful customers in the relevant market invalidates a power buyer defense. *United States v. United Tote*, 768 F.Supp.1064 (D. Del. 1991); *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 40 (D.D.C. 1998).
1362. The presence of small buyers undermines a power buyer argument unless the smaller purchasers possess similar bargaining power to their larger counterparts,

with a demonstrated ability to negotiate “meaningful discounts” from suppliers in the relevant market. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1419 (S.D. Iowa 1991).

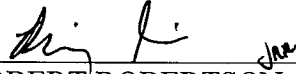
1363. The validity of the power buyer argument depends, in part, on the ability of the large buyers to “directly affect the market price” of the input or product in question. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1416 (S.D. Iowa 1991).
1364. Respondent has not demonstrated that it is constrained by power buyers.
1365. 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); *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).
1366. The events, transactions, and evidence presented by Respondent are subject to manipulation by it. This evidence is entitled to little or no weight.
1367. Respondent has not produced any significant evidence rebutting the presumption of a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Because Respondent did not produce evidence sufficient to rebut the presumption of a violation of Section 7 of the Clayton Act, the burden of producing further evidence of anticompetitive effects did not shift to Complaint Counsel.
1368. Although Complaint Counsel is not required to prove the existence of actual anticompetitive effects resulting from the merger, such evidence, either in the form of unilateral post merger price increases or coordinated interaction, negates any attempt to rebut the FTC’s *prima facie* case, and independently establishes a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.
1369. The Acquisition violates Section 7 of the Clayton Act because “the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.” 15 U.S.C. § 18. The Acquisition also constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.
1370. Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1) (2008).
1371. Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC

Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

1372. Prior to the Acquisition, Daramic engaged in monopolistic conduct and/or attempts to monopolize, which constituted unfair methods of competition in violation of Section 5 of the FTC Act.
1373. To meet its burden of proof under Count III of the Complaint, Complaint Counsel may establish an offense of monopolization or attempted monopolization patterned on standards of liability under Section 2 of the Sherman Act. *Cement Inst.*, 333 U.S. at 694.
1374. Complaint Counsel makes out a *prima facie* case of monopolization, and gives rise to a presumption of violation, by demonstrating two elements: 1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).
1375. Complaint Counsel makes out a *prima facie* case of attempted monopolization, and gives rise to a presumption of violation, by demonstrating four elements: 1) that the defendant possesses monopoly power, and 2) has engaged in predatory or anticompetitive conduct with 3) a specific intent to monopolize, and 4) a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951).
1376. Daramic's anticompetitive conduct meets the standards of liability for monopolization or attempted monopolization under Section 2 of the Sherman Act, and constitutes a violation of the FTC Act.
1377. Complaint Counsel met its burden of proof in support of Count I, Count II, and Count III of the Complaint.
1378. Divestiture is the appropriate and natural remedy. *In re Chi. Bridge & Iron Co.*, 138 F.T.C. 1024, 1161 (F.T.C. 2005). "The very words of § 7 suggest that an undoing of the acquisition is a natural remedy." *United States v. E.I. du Pont de Nemours and Co.*, 366 U.S. 316, 329 (1961). Divestiture is "simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *Du Pont*, 366 U.S. at 330-1.

Dated: December 1, 2009

Respectfully submitted,

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