ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR RE-OPENED HEARING

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1573. {

}. (Toth, Tr. 5746-47, *in camera*).

1574. {

}. (Toth, Tr. 5746-47, *in camera*).

1575. Consequently, {

}. (Toth, Tr. 5746, *in camera*). As Toth elaborated at the November 12, 2009 hearing, "{

}." (Toth, Tr. 5746, *in camera*)(emphasis added).

1576. {

}.

(Toth, Tr. 5772, *in camera*). {

}. (Toth, Tr. 5747, *in camera*).

1577. First, {

}.

(Toth, Tr. 5748, *in camera*).

1578. {

}. (RX01706, *in camera*; Toth, Tr. 5747-49, *in camera*).

1579. {

}. (Toth, Tr. 5747, *in camera*).

1580. {

}. (Toth, Tr. 5780, *in camera*).

1581. {

}. (Toth, Tr. 5747-48, *in camera*).

1582. Finally, {

}. (Toth, Tr. 5748-49, *in camera*).

1583. {

}. (Toth, Tr. 5749, *in camera*). Clearly, {

}. (PX5075 at 008, *in camera*).

1584. {

}. (Toth, Tr. 5749-50, *in camera*).

1585. {

}. (Toth, Tr. 5749-50, *in camera*). {

}. (Toth, Tr. 5749-50, *in camera*). {

}.

1586. Although, {

}. (Toth, Tr. 5750-51, *in camera*).

1587. {

}. (Toth, Tr. 5751-52, 5755, *in camera*). {

}.

1588. Moreover, {

}. (Toth, Tr. 5752, *in camera*).

1589. {

}. (Toth, Tr. 5753-54, *in camera*).

1590. {

}. (Toth, Tr. 5755-56, *in camera*). {

}. (Toth, Tr. 5756, 5758, *in camera*). {

}. (RX01712 at 002, *in camera*).

1591. Thereafter, {

}. (Toth, Tr. 5756-59, *in camera*).

1592. {

}. (Toth, Tr. 5756, 5758-59, *in camera*).

1593. {

}. (Toth, Tr. 5760-61, 5780, *in camera*).

1594. {

}. (Toth, Tr. 5760-61, *in camera*; Gillespie, Tr. 5838-39, 5867-68, *in camera*).

{

}.

1595. {

}. (Toth, Tr. 5760-61, *in camera*; PX5075 at 007, *in camera*).

F. {_____}

1596. {

}. (RX01714, *in camera*; Toth, Tr. 5761-62, *in camera*). {

}. (RX01714 at 002, *in*

camera). {

}. (RX01714, *in*

camera).

1597. {

}. (RX01687 at 002, *in camera*;

Toth, Tr. 5761-62, *in camera*).

1598. {

}. (RX01687 at 002, *in camera*; Seibert, Tr. 5686,

in camera; Gillespie, Tr. 5852-53, *in camera*). {

}. (Seibert, Tr. 5687, *in*

camera; RX01687, *in camera*). {

}. (RX01687 at 003, *in camera;* Seibert, Tr. 5686-87, *in camera*). {

}. (Seibert, Tr. 5690, *in camera*).

{

}. (RX01712, *in*

camera).

1599. {

}. (Seibert, Tr. 5690-91, *in camera*). {

}. (Toth, Tr. 5762-63, *in camera*; RX01693, *in camera*; RX01712, *in camera*; Seibert, Tr. 5691, *in camera*; Gillespie, Tr. 5854-55, *in camera*).

1600. {

}. (RX01712, *in camera*; Toth, Tr. 5762-63, *in camera*). {

}. (RX01712, *in camera*). {

}.

1601. {

}. (RX01681, *in camera*; Toth, Tr. 5763-64, *in camera*). {

}.

1602. {

}. (Gillespie, Tr. 5851, *in camera*). {

}. (Gillespie, Tr. 5852, *in camera*).

1603. {

}. (

}."), *in*

camera).

1604. {

}. (Gillespie, Tr. 5870, *in camera*). {

}." (RX01693, *in*

camera; *see also* RX01685 ("{

}."), *in camera*).

1605. {

}. (Seibert, Tr. 5691, *in camera*). {

}. (Seibert, Tr. 5691, *in camera*; Toth, Tr. 5762-63, *in camera*).

IV. { }

1606. {

}. (Toth, Tr. 5737, *in camera*). {

}. (RX01701, *in camera*; RX01702, *in camera*).

1607. {

}. (Toth, Tr. 5737, *in camera*). In addition, {

}. (Toth, Tr. 5737, *in camera*; RX01706, *in camera*).

1608. {

}. (Seibert, Tr. 5673, *in camera*; Toth, Tr. 5737, *in camera*).

1609. {

}. (RX01719, *in camera*; Seibert, Tr. 5701-03, *in camera*).

1610. {

}.

(Toth, Tr. 5739-40, *in camera*).

1611. {

}. (Toth, Tr. 5737, *in camera*;

Seibert, Tr. 5692-93, *in camera*). {

}. (Seibert, Tr. 5692, *in camera*).

1612. {

}.

(RX01692, *in camera*; Toth, Tr. 5772, *in camera*).

1613. {

}. (Seibert, Tr.

5718-19, *in camera*).

1614. As Toth testified, {

}. (Toth, Tr. 5747-49, 5772, 5739-40, *in*

camera).

1615. {

}. (Seibert, Tr. 5694, *in camera*; Toth, Tr. 5766, *in camera*).

1616. {

}. (RX01696, *in camera*; Toth, Tr. 5764-67, *in camera*; Seibert, Tr. 5694-95, *in camera*).

1617. {

}. (Toth, Tr. 5766-67, *in camera*).

1618. {

}. (Toth, Tr. 5766, *in camera*).

1619. {

}. (Toth, Tr. 5765, *in camera*).

1620. {

}. (Toth, Tr. 5766, *in camera*).

1621. {

}. (Toth, Tr. 5767, *in camera*).

1622. Currently, {

}. (RX01707 at 003, *in camera*).

1623. Based on the foregoing, the Court finds that {

}. The Court further finds that these facts manifest that {

}.

CONCLUSIONS OF LAW

1624. As previously found in RFOFCOL 1436, Courts and the FTC must not rely on market shares and concentration alone to determine whether a violation of Section 7 has occurred. The Merger Guidelines state that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." (Sec. 2.0). The Guidelines further provide that "market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger." (Sec. 1.52). The courts have agreed that concentration data "[are] not conclusive indicators of anticompetitive effect." United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). "[E]vidence of a high market share does not require a district court to conclude that there is an antitrust violation" (United States v. Syufy Enterprises, 903 F.2d 659, 665 n.6 (9th Cir. 1990)), because market share statistics can be "misleading as to actual future competitive effect." United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984). As the D.C. Circuit said, "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

1625. As this Court has previously found, Microporous was not an actual participant or uncommitted entrant in Complaint Counsel's SLI market in North America prior to the merger. RFOFCOL 1437-39. No evidence was presented at the hearing on November 12, 2009 to alter this conclusion.

1626. Evidence was introduced, however, at the November 12 hearing further demonstrating to this Court that competition is robust in Complaint Counsel's alleged SLI North America market and that {

}.

1627. As found previously by this Court, {

}. (RFOF 306). Now,

{

}.

1628. {

}. (RX01719, *in camera*). All of this evidence demonstrates that even after the merger, competition in North America among separator suppliers is vigorous.

1629. It is appropriate for this Court to consider post-acquisition evidence to determine that the acquisition had no anticompetitive effect. *See e.g. United States v. Int'l Harvester Co.*, 564 F.2d 769 (7th Cir. 1977) (post acquisition evidence showed no anticompetitive conduct); *Lektro-Vend. Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (post acquisition evidence showed that defendant's profits and market shares declined); *Vaney v. Coleman Co.*, 385 F. Supp. 1337 (D.N.H. 1974) (post-acquisition evidence showed that defendant lost market share); *United*

States v. Falstaff Brewing Corp., 383 F.Supp. 1020 (D.R.I. 1974) (evidence showed a decline in market share and profits). From the evidence before this Court, the merger has had no anticompetitive effect in this alleged market. The Court's conclusion here is buttressed by the fact that {

}.

1630. The evidence from the November 12, 2009 hearing further demonstrates that the conditions for coordinated interaction do not exist in the alleged SLI market. According to the *Commentary on the Merger Guidelines*, "Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group; (2) to have a means to detect deviations that would undermine the coordinated interaction; and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of deviations . . . . It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade." (*Commentary on the Horizontal Merger Guidelines* at 18-19).

1631. Here, at the hearing on November 12, 2009, Complaint Counsel offered no evidence to the Court to show that these conditions can be met. Rather, ample evidence was presented to this Court, both through testimony and exhibits, demonstrating just the opposite. Indeed, {

}.

1632. As this Court has previously concluded, the presence of powerful customers in markets involving infrequent purchases, long-term contracts and bidding can frequently prevent coordinated interaction. (*See* RFOFCOL 1441; *Baker Hughes Inc.*, 908 F.2d at 986 ("[t]his sophistication . . . was likely to promote competition even in a highly concentrated market."); ABA Section of Antitrust Law, *Mergers and Acquisitions* at 159-60 (3d ed. 2008) ("Courts have recognized that evidence that a small number of buyers purchase most of the product in the market indicates that sellers may not have a great deal of freedom in establishing prices and thus may be less likely to adhere to a collusive agreement. Sophisticated buyers are more likely to detect collusion and offer sellers large orders to induce defections from the agreement or to vertically integrate."); *FTC v. Elders Grain*, 868 F.2d 901, 905 (7th Cir. 1989) (powerful buyers may cause sellers to cheat on any price agreement); *FTC v. R.R. Donnelley & Sons Co.*, Civ. No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361, at *10 (D.C. Cir. 1990) ("[T]he sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction.")).

1633. The evidence presented at the November 12 hearing and before readily demonstrates to this Court that {

}. Power buyers such as { } make coordinated interaction unlikely.

1634. Moreover, it has been demonstrated convincingly in this hearing that {

}.

1635. Complaint Counsel's argument that { } is not a powerful buyer because it does not have "{ }" is incorrect. The courts have not required a minimum market share when making "powerful buyer" determinations. (*See, e.g.*, *Federal Trade Commission v. Elders Grain*, 868 F.2d 901 (7th Cir. 1989); *United States v. Baker Hughes, Inc.*, 908 F.2d 918 (D.C. Cir. 1990); *In the Matter of Owens-Illinois, Inc.*, 115 F.T.C. 170 (1992); *United States v. Archer-Daniels-Midland Co.*, 781 F.Supp. 1400 (S. Dist. Iowa, 1991)). In fact, if Complaint Counsel's statement were true, there could be only one powerful buyer in each market – a suggestion that is contrary to existing case law. Even the Horizontal Merger Guidelines, which recognize the "power buyer" defense, do not require that a powerful buyer have a requisite share of the relevant purchases. Rather, the Guidelines note that "[b]uyer size alone is not the determining characteristic." (Sec. 2.12).

1636. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore's acquisition of Microporous would harm competition because of coordinated interaction.

1637. The evidence adduced at the November 12 hearing further refutes Complaint Counsel's unilateral effects theory. As this Court previously found, where the FTC focus in a merger case is on the alleged dominance of the merged entity, the FTC must show that the "merger may result in a single firm that so dominates a market that it is able to maintain prices above the level that would prevail if the market were competitive" and it must show that such increased prices are accompanied by "lower output." *In the Matter of Chicago Bridge & Iron Co.*, Dkt. No. 9300 at 7 (Jan. 6, 2005). *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997). (RFOFCOL 1448).

1638. The testimony and exhibits introduced at the November 12 hearing demonstrate Daramic's complete lack of ability to unilaterally increase price. In fact, the evidence demonstrates just the opposite: {

}. Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Daramic has no ability to control prices or exclude competition.

1639. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore's acquisition of Microporous would harm competition because of anticompetitive unilateral effects.

1640. The evidence adduced at the November 12 hearing further demonstrates that Daramic does not have monopoly power in Complaint Counsel's SLI market. As found previously, Dr. Simpson's data shows {

}. (RFOF 1287, 1388) By themselves, those figures are too low to find monopoly power. Here, however, the evidence

shows that {

}. Accordingly, {

}.

1641. Finally, additional evidence was introduced at the November 12 hearing supporting this Court's previous finding that there are no substantial barriers to entry into the production of battery separators. (RFOFCOL 1453-57). First, {

}, (RFOF 1209, 1212), {

}.

1642. Second, {

}.

1643. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel has not shown that there are significant barriers to entry into the production of and sale of battery separators.

V. CONCLUSION

For the reasons stated above, and in Respondent's previous submissions, the Court finds that Complaint Counsel have not proven their claims and the acquisition between Polypore and Microporous Products has not, and will not, cause competitive harm in the worldwide PE separator market. Accordingly, the Court dismisses the FTC's claims with prejudice.

Dated: December 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Proposed Findings of Fact and Conclusions of Law for Re-opened Hearing [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
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I hereby certify that on December 2, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand delivery of the foregoing ***Respondent's Proposed Findings of Fact and Conclusions of Law for Re-opened Hearing [PUBLIC]*** upon:

The Honorable D. Michael Chappell
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I hereby certify that on December 2, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Proposed Findings of Fact and Conclusions of Law for Re-opened Hearing [PUBLIC]*** upon:

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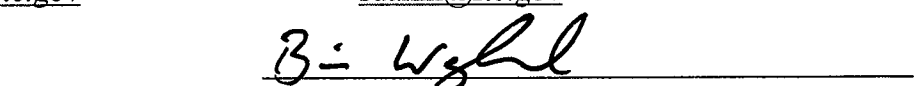

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