premise for a power buyer argument. *Chicago Bridge & Iron Company N.V. v. FTC*, 534 F.3d 410, 439 440 (5th Cir. 2008). The court distinguished *Baker Hughes* and held it inapplicable "where there [are not] ample available alternatives for customers in a market with [high] entry barriers." The court went on to note, "unlike *Baker Hughes*, pricing data for the four markets are mostly confidential from bid to bid, and thus buyers are generally unable to ascertain whether CB&I is imposing supracompetitive prices on any particular bid weakening buyers' ability to demand competitive prices." *Chicago Bridge,* 534 F.3d 439-440.. In the present case, the Court is faced with an identical set of circumstances. Complaint Counsel has shown the high entry barriers and lack of existing supply options in today's separator markets. (CCFOF 817-936; 258-323). The elimination of Microporous has served to further limit the alternatives in SLI and completely eliminate them in each of the three other markets.

The foundation of a proposed defense based on a power buyer argument is the procompetitive impact such buyers can have, even in concentrated markets. *Baker Hughes Inc.*, 908 F.2d at 986; *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991) That is to say, the presence of powerful buyers has the effect of ***lowering the market price*** for the good in question. (*See* 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: an Analysis of Antitrust Principles and their Application 943 (2nd ed. 2000)). The argument, at its most potent, therefore, depends on a showing that the market price is kept in check, benefitting the large and small customers alike. Here, there is no evidence of procompetitive activity since the acquisition of Microporous; in fact, just the opposite has occurred. As discussed above, when an independent Microporous was actively competing in the market for SLI battery

separators, {

}. (Gilchrist, Tr. 423, 466-467, *in camera*; Roe, Tr. 1685-1686, *in camera*; Hall, Tr. 2884, *in camera*; RX00072, *in camera*). While {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). Therefore, the evidence regarding the market price for the only separator market that is not a complete monopoly today shows an increase in prices of more than {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). This is hardly the power-buyer-induced, procompetitive impact envisioned by commentators or the courts.

In *Cardinal Health* the court analyzed the power buyer argument and found the power of the buyers in the relevant market insufficient to rebut the government's prima facie case. *FTC v. Cardinal Health*, 12 F.Supp. 2d 34 (D.D.C. 1998). The merging parties were large US drug wholesalers. The four wholesaler defendants in the case controlled almost 80% of the wholesale pharmaceutical distribution market in the US. *Id.* at 40. The court noted three types of customers that could be at competitive risk as a result of the combination; small retail drug store chains, institutional customers (Hospitals), and independent pharmacies. Each of these consumer profiles possessed some bargaining power in its negotiations with the defendants. Yet, the court was not willing to rely on the buyers' ability to frustrate anticompetitive price increases in approving the merger. On the contrary, the court stated that although it recognized the

evidence of significant power on the part of *some* buyers, it nonetheless found that smaller, less sophisticated customers existed alongside the more powerful buyers, making the relevant market "considerably fragmented." This fragmentation resulted in the bargaining ability of the power buyers being not fully representative of customers within the market, and therefore of insufficient disciplining force for the market as a whole. *Id.* at 61. The court concluded, "[i]n the end, although this Court finds that buyer power does exist in whole [sic] market. . . . and is worthy of consideration, it alone cannot rebut the Government's *prima facie* case." *Id.*

Areeda and Hovenkamp considered the power buyer argument within a fragmented market as well:

> There is a high probability that only large buyers will be able to derive the benefit of their bargaining position. Large-buyer bargaining pressure will not always lead to general reductions to competitive levels, and even then there will be some time lapse before any such reductions occur. Also, the greater the opportunity for concealment, the less likely that small buyers will derive any significant benefit. Thus, a common consequence of large-buyer bargaining pressure is likely to be recurrent and more systematic price discrimination in which large buyers obtain lower prices than smaller buyers, but adverse price effects on small buyers alone is sufficient to invoke [section] 7's prohibitions.

4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: an Analysis of Antitrust Principles and their Application 943 (2nd ed. 2000).

Each of the flooded lead-acid separator markets alleged in this case contain both large and small purchasers.[6] Respondent has gone to considerable lengths to depict Exide as a powerful customer, but has failed to put on any evidence at all regarding the ability of its smaller customers to gain favorable pricing and service. It is noteworthy that

[6] According to Daramic's own documents, there are { } (*See, e.g.*, PX0044 at 006-009).

Exide, {

}. (Respondent's Brief at 26). {

} (Respondent's Brief at 12). Daramic's remaining customers are all even smaller.

Complaint Counsel's opposition to the Microporous acquisition is based not simply on the merger's affect on one customer, but on its affect on the markets for separators themselves. As such, no argument limited to the impact of Polypore's acquisition of Microporous on just one or two customers can alleviate the anticompetitive impact shown, and predicted, by the evidence.

Respondent claims that {

}. This too is unsupported, misleading, and contradicted by the evidence. From well before the contract negotiations even began, {

}. (CCFOF 1249). {

}. (*See e.g.*, CCFOF 1337-1339). {

. (CCFOF 1338). {

}.

In *Archer-Daniels*, the court noted with approval the contracts that dominated the market for HFCS[7], as having "meet or release" clauses which gave the customers the ability to shop their orders around, and play their suppliers "off one another." 781 F. Supp. at 1419. In fact, it was precisely this factor that led the court to support the defense's power buyer claim. *Id.* at 1419, 1422. By having the ability to force its supplier to lower its offering price due to the customers' ability to shift orders, the buyers wielded sufficient power to chasten the HFCS suppliers even when the concentration figures would suggest that the suppliers actually had market power. *Id.* at 1418. {

}. Furthermore, to the extent such intransigence is indicative of power in a supplier/customer relationship, it is important to note that Daramic has demanded {

}. (CCFOF 1316-1319, 1325).[8] {

}. (CCFOF 1324). One wonders how Daramic could continuously insist on {

}.

[7] High Fructose Corn Syrup.

[8] {

. (CCFOF 1281-1282). That offer was not even considered by Daramic. (CCFOF 1303).

Finally, Respondent exerts considerable effort in attempting to causally link {

}. (CCFOF 1292, 1294-1295, 1297-1302). {

}. (RX01692 at 2, *in camera*; *see also* CCFOF 1304-1306).[9]

But the most odd thing about Daramic's argument is that it seems to think that its reduction of output by idling plants {

} helps its case. But why should we be surprised that a monopolist is reducing output? That is what monopolists do to raise prices! This is classic antitrust theory. *See National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, 116 (1984) ("just as any monopolist increases revenues by reducing output"). As the U.S. Supreme Court explained in *Brown Shoe*, 370 U.S. at 346 n72:

> "expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity,

---

[9] {

}. (CCFOF 1330). {

. (RPTB at 11).

> jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry."

Mr. Toth's admission {

} tells us what is happening here. (CCFOF 1292, 1296). Too much capacity allows prices to move down. Reducing output, which is now easier that Daramic controls one of its former competitors, Microporous, allows Daramic to keep prices higher than competitive levels. Thus, Daramic's evidence actually adds to Complaint Counsel's case and is not a defense at all. But as *Brown Shoe* teaches us, this additional evidence in Complaint Counsel's favor goes far beyond what is necessary to undo a merger that led to only two competitors in SLI and only one monopolist in deep-cycle, motive, and UPS lead-acid battery separators. This evidence goes far beyond the threshold of "incipiency" of concentration that *Brown Shoe* established as the government's burden of proof. 370 U.S. at 346.

IV. 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 10, 2009

Respectfully submitted,

J. ROBERT ROBERTSON
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2008
Fax:(202)326-2884

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Reply 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 10, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Reply Post-Trial Brief on the Reopened Record with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on December 10, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing public version of Complaint Counsel's Reply Brief on the Reopened Record with:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
williamrikard@parkerpoe.com
ericwelsh@parkerpoe.com

By: Linda Cunningham

Linda Cunningham
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2638
lcunningham@ftc.gov