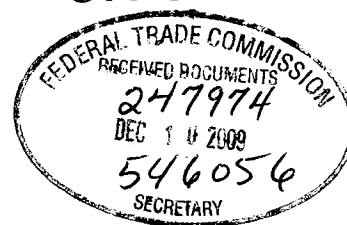


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL



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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL REPLY
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON THE REOPENED RECORD

RICHARD A. FEINSTEIN
Director
PETER J. LEVITAS
Deputy Director
Bureau of Competition

J. ROBERT ROBERTSON
STEVEN DAHM
BENJAMIN GRIS
JOEL CHRISTIE
STEPHEN ANTONIO
CHRISTIAN H. WOOLLEY
PRIYA VISWANATH

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

CATHARINE MOSCATELLI
Assistant Director
MORRIS BLOOM
Deputy Assistant Director
Bureau of Competition
Mergers II

Counsel Supporting the Complaint

DECEMBER 10, 2009

Table of Contents

I.	EXHIBIT AND WITNESS INDICES.....	1
II.	PROCEDURAL BACKGROUND.....	1
III.	{EXIDE'S CONDUCT FOLLOWING THE CLOSE OF THE RECORD ON JUNE 22, 2009}.....	2
A.	{.....}	2
a.	{.....}	4
b.	{.....}	13
B.	{.....}	18
a.	{.....}	19
b.	{.....}	23
C.	{.....}	31
D.	{.....}	54
E.	{.....}	60
a.	{.....}	63
b.	{.....}	73
F.	{.....}	99
IV.	{DARAMIC'S DECISION TO IDLE PE ASSETS AT OWENSBORO}	116
V.	CONCLUSIONS OF LAW.....	124
VI.	CONCLUSION.....	133

I. EXHIBIT AND WITNESS INDICES

II. PROCEDURAL BACKGROUND

1494. On June 22, 2009, after a five-week hearing in this proceeding, the record was closed.

Response to Finding No. 1494:

Complaint Counsel has no specific response.

1495. On September 25, 2009, Respondent, Polypore International, Inc. ("Polypore or Respondent") moved for a second time to re-open the record in this proceeding to permit the introduction of new and additional evidence (the "Second Motion to Re-open"). By its Second Motion to Re-open, Respondent sought leave to introduce new and additional evidence regarding (1) {

and (2) {
}, set forth in four proffers.

Response to Finding No. 1495:

Complaint Counsel has no specific response for Respondent's first sentence in this Finding of Fact. Complaint Counsel does not believe that Exide's conduct is an issue in this case, unlike the actual issues which are Respondent's merger to a monopoly in the Motive, UPS, and Deep-cycle markets, a decrease from three to two firms in the SLI market, Respondent's anticompetitive behavior, attempt to monopolize, and further monopoly power.

1496. After briefing, the Honorable D. Michael Chappell granted Respondent's Second Motion to Re-open.

Response to Finding No. 1496:

Complaint Counsel has no specific response.

1497. On November 12, 2009, in connection with the Second Motion to Re-open, a hearing was held before Administrative Law Judge Chappell. At the November 12 hearing, Respondent presented additional evidence to the Court through witnesses and exhibits regarding the four proffers. Respondent called two witnesses: Mr. Robert Toth ("Toth"), Chief Executive Officer of Respondent and Mr. Harry D. Seibert ("Seibert"), Vice President and Business Director for Respondent's Daramic subsidiary. Respondent also cross-examined Mr. Douglas Gillespie ("Gillespie"), Vice President of Global Procurement for Exide, who was called by Complaint Counsel as their witness. Respondent introduced 46 exhibits which were admitted into evidence, some over Complaint Counsel's objections. (Tr. 5632-5642, 5812, 5841; Pre. Tr. 10-11, 14-20). Complaint Counsel called only Gillespie in rebuttal. The record of the November 12, 2009 hearing was closed by Order dated November 23, 2009.

Response to Finding No. 1497:

Complaint Counsel has no specific response.

1498. Respondent incorporates herein the definitions set forth in its Proposed Findings of Fact and Conclusions of Law, submitted on July 10, 2009.

Response to Finding No. 1498:

Complaint Counsel incorporates its responses, if any, to Respondent's definitions set forth in its reply to Respondent's Proposed Findings of Fact and Conclusions of Law, submitted on July 10, 2009.

III. {

A. { }

1499. On May 28 and May 29, 2009, Gillespie testified in this proceeding. (JX-9).

Response to Finding No. 1499:

Complaint Counsel has no specific response.

1500. At the time of the hearing this past spring,

. (RX01720, *in camera*). {

. (Gillespie, Tr. 5807-08, *in camera*; see also RFOF 524, 530, 531).

Response to Finding No. 1500:

Exide currently pays { } for SLI separators in North

America under the North America Supply Agreement. (Gillespie, Tr. 3018-3020, 3059, *in camera*; see also Gillespie, Tr. 5807-5808, *in camera* ({

}).

1501. {
}. (JX-9, *in camera*).

Response to Finding No. 1501:

Complaint Counsel has no specific response.

1502. {
}. (RX01119, *in camera*;
Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*).

Response to Finding No. 1502:

With respect to this finding of fact, these citations do not support the assertions. The citations to the trial transcript do not remotely relate to {
}. The documents cited do not support Respondent's contentions. (RX01119, *in camera*; RX01120, *in camera*). Furthermore, Respondent's never stated nor does the citation demonstrate what year {
} (RX01119, *in camera*; Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*). Certainly, Exide did not constitute {

} Exide's relative share of Respondent's business. (Seibert, Tr. 5673, *in camera*).

1503. {
}. (Gillespie, Tr. 5855-56, *in camera*).

Response to Finding No. 1503:

To the extent that Respondent is asserting that the industrial battery business is insignificant to Exide, they are incorrect. 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; *see also* Gillespie, Tr. 5863, *in camera* ({
})).

1504. At the time of the hearing this past summer, {

Tr. 5646-48, *in camera*; RX01721, *in camera*).

. (Seibert,

Response to Finding No. 1504:

{

}. In

2007, Exide issued a Request for Proposal (“RFP”) to battery separator manufacturers around the world. (Gillespie Tr. 2962). {

}. (PX0922 (Roe, IH at 228, *in camera*)). {

}. (PX1028 at

058-060, *in camera*; Roe, Tr. 1785-1786, *in camera*; *see also* Gillespie, Tr. 2966). Furthermore,

{

}. (RX01666, *in camera*; RX01667, *in camera*; RX01668, *in camera*; RX01669, *in camera*; RX01683, *in camera*; RX01687, *in camera*; RX01713, *in camera*; RX01714, *in camera*; RX01721, *in camera*).

a. { }

1505. {

002, *in camera*; Seibert, Tr. 5648, *in camera*).

. (RX01721 at

Response to Finding No. 1505:

Complaint Counsel has no specific response.

1506. {

. (Seibert, Tr. 5648-49, 5662-63, *in camera*).

. (Seibert, Tr. 5682, *in camera*). Even this year,

. (Seibert, Tr. 5681-83, *in camera*; RX01724, *in camera*).

. (Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*).

{

Response to Finding No. 1506:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

Although Respondent claims that {

} (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In

fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller, and that firms can maintain their production lines. Most Microporous customers did not have actual supply contracts with Microporous. (Trevathan, Tr. 3773; Gilchrist, Tr. 614). {

} (RX00116 at 004, *in camera*). {

} square meters of separators from Entek on an annual basis without a contract. (Hall, Tr. 2686-2687, 2690).

To the extent that Respondent is asserting that the {

} In fact, when Respondent's counsel

questioned Mr. Gillespie on this subject he stated the

} (Gillespie, Tr. 5849-5850, *in camera*). Moreover, Exide's

{

} (Gillespie, Tr. 5792, 5860, *in camera*). {

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

RX01724-001, *in camera*).

1507. {

. (Toth, Tr. 5648-49, *in camera*). {

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

Response to Finding No. 1507:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5748-5750, *in camera*).

To the extent that Respondent is asserting that {

} (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller and that firms can maintain their production lines. Most

Microporous customers did not have actual supply contracts with Microporous. (Trevathan, Tr. 3773; Gilchrist, Tr. 614). {

} (RX00116 at

004, *in camera*). From 2004-2007, JCI purchased over 100 million square meters of separators from Entek on an annual basis without a contract. (Hall, Tr. 2686-2687, 2690).

1508. {

. (Seibert, Tr. 5649, 5658, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*; RX01669 at 002, *in camera*; RX01713, *in camera*; RX01718, *in camera*; RX01714 at 001 (“

}).”), *in camera*).

Response to Finding No. 1508:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent’s one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent’s negotiation and litigation posture in its unresolved dispute with Exide.

The allegation about the { } is outside the scope of the proffered facts, because it is not evidence that supports any of the four proffers.

{

}. (See e.g., RX01713-003, *in camera* {(

}; see also RX01666 at 002, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*; RX01669 at 002, *in camera*; RX01683 at 001, *in camera*; RX01718 at 002, *in*

camera; RX01714 at 002, *in camera*). Mr. Seibert testified that all of the {
}. (PX5076 (Seibert, Dep. at 33-34), *in camera*).¹
{
} (PX5076 (Seibert, Dep. at 30-31), *in camera*). As
recently as Daramic's October 2, 2009 {

}. (RX01714 at 001-003, *in camera*). Moreover, Mr. Seibert testified at trial that
Daramic has not { }.
(Seibert, Tr. 5725, *in camera*).

1509. { }.
(Seibert, Tr. 5651, *in camera*).
. (Seibert, Tr. 5668, *in camera*).

Response to Finding No. 1509:

Any proposed { } is simply a reflection of the fact that Exide currently
pays { } for SLI separators in North America. (Gillespie, Tr.
3018-3020, 3059, *in camera*). {

}. (Hauswald, Tr. 763 ({
}); Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-
3020, *in camera*; see also PX1026, *in camera*). {

¹ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, *in camera*).

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

Moreover, {

} (RX01714 at 001-003, *in camera*;

Gillespie, Tr. 5814, *in camera*; see also CCFOF 1316-1320).

Respondent's allegations that its {

} (CCFOF 1321; Seibert, Tr. 5668, *in camera*).

1510. {

5668, *in camera*).

. (Seibert, Tr.

.” (Seibert, Tr. 5668, *in camera*).

Response to Finding No. 1510:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

{

} The fact that parties

are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See* CCRF 1512).

Moreover, {

} (See CCRF 1509).

Based on Mr. Seibert's testimony it is clear that Daramic does not have to {

} (CCFOF 1321; Seibert, Tr. 5668-5669, *in camera*); (RX01669 at 002, *in camera*

(Exide proposed {

}); Gillespie, Tr.

5808-5810, *in camera*; see also CCFOF 1321).

To the extent that Respondent alleges that any { offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors.

All three potential SLI suppliers in North America (Daramic, Entek and Microporous) were actively competing for {

} (Gilchrist, Tr. 423, 466-467, *in camera*).

During this same time period, {

} (Roe, Tr.

1685-1686, *in camera*; Hall, Tr. 2884, *in camera*). {

} (RX00072, *in camera*).

{

} (RX00072 at 54-61, *in camera*). {

} (RX00072 at 56, *in camera*). In comparison, the best { }
offered to Exide by Daramic for {

} (RX01668 at 002, *in camera*; Seibert, Tr.
5656, *in camera*). {

} (RX00072 at 56, *in camera*;
RX01668 at 002; Seibert, Tr. 5656, *in camera*).

1511. This Court finds Seibert to be a credible witness. Seibert's testimony is consistent with Respondent's exhibits. This Court credits Seibert's testimony in this matter. In contrast, for the reasons stated herein and previously, this Court does not find Gillespie to be a credible witness. The evidence adduced during the hearing on November 12 and May 28 and 29, 2009 demonstrates that Exide has attempted to manipulate this proceeding by intentionally refraining from certain relevant conduct until after the hearing record had been closed. Gillespie's testimony on May 28 and 29, 2009 was rehearsed with Complaint Counsel, including Exide's "recommendation" of relief. (RFOF 602). Accordingly, this Court does not credit Gillespie's testimony.

Response to Finding No. 1511:

Respondent's ludicrous statements are outside of the scope and are only dealing with alleged facts that arose in the first hearing in this matter. This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

{

} The fact that parties
are in negotiations and thus far have been unable to reach an agreement does not provide any
evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence

establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (See CCRF 1512).

Respondent's allegation that Exide has attempted to manipulate this proceeding is inaccurate. At no time did Exide intentionally refrain from certain relevant conduct until after the hearing record closed. (See CCRF 1543).

The determination of the credibility of Mr. Seibert and Mr. Gillespie is a legal conclusion, not a factual assertion. However, Mr. Seibert is not a credible witness and has been caught by Complaint Counsel on several occasions changing his story. (See CCFOF 1345-1347). One example of Mr. Seibert's lack of credibility relates to {

}. (PX5076 (Seibert, Dep. at 27), *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 {

}. Yet, 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*).

Respondent's bare assertions regarding Mr. Gillespie's credibility are not only unsupported by citations to the voluminous record, but merely speculation and conjecture regarding Exide's intentions. Mr. Gillespie has given three depositions and several days of testimony at trial, yet Respondent can not cite to any lies that would directly affect his

credibility. Instead, Respondent had made an unfounded assertion about a neutral third party's credibility.

b. { }

1512. After Gillespie testified in this hearing on May 28 and 29, 2009,

{ (Seibert, Tr. 5650, *in camera*; RX01665, *in camera*). {

.” (RX01665 at 001, *in camera*).

Response to Finding No. 1512:

Respondent's assertion regarding {

} . Proof that Exide was not able to dictate its alleged demands to Daramic can be found in the fact that during the course of negotiations, Exide {

}.

(RX01665 at 002, *in camera*; RX1250 at 001, *in camera*; RX01668 at 002, *in camera*). Daramic

refused to provide Exide with {

} . (RX01668 at 002, *in camera*; RX01687, *in camera*). Second, Exide sought to have {

} . (RX01665 at 002). Daramic refused to agree to this {

} . (RX01668 at 002, *in camera*).

Third, Exide sought a {

}. (RX01668 at 002, *in camera*).

Moreover, contrary to Respondent's contention that Exide was able to dictate terms to Daramic, Daramic {

}. (RX01714 at 003, *in camera*;

RX01720 at 039, *in camera*). Similarly, Daramic never agreed to Exide's request for

{

}. (RX1714,

in camera). In fact, contrary to Mr. Toth's testimony that Daramic offered Exide {

}. (RX1714, *in camera*). {

}. (RX01665 at 002-003, *in*

camera). {

}. (RX01687, *in camera*).

1513. {

. (Seibert, Tr. 5650-51, 5697, 5669-70, *in camera*; RX01665 at 002-003, *in camera*).

Response to Finding No. 1513:

Respondent's use of {

} is a gross overstatement of what occurred. In fact,

{

}. (See CCRF 1512; *see, e.g.*,

RX01687 at 003, *in camera* ({

});

RX01714 at 003, *in camera* ({

}).

To the extent that Respondent alleges that Daramic conceded to Exide's alleged "demand[s]" with regards to { } for a new contract, such allegations are not true. First, Exide's {

}. (RX01665 at 004, *in camera*). But within one month's time, Exide indicated that it would be willing to {

}. (RX01669 at 002, *in camera*). Second,

Daramic was never willing to {

}. (See CCFOF 1321). Third, Daramic's proposed {

}. (Gillespie, Tr.

5807-5808, *in camera*; *see also* CCFOF 1326-1327). Fourth, all of Daramic's proposed {

}. (CCFOF 1316-1322).

1514. In addition, {

}. (RX01665 at 003, *in camera*).
Tr. 2934, *in camera*), and is further evidence that {
, (Gillespie,
} and therefore, contrary to Complaint Counsel's assertions, there are no
significant barriers to entry for battery separators due to testing, whether for automotive,
motive or some other application or use.

Response to Finding No. 1514:

Respondent's assertion that Mr. Gillespie's {

}. (Gillespie, Tr. 2934, *in camera*). {

}. (RX01665 at 003, *in camera*).

In fact, contrary to Mr. Toth's testimony that Daramic offered Exide {

}. (RX1714, *in camera*).

The assertions made by Respondent's about the time it takes to test different separator end-uses in the third sentence of this finding is outside of the scope of the four proffers of the second hearing; thus, is improperly included in these findings of fact.

1515. {
}. (Seibert, Tr. 5670, *in camera*; RX01697,
in camera).

Response to Finding No. 1515:

{

}. (*See*

CCRF 1509). Moreover, Daramic has not {

}. (See CCRF 1509).

1516. At the hearing,

” (Gillespie, Tr. 5852, *in camera*). {

. (RX01665 at 001, *in camera*).

. This Court finds Gillespie’s testimony not to be credible and further finds that Exide has attempted to manipulate this proceeding to its benefit.

Response to Finding No. 1516:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent’s one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent’s negotiation and litigation posture in its unresolved dispute with Exide. Moreover, this finding calls for a legal conclusion, which is improper.

Respondent’s assertion Exide’s {

} (RX01665 at 001, *in camera*). {

}. (RX01665, *in camera*).

Moreover, Respondent’s allege that Mr. Gillespie’s testimony is in some way inconsistent with the { }; therefore, his testimony should be discounted. However, Mr. Gillespie’s testimony is entirely consistent with the actions Exide took. At trial Mr. Gillespie stated that {

} . (Gillespie, Tr. 5852, *in camera*). None of Mr. Gillespie's testimony that Respondent cited discusses why {
}. Respondent is simply ignoring the record evidence and developing its own story from wild speculation and conjecture as to the true reason for the {
}.

Respondent's last sentence is a legal conclusion and not a factual conclusion. Moreover, the assertion made in Respondent's last sentence is unsupported by any evidence.

B. {
1517. {
}. (RX01713, *in camera*; RX01667, *in camera*; Seibert, Tr. 5665, *in camera*). {
(RX01713 at 002, *in camera*). }.

. (RX01713 at 003; Seibert, Tr. 5657, *in camera*).

Response to Finding No. 1517:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide. Moreover, this finding calls for a legal conclusion, which is improper.

{
}. (See CCRF 1509). Moreover, Daramic has not {

}. (See CCRF 1509).

Importantly, Daramic continued to {

}. (See generally, CCFOF 1069-1078). {

}. (RX01714 at 001-003,

in camera). {

}. (Gillespie, Tr. 5814-5815, 5865-5866, *in*

camera).

a. {

}

1518. {

. (Seibert, Tr. 5651-53, 5655, *in camera*;

RX01617, *in camera*).

Response to Finding No. 1518:

Complaint Counsel has no specific response.

1519. {

. (Seibert, Tr. 5651-52, 5670, *in camera*). {

5652, *in camera*). {
Tr. 5652, *in camera*).

. (Seibert, Tr.
}. (Seibert,

. (Seibert, Tr. 5658, *in camera*).

Response to Finding No. 1519:

The citation in the third sentence does not reference Mr. Gillespie agreeing with Daramic's rationale. (Seibert, Tr. 5652, *in camera*).

Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5651-5652, 5658, 5670 *in camera*). The statements attributed to Mr. Gillespie are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are

inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009). Complaint Counsel and Respondent agreed that any testimony provided by Mr. Seibert or Mr. Toth regarding statements made by Exide officials would be admitted solely for the state of mind of Mr. Seibert or Mr. Toth, and not for the truth of the matter asserted. (Seibert, Tr. 5660-5661, *in camera*; Toth, Tr. 5740, *in camera*).

Per the Court's June 16, 2009 Order on Post Trial Briefs, the parties shall

“not cite to testimony for the truth of the matter asserted if the testimony was admitted over objection for a purpose other than for the truth of the matter asserted. If such testimony is cited, the party must indicate in its brief or proposed findings that the testimony was elicited for a purpose other than for the truth of the matter asserted.”

(Order on Post Trial Briefs, dated June 16, 2009). Respondent's proposed finding violates this provision of the Court's order in two ways. First, it cites to Mr. Seibert's testimony for the truth of statements made by Mr. Gillespie. Second, it fails to indicate that the statement of Mr. Gillespie was elicited solely for the state of mind of Mr. Seibert. In addition in a separate provision, the Court's order states that the parties shall “not cite to evidence that was admitted for a limited purpose for any purpose other than the theory for which it was admitted. (Order on Post Trial Briefs, dated June 16, 2009). Respondent's proposed finding violates this provision of the Court's order by citing Mr. Seibert's testimony for a purpose other than his state of mind, the theory for which it was admitted.

Although Respondent claims that {

} (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In

fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller and firms can maintain their production lines. (*See* CCRF 1506).

1520. {

. (Seibert, Tr. 5652-53, *in camera*). {

. (RX01667 at 002, *in camera*; Seibert, Tr. 5658, *in camera*). {

. (Gillespie, Tr. 5858, *in camera*).

Response to Finding No. 1520:

This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

The statements attributed to Mr. Gillespie are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

Moreover, {

} . In fact, Respondent's counsel at the hearing asked {

}

(Gillespie, Tr. 5858, *in camera*).

1521. {

. (RX01667 at 002; Seibert, Tr. 5670, *in camera*).

Response to Finding No. 1521:

Mr. Seibert's testimony that he understood that {

}

is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing

negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

To the extent that Respondent alleges that Daramic conceded to Exide's alleged { } for a new contract, such allegations are not true. First, Exide's { }.

(RX01665 at 004, *in camera*). But within one month's time, Exide indicated that it would be willing to {

} (RX01669 at 002, *in camera*). Second, Daramic's proposed {

}.

(Gillespie, Tr. 5807-5808, *in camera*; see also CCFOF 1326-1327). Third, all of Daramic's proposed {

} (CCFOF 1316-1322). Fourth,

Respondent's allegations that its {

} (See CCRF 1509).

To the extent that Respondent alleges that any { } offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts showing the SLI market was much more competitive with three competitors than it currently is with only two competitors.

{

} (RX00072 at 054-061, *in camera*). {

} (RX00072 at 056, *in camera*). In comparison, the {
} offered to Exide by Daramic for {

} (RX01668 at 002, *in camera*; Seibert, Tr.
5656, *in camera*). {

} (RX00072 at 56, *in camera*;
RX01668 at 002; Seibert, Tr. 5656, *in camera*).

b. {

1522. {

. (RX01668, *in camera*; RX01669, *in camera*; Seibert, Tr. 5658-59, 5662, *in camera*). {

. (RX01668 at 002, *in camera*; Seibert, Tr. 5659-60, *in camera*;
Gillespie, Tr. 5839, *in camera*).

Response to Finding No. 1522:

Respondent's assertion that there had been { } is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

Respondent fails to acknowledge that Exide's {

} (RX01668 at 002, *in camera*).

Additionally, on the same {

}.
}

(RX01668 at 002, *in camera*). Moreover, {

} (RX01704 at 001, *in*

camera). Furthermore, {

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

However, none of Exide's scenarios mattered because all of Daramic's proposed {

}. (CCFOF 1316-1322; *see e.g.*, RX01713-003, *in*

camera {

}; Toth, Tr. 5750-5751, *in*

camera; Seibert, Tr. 5663-5664 ({

}; *see also*

RX01666 at 002, *in camera*; RX01667 at 002, *in camera*; RX1668 at 002, *in camera*; RX01683 at 001, *in camera*; RX01718 at 002, *in camera*; RX01714 at 002, *in camera*).

1523. At the same time

. (RX01668 at 002
{
}), *in camera*;

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

Response to Finding No. 1523:

Respondent fails to acknowledge that Exide's {

}. (*See* CCRF 1522).

To the extent that Respondent alleges that Daramic conceded to Exide's alleged { } for a new contract, such allegations are not true. (See CCRF 1521).
{ } (See

CCRF 1509). Respondent's allegations that {

} (See CCFOF 1321).

To the extent that Respondent alleges that any { } offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors. (See also CCRF 1521). {

} (Gillespie, Tr. 5814-5815, 5865-5866, *in camera*). Mr. Seibert confirmed at trial that {

} (Seibert, Tr. 5726, *in camera*²; see also CCRF 1527).

1524. Upon learning that {

. (Seibert, Tr. 5660, *in camera*).

. (RX01720 at 035, *in camera*; Seibert, Tr. 5660, *in camera*). {

. (Seibert, Tr. 5660, *in camera*).

Response to Finding No. 1524:

Respondent's assertion that { } is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide.

² 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*).

The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

Respondent fails to acknowledge that Exide's {

}. (RX01668 at 002, *in camera*).

Additionally, on the same {

}.

(RX01668 at 002, *in camera*). Moreover, Mr. Ulsh in a letter to Mr. Toth, {

} (RX01704 at 001, *in*

camera). Furthermore, {

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

Moreover, Polypore's own document anticipated a {

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

Daramic expects to {

}. (CCFOF 1253 – 1255, 1305 - 1306). However, Daramic has never {

}. (CCFOF 1312 - 1315). Because Daramic is {

}. (CCFOF 1321). Finally, Daramic has

repeatedly refused to offer to supply Exide with {

}. (CCFOF 1317).

1525. {

. (Seibert, Tr. 5660-61, *in camera*).

{
 . (Seibert, Tr. 5661, *in camera*).

Response to Finding No. 1525:

Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5660-5661 *in camera*). The statements attributed to Mr. Gillespie are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

Respondent fails to acknowledge that Exide's {
 } . (See CCRF 1524).

Polypore's own document anticipated a {
 } . (See CCRF 1524).

At trial Mr. Seibert was asked if Exide had ever informed him that it intended to {

} . (PX5076 (Seibert, Dep. at 48-49), *in camera*). Mr. Seibert admitted that {

} PX5076 (Seibert, Dep. at 49), *in camera*). What Mr. Seibert
does know is that {

} . (PX5076 (Seibert, Dep. at 74), *in camera*). Mr. Gillespie testified that {

} . (Gillespie, Tr. 5826, 5838, *in camera*). Moreover, Exide has {

} . (Gillespie, Tr. 5868, *in camera*).

1526. In subsequent discussions, {

. (Seibert, Tr. 5662-63, 5666, *in camera*; Toth, Tr. 5749-50, *in camera*; RX01714 at 002, *in camera*; RX01718 at 002, *in camera*). In addition,

. (Seibert, Tr. 5663-65, *in camera*; Toth, Tr. 5750-51, 5760-61, *in camera*; RX01718 at 002, *in camera*; RX01683, *in camera*; RX01714 at 002, *in camera*). {
}

Response to Finding No. 1526:

Respondent's assertion that it {

} is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

{

} The fact that parties are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See* CCRF 1512).

} (CCFOF 1317, 1322; *see generally*, CCFOF 1069-1078). {

} (*See* CCRF 1509).

1527. {

. (Seibert, Tr. 5732-34, *in camera*).

Response to Finding No. 1527:

Respondent's assertion that {

} is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

{

} The fact that parties are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See CCRF 1512*).

Mr. Seibert testified that all of the {

}. (PX5076 (Seibert, Dep. at 33-34), *in camera*).³ {

} (PX5076 (Seibert, Dep. at 30-31), *in camera*). As recently as Daramic's October 2, 2009 {

}: (RX01714 at

³ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, *in camera*).

001-003, *in camera*). Mr. Seibert testified at trial that Daramic has not {

}. (Seibert, Tr. 5725, *in camera*).

{

}. (See

CCRF 1509). Furthermore, Respondent's allegations that {

}. (See CCRF 1524;

CCFOF 1321).

To the extent that Respondent alleges that any { offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors. (See also CCRF 1521).

Lastly, Daramic has never {

}. (CCFOF 1312 - 1315). {

}. (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 {

}. (Seibert, Tr. 5726, *in camera*).⁴ Mr. Seibert was unable to even {

}. (Seibert, Tr. 5725,

⁴ 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*).

in camera). Mr. Seibert could not testify about {
} (Seibert, Tr. 5725, *in camera*).

Moreover, Mr. Seibert testified that {
}

(PX5076 (Seibert, Dep. at 101), *in camera*). Mr. Gillespie testified that {

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

1528. {

. (Seibert, Tr. 5645, *in camera*; Gillespie, Tr. 5851, *in camera*; RX01665, *in camera*;
RX01669 at 002, *in camera*; RX01687, *in camera*).

Response to Finding No. 1528:

The fact that the parties are in negotiations and thus far have been unable to reach an
agreement does not provide any evidence that Exide yields power in negotiations with Daramic.

{ } In October 2009, after

Daramic {

} (Gillespie, Tr. 5815, *in*

camera). According to Mr. Gillespie, Daramic's immediate response was that it {

} (Gillespie,

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

C. { }

1529. After the record was closed on June 22, 2009, {

(RX01676, *in camera*; Seibert, Tr. 5674, *in camera*; Gillespie, Tr. 5845, *in camera*).

(Seibert, Tr. 5673-74, 5676-77, *in camera*; Gillespie, Tr. 5845-46, *in camera*; RX01676, *in camera*). {

. (RX01676, *in camera*; JX-9, *in camera*; Gillespie, Tr. 5839, 5843, *in camera*). Specifically, {

} (RX01676, *in camera*).

Response to Finding No. 1529:

The contention that Exide's { } began "after the record was closed" is wrong. Exide first { } prior to the close of the record. (RX01676 at 001, *in camera*). Furthermore, Exide had previously informed Daramic of its intention to {

}. (CCFOF 1261-1262, 1267-1268). {

}. (CCFOF 1262, 1265-1266). Additionally, on June 2, 2009 Mr. Seibert

acknowledged that Daramic had received { } (CCFOF 1264; PX5076 (Seibert, Dep. at 10-11, *in camera*).

Moreover, to the extent that Respondent alleges that Exide will in fact have { }, such allegation is contradicted by the facts in the record. In fact, Daramic {

} (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

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

Furthermore, Respondent's allegations that Exide {

} (CCFOF 1267-1268). Mr. Gillespie testified that {

} (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

{

} (CCFOF 1276).

1530. {

. (RX01667 at 001, *in camera*; RX01670 at 001, *in camera*; RX01671 at 001, *in camera*; Seibert, Tr. 5675-76, *in camera*; Gillespie, Tr. 5844, *in camera*).

Response to Finding No. 1530:

The contention that Daramic was not aware of the {

}. During the first half of 2009, Exide informed Daramic of its intention to {

}.

(CCFOF 1261-1262, 1267-1268). Daramic knew precisely {

}. (RX01720 at 019, *in camera*). Moreover, on June 2,

2009 Mr. Seibert acknowledged that Daramic had received {

}. (CCFOF 1264; PX5076 (Seibert, Dep. at 10-11, *in camera*).

1531. {

. (Seibert, Tr. 5673-74, 5679, *in camera*). {

. (Gillespie, Tr. 5842-43, *in camera*).

. (Gillespie, Tr. 5843, *in camera*; Toth, Tr. 5752-53, *in camera*; RX01686, *in camera*).

Response to Finding No. 1531:

To the extent that Respondent alleges that Exide will in fact have {

}, such allegation is contradicted by the facts in the record. In fact,

Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

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

To the extent that Respondent contends that Exide does not {

} (Gillespie, Tr. 5859, *in camera*).

Furthermore, Respondent's allegations that Exide {

}. (CCFOF

1267-1268). Mr. Gillespie testified that {

}. (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

Moreover, the statements attributed to Mr. Ulsh are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

1532. Based on past practice,

. (Seibert, Tr. 5671, *in camera*; JX-9, *in camera*). In contrast, {

. (RX01676, *in camera*; JX-9, *in camera*; Seibert, Tr. 5673-74, *in camera*; Gillespie, Tr. 5839, *in camera*).

Response to Finding No. 1532:

{

}. (Gillespie, Tr. 5806, 5833, *in camera*).

To the extent that Respondent alleges that Exide will in fact have {
}, such allegation is contradicted by the facts in the
record. Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

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

Respondent's allegations that Exide {

}. (CCFOF

1267-1268). Mr. Gillespie testified that {

}. (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

1533. {

. (Seibert, Tr. 5671, *in*

camera). {

. (Seibert, Tr. 5672, *in*

camera; RX01723, *in camera*).

. (Seibert, Tr.

5673, *in camera*; RX01708 (

), *in camera*.)

Response to Finding No. 1533:

{

}. (Seibert, Tr. 5672, *in camera*). {

}.

(CCFOF 1260). {

}. (CCFOF 1276).

1534. {

camera). {

. (Seibert, Tr. 5678-79, 5709-10, *in*

in camera; Seibert, Tr. 5672, *in camera*).

. (RX01698,

. (RX01699, *in camera*; Seibert, Tr. 5672-73, *in camera*).

Response to Finding No. 1534:

To the extent that Respondent alleges that Exide will in fact have {

}, such allegation is contradicted by the facts in the

record. Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

}.

(CCFOF 1288).

{

}. (CCFOF 1276).

1535. {

, (Seibert, Tr. 5674, *in*