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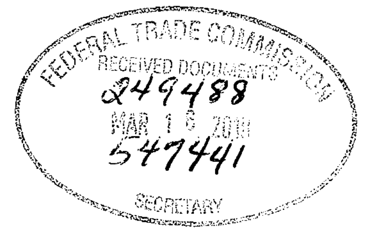


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: John Liebewitz, chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

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

COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S MOTION FOR EXTENSION OF TIME TO
FILE APPEAL BRIEF AND REQUEST FOR EXPEDITED TREATMENT

Respondent's motion should be denied. Judge Chappell found existing and ongoing consumer harm as a result of the consummated acquisition of Microporous by Polypore.[1] Initial Decision at 266 ("post-acquisition price increases add to the strong presumption that *a merger to monopoly* in three markets, and from three to two competitors in the SLI market, will lead to anticompetitive effects" (emphasis added)). Complaint Counsel is not appealing the ALJ's decision dismissing the monopolization count (Count 3 of the Complaint) and Respondent is not appealing the ALJ's decision that its non-compete agreement with Hollingsworth & Vose is illegal (Count 2 of the Complaint), so the case on appeal before the Commission boils down to a simple merger

[1] Respondent's assertion that "[n]o party with an interest in this proceeding will be prejudiced in any way by granting the requested relief" is ironic and blatantly contradicts Judge Chappell's opinion in this matter. *See* Respondent's Motion for Extension of Time to File Appeal Brief at ¶ 13.

challenge.[2] Respondent has not changed counsel for this appeal so its counsel is intimately familiar with the record in this matter. Due to delays in producing a public version of the initial opinion Respondent has already received more than two additional weeks of time to prepare its appeal brief. In view of the interim harm to consumers and the simplicity of the case on appeal, Respondent is entirely capable of filing its appeal in the time provided by law, particularly in view of the extra time it has already enjoyed.

Respondent has collected more than two years of monopoly profits at the expense of its customers. Any further delay adds insult to injury. Accordingly, Complaint Counsel requests that the Commission expedite the hearing and appeal in this matter to the fullest extent possible under the law.

BACKGROUND

Judge Chappell found that Polypore's acquisition of Microporous on February 29, 2008 violated Section 7 of the Clayton Act. Initial Opinion at 8. Prior to the acquisition, Polypore, through its Daramic business unit competed with Microporous in the manufacture and sale of separators for lead acid batteries. Battery separators are highly engineered and created through sophisticated manufacturing processes. Battery separators are microporous sheets of polyethylene, rubber, or a combination of polyethylene and rubber that separate the lead plates in a battery. These separators prevent the positive and negative plates from touching and shorting out while allowing ions to flow between them.

The ALJ held that the acquisition reduced competition in four North American markets: deep-cycle (often referred to as golf cart batteries), motive (often referred to as

[2] Respondent's challenge of "several specific findings" in the ALJ's analysis dismissing the Count 3 monopolization claim adds no particular complexity to this appeal.

forklift batteries), SLI (also called automotive batteries), and uninterruptible power supply ("UPS" or sometimes "reserve" power batteries). Each of these markets is highly concentrated. Indeed, in the deep-cycle, motive, and UPS markets Polypore and Microporous were the only competitors. In the SLI market, there is only one other competitor in North America, a company called Entek.

Judge Chappell also found that Polypore's non-compete agreement with Hollingsworth & Vose, whereby each agreed not to enter the other's markets, was "an obvious restraint of trade likely to harm consumers" with "no procompetitive justification" that "violates Section 5 of the FTC Act." Initial Decision at 322. Respondent does not appeal the judge's opinion on this count.

Finally, with respect to Count 3, Judge Chappell held that while Respondent possesses monopoly power or a dangerous probability of achieving monopoly power in the deep-cycle, motive and UPS battery separator markets, that the challenged conduct was not unlawful exclusionary conduct. Complaint Counsel does not appeal the dismissal of this count, though Respondent appeals the portions of the opinion discussing whether Respondent has monopoly power or a dangerous probability of achieving or maintaining monopoly power in the North American deep-cycle, motive and UPS battery separator markets.

FACTS

Judge Chappell found *actual* post-acquisition anticompetitive effects from the merger. *See e.g.* Initial Decision at 147 ("Daramic's acquisition of Microporous led to price increases"), 262 ("Daramic has exerted unilateral market power"), 266. As a result of the acquisition of Microporous by Polypore consumers paid, and continue paying,

anticompetitive prices for battery separators each and every day. Judge Chappell specifically found that "Daramic's acquisition of Microporous led to price increases" and "post-acquisition price increases add to the strong presumption that *a merger to monopoly* in three markets, and from three to two competitors in the SLI market, will lead to anticompetitive effects." *Id.* at 266 (emphasis added). Innovation in battery separators has also been eliminated as a result of the merger. *Id.* at 264. Respondent's own documents acknowledge the problem of ongoing harm, pointing out as early as June 2008 that "[i]t is sure getting difficult to convince our customers that we are not a monopoly." PX0803. Indeed, Polypore far exceeded its premerger predictions about the amount of price increases it would achieve as a result of the merger and the ALJ found that despite significant price increases Respondent has not lost a single customer in the deep-cycle and motive separator markets since the acquisition. Initial Decision at 263 (no customers lost in deep-cycle), 264 (no customers lost in motive).

Respondent already significantly delayed the Part 3 proceedings before the ALJ, taking advantage of delay tactics available to respondents under the old Part 3 rules. The original trial in this matter was set for December 9, 2008. Respondent sought twice to delay the proceeding, and, over Complaint Counsel's objection, succeeded in pushing the trial back first to April, then to May 2009. On September 25, 2009, more than three months after the close of trial, Respondent proffered additional evidence for a second hearing in this matter.[3] Respondent then delayed the second hearing from November 4 to November 12, 2009. With its multiple delays, and despite failing to prove any of its

[3] This delay was possible under the old Part 3 rules because under that standard the ALJ may reopen the record at any time before the initial decision to take additional evidence in the matter. October 15, 2009, Order Granting Respondent's Second Motion to Reopen the Hearing Record and Setting Hearing Schedule at 4.

proffers in the second hearing, Respondent has succeeded in delaying an ALJ ruling in this matter for almost a year.

Respondent has already received more than two weeks of extra time to prepare its papers. The ALJ issued his initial decision on February 22, 2010. Courtesy copies of the decision were provided to the parties that same day. Because of delays required to review and request additional redactions, the public decision was not served on Polypore until March 10, 2010 – two weeks and two days after Polypore's counsel had already received a copy of the entire unredacted opinion. Indeed Polypore filed its notice of appeal on the same day that it received service of the opinion, belying its assertion that it needs additional time to review it. Accordingly, Polypore has 46 days to prepare its brief in this matter already, rather than the statutory 30 days.

Polypore does not need the additional time to file its brief. Neither party is appealing the judge's rulings on the monopolization counts. Respondent only takes issue with particular findings in the ALJ's dismissal of the monopolization claim in Count 3 of the Complaint. This adds no complexity to the appeal at all. Accordingly, two thirds of the issues drop away. Indeed there are no complex monopolization issues to deal with at all. Respondent's appeal is no more than a garden-variety merger challenge. The merger challenge is not complex. It is a merger to monopoly in three markets and a three to two in the fourth. The ALJ's ruling rests on ordinary antitrust case law.

The record on appeal is not particularly large nor complex. There are fewer than 6000 pages of trial transcript, fewer than 1300 findings, and only 30 live witnesses.[4] Much of this evidence relates to the two unchallenged monopolization counts. Although

[4] Respondent fails to point out that the three witnesses who testified in the second evidentiary hearing were not new at all, but had testified in the first hearing already.

battery separators are highly engineered and require sophisticated manufacturing techniques, the subject is not extremely high-tech or difficult to understand – it is separators for lead-acid batteries. The issues are confined to a straightforward application of the antitrust laws to a merger. In the interest of the customers and consumers involved, it is time to move this case to a conclusion.

LEGAL ANALYSIS

The Commission has consistently held that the time periods provided in the Commission's Rules of Practice afford parties sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. *In the Matter of Chicago Bridge and Iron company N.V.*, Docket No. 9300, Order Granting Extensions of Time to File Appeal and Answering Briefs (July 17, 2003) at 1 ("CB&I").[5] The Commission further recognizes that "in any litigation involving a consummated merger, unnecessary delay at any step along the way to final resolution may increase the risk of ongoing injury to consumers and competition." *Id.*

Indeed, in revising the Part 3 rules to address public concern about Part 3 delays, the Commission noted that "[t]he Commission understands the public concern about Part 3 delay is not limited to the proceedings before the ALJ, but extends to the delay occasionally incurred by the Commission resolution of appeals of initial decisions. The Commission intends to expedite all phases of Part 3 process." Federal Register, Vol. 73, No. 195, October 7, 2008 – Proposed Rules at 58834. Specifically, "[t]o accommodate those expedited deadlines, the Commission is reducing the time in which parties may file

[5] Like *In the Matter of Rambus, Inc.*, Docket No. 9302, Order Granting Extensions of Time to File Appellate Briefs and Increases in Word Count Limits (Mar. 18, 2004) ("Rambus"), discussed in more detail below, complaint counsel joined in respondent's request for additional time in *CB&I*, and there was no finding of existing, interim harm.

briefs from the initial decision." Federal Register, Vol. 74, No. 8, January 13, 2009 – Rules and Regulations at 1819. Accordingly, there are strong policy reasons not to permit unwarranted delay in the briefing of straightforward merger challenges such as this.

In its motion, Respondent relies exclusively on the Commission's decision in *Rambus*. This reliance is misplaced. First, in Polypore the ALJ found existing consumer harm. There was no such finding in *Rambus*. Second, Complaint Counsel also sought additional time in *Rambus*, and indeed, it was a *joint* motion on which the Commission ruled, so prejudice was not at issue. Third, the *Rambus* trial transcript was twice as long as Polypore (over 11,800 pages vs. fewer than 6,000). Fourth, there were 59 testifying witness in *Rambus* (44 live, 15 via designated trans.) versus 35 here (30 live and 5 through designated transcripts). Fifth, there were more than 1650 findings in *Rambus* compared to fewer than 1300 in this case. Sixth, the complexity of the facts and their interpretation were significantly more challenging in *Rambus* given the high tech subject matter. Moreover, in *Rambus* the respondent had a total of 53 days from the filing of the initial decision on February 23, 2004 until the agreed upon date of the appeal brief on April 16, 2004, whereas in Polypore, Respondent seeks an additional 21 days to file its brief, or a total of 67 days from the filing of the initial decision on February 22nd until their requested date of the appeal brief on April 30th. This request is excessive in view of the fact that Respondent already has 46 days to prepare its brief.

The most important fact that compels the denial of Respondent's motion for an extension of time is the existing and ongoing harm to consumers as a result of the

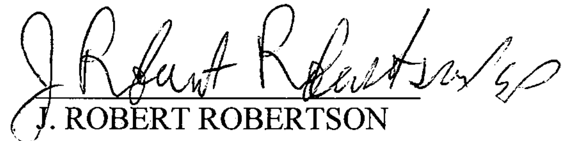
challenged acquisition. Any delay at all simply provides Polypore with monopoly profits at consumers' expense, is unwarranted, and should be denied.

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 was illegal and resulted in actual and ongoing harm to consumers. The public deserves a complete and quick remedy to restore competition and prevent further harm to competition. Accordingly, Complaint Counsel requests that Respondent's Motion for Extension of Time to File Appeal Brief be denied, and that the appeal in this matter be expedited.

Dated: March 16, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2010, I filed via hand delivery an original, twelve copies and an electronic copy of the foregoing Complaint Counsel's Response to Respondent's Motion for Extension of Time to File Appeal Brief and Request for Expedited Treatment with:

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I hereby certify that on March 16, 2010, I filed via hand two copies and one copy via electronic mail delivery the foregoing Complaint Counsel's Response to Respondent's Motion for Extension of Time to File Appeal Brief and Request for Expedited Treatment with:

The Honorable D. Michael Chappell
Administrative Law Judge
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I hereby certify that on March 16, 2010, I filed via electronic and first class mail delivery a copy of the foregoing Complaint Counsel's Response to Respondent's Motion for Extension of Time to File Appeal Brief and Request for Expedited Treatment with:

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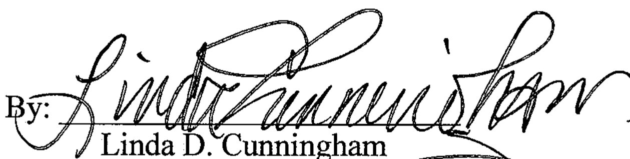
By: 

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