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FEDERAL TRADE COMMISSION

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
POLYPORE INTERNATIONAL, INC.,) Docket No. 9327
a corporation.)
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ORAL ARGUMENT
BEFORE THE COMMISSIONERS OF THE FEDERAL TRADE COMMISSION
JULY 28, 2010, 2:00 P.M.

BEFORE:
JON LEIBOWITZ, Chairman
WILLIAM E. KOVACIC, Commissioner
J. THOMAS ROSCH, Commissioner
EDITH RAMIREZ, Commissioner
JULIE BRILL, Commissioner

Reported by: Susanne Bergling, RMR-CRR-CLR

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 J. ROBERT ROBERTSON, ESQ.

5 MORRIS BLOOM, ESQ.

6 STEVEN A. DAHM, ESQ.

7 BENJAMIN GRIS, ESQ.

8 CHRISTIAN H. WOOLLEY, ESQ.

9 STEPHEN ANTONIO, ESQ.

10 JOEL CHRISTIE, ESQ.

11 Federal Trade Commission

12 Bureau of Competition

13 600 Pennsylvania Avenue, N.W.

14 Washington, D.C. 20580-0000

15 (202) 326-2008

16 rrobertson@ftc.gov

17

18

19

20

21

22

23

24

25

1 APPEARANCES: (continued)

2

3 ON BEHALF OF THE RESPONDENTS:

4 ERIC D. WELSH, ESQ.

5 WILLIAM L. RIKARD, JR., ESQ.

6 Parker Poe Adams & Bernstein L.L.P.

7 Three Wachovia Center

8 401 South Tryon Street

9 Suite 3000

10 Charlotte, North Carolina 28202

11 (704) 372-9000

12 ericwelsch@parkerpoe.com

13 and

14 JOHN F. GRAYBEAL, ESQ.

15 Parker Poe Adams & Bernstein L.L.P.

16 150 Fayetteville Street

17 Raleigh, North Carolina 27602

18 (919) 835-4599

19 johngraybeal@parkerpoe.com

20

21

22

23

24

25

P R O C E E D I N G S

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CHAIRMAN LEIBOWITZ: Good afternoon. The Commission is meeting today in open session to hear oral argument in In the Matter of Polypore International International, Docket Number 9327, on the appeal of the Respondent of the initial decision issued by the Administrative Law Judge.

The Respondent is recommended by Eric D. Welsh, and counsel supporting the complaint are represented by Robbie Robertson.

During this proceeding, each side will have 45 minutes to present its arguments, but I am sure will be outstanding with advocates that we have here on both sides of the table, their arguments will be far more concise.

The Respondent is the appellant, and counsel for the Respondent, therefore, will make the first presentation, and will be permitted to reserve up to five minutes for rebuttal.

Counsel supporting the complaint will then make his presentation. Counsel for the Respondent will conclude the argument with his rebuttal presentation if he chooses rebuttal or rebuttal time.

Mr. Welsh, do you wish to reserve any time for

1 rebuttal?

2 MR. WELSH: I do. Five minutes.

3 CHAIRMAN LEIBOWITZ: Okay.

4 You may begin.

5 MR. WELSH: Thank you.

6 Good afternoon. My name is Eric Welsh, and I am
7 with the law firm Parker Poe Adams & Bernstein in
8 Charlotte, North Carolina, here today representing the
9 Respondent, Polypore International.

10 We are here today on Respondent's appeal of the
11 initial decision issued by the Administrative Law Judge
12 on February 22nd of this year, in which he found that
13 Polypore's acquisition of Microporous Products LP
14 violated Section 7 of the Clayton Act and Section 5 of
15 the FTC Act.

16 Now, as you know from our briefs, we have many
17 problems with the initial decision. We think that there
18 are many serious errors. I am going to touch on some of
19 these during my argument today.

20 In particular, I am going to talk about that
21 Complaint Counsel has failed to meet its burden on
22 proofing the geographic and product markets; that
23 complaint counsel has abandoned any semblance of trying
24 to present quantitative evidence to the Commission in
25 support of their arguments. They have not shown any

1 anticompetitive effects from this merger.

2 COMMISSIONER ROSCH: Well, let me ask you a few
3 questions about that, if I may, Mr. Welsh. First of
4 all, this is a consummated transaction, is it not?

5 MR. WELSH: It is.

6 COMMISSIONER ROSCH: And as I understand it, it
7 was closed back in February -- at the end of February of
8 2009. Is that correct?

9 MR. WELSH: That is correct.

10 COMMISSIONER ROSCH: Now, what is your view as
11 to what is the most probative kind of evidence in a
12 consummated transaction with respect to competitive
13 effects? Is it on the one hand, the, if you will,
14 empirical evidence with respect to what actually
15 happened since the closing of the transaction, or is it
16 on the other hand economic evidence with respect to what
17 is likely to have happened? What's the most probative
18 evidence of anticompetitive effects?

19 MR. WELSH: Well, first of all, I would say that
20 I think it has to be quantitative evidence that should
21 be in front of the Commission on this point, not looking
22 at the qualitative evidence, the customer testimony,
23 looking at some piecemeal -- looking at documents from
24 selected presentations from either the Respondent or
25 from third parties. That's the first thing.

1 I think it has to be --

2 COMMISSIONER ROSCH: The parties? Are you
3 saying that the parties' statements are not probative?

4 MR. WELSH: I think that they are something that
5 has to be looked at, but you have to look at the
6 totality, and I think that when we are looking here at
7 the consummated merger, I think that the economic
8 evidence of what has happened, the things that are
9 quantitative here that we should be looking at. When
10 Complaint Counsel wants to talk about there being
11 post-acquisition price increases, then I think they
12 should be put to the task of coming in and proving that
13 post-acquisition there were price increases.

14 Instead, they come in, and when you look at the
15 evidence, what it actually is talking about is prices
16 that are sought post-acquisition, not prices that were
17 attained. That's a problem. I think that's a problem
18 for Complaint Counsel's case and where they failed to
19 meet their burden.

20 When you look at --

21 COMMISSIONER ROSCH: Just a second, if I may,
22 Mr. Welsh.

23 First of all, let me ask you, in terms of
24 weighing the post-acquisition price increases, what
25 actually happened, can we look to the parties' intent

1 with respect to those price increases as they existed
2 prior to the transaction? leading up to the transaction?
3 presentations to the board?

4 Can we take into account, for example, evidence
5 that some people at Polypore, at least, intended that
6 there be price increases post-acquisition and that it
7 was one of the reasons for the acquisition?

8 MR. WELSH: I think if we're going to look at
9 what pre-acquisition documentation there might have been
10 about the reason for the acquisition itself -- which is
11 what I understand your question to be -- and I think we
12 should look at what the evidence really shows there, and
13 what the evidence shows that the decision as to whether
14 or not to acquire Microporous was made by the board of
15 Polypore.

16 When you look at the testimony of those
17 individuals, the directors -- and there were two that
18 testified in this hearing, Mr. Toth and Mr. Graff --
19 their testimony is unrefuted, that the reason for the
20 acquisition was that this was a product extension. They
21 were trying to obtain a product that they did not have,
22 they did not compete in the market. It was the Flex-Sil
23 product, the rubber product that Microporous made. That
24 was the intent.

25 So, yes, let's look at the documentation. Let's

1 look at the testimony that came into this hearing about
2 what was the intent of the acquisition, and those are
3 the people that made the decision. A salesman didn't
4 make the decision to buy Microporous. Whatever he says,
5 frankly, is irrelevant.

6 COMMISSIONER ROSCH: Should we just simply
7 blink, then, at the testimony with respect to what was
8 told the board before the acquisition? That is to say,
9 that one of the reasons -- indeed, the main reason for
10 the acquisition -- was in order to be able to increase
11 prices?

12 MR. WELSH: I disagree with that. I don't think
13 that was the reason. I don't think it was a reason. I
14 think that the --

15 COMMISSIONER ROSCH: You're saying that that is
16 not a reason that was given by at least some of the
17 people at Polypore to the board?

18 MR. WELSH: I don't think that that's what the
19 evidence shows. I think that there was some
20 documentation that was prepared. I think if you look
21 fairly at the testimony that occurred around that
22 documentation, you'll see that it was done by an
23 individual who has no understanding of the economic
24 sides of things and had his thoughts down on paper.

25 But we come back to the issue, who made the

1 decisions here? Well, the decisions were made by the
2 directors of the company. What was their testimony,
3 which is unrefuted --

4 COMMISSIONER ROSCH: On the basis of what they
5 were told.

6 MR. WELSH: -- unrefuted --

7 COMMISSIONER ROSCH: On the basis of what they
8 were told. Is that not correct, sir?

9 MR. WELSH: They were making a decision based on
10 a whole panoply of things, including that. But the
11 point is, when they were asked, both on direct and they
12 had the opportunity to cross examine the witnesses on
13 this, the testimony is unrefuted that the reason why
14 they made this acquisition was to obtain the rubber
15 products of Microporous. It was not to take out some
16 competition.

17 COMMISSIONER ROSCH: Now, let me ask you another
18 question.

19 MR. WELSH: Yes, sir.

20 COMMISSIONER ROSCH: What's the difference
21 between announcing a price increase and actually
22 executing it? If you don't intend to have your pricing
23 constrained by a competitor, why would you announce a
24 price increase in the first place?

25 MR. WELSH: These are -- what the evidence shows

1 is that the pricing issues with customers in this
2 business is one that is a very protracted process. The
3 companies, the separator company, my client, would enter
4 into discussions and into negotiations with a customer.
5 They would announce a price increase, and from an
6 historical relationship with these customers, it is
7 evident that what they're asking for, that the customers
8 are pushing back. These are very strong, sophisticated,
9 they are powerful customers that --

10 COMMISSIONER ROSCH: Is that true of all of
11 them?

12 MR. WELSH: I think that is true of, if not all,
13 certainly the vast majority. What we are looking at
14 here, when you look at the customers -- and I'm not --

15 COMMISSIONER ROSCH: Well, you identified three
16 of them that you said were power buyers. How about the
17 rest of them?

18 MR. WELSH: I think on the other ones, I think
19 that they all have to some extent power in this
20 relationship. There's no question about that. There
21 are other options out there if they decide to choose to
22 do it.

23 We know that from examples in the record. We
24 know that some of the customers out there have gone to
25 competition. We know that they have gone and engaged in

1 alliances or joint ventures or other relationships that
2 are tantamount to sponsorships of expansion to entry.

3 COMMISSIONER ROSCH: Didn't some of them testify
4 that they didn't have an option?

5 MR. WELSH: I'm sorry? I didn't hear that.

6 COMMISSIONER ROSCH: Didn't some of these
7 customers testify that they did not have an option?
8 Should we blink at that?

9 MR. WELSH: I don't recall them saying that they
10 didn't have an option. I think that what the evidence
11 shows is that there are competitors all over, and even
12 some of these customers that might have come in and
13 said, well, gosh, where am I going to go, again, when
14 you look at the evidence of what was introduced, I think
15 that their testimony doesn't hold up.

16 These are customers that, even as they were on
17 the stand, in the months before had been talking with
18 the competition, had been talking with competition
19 outside of North America, about giving them a separator
20 product that could be brought into North America.

21 So, again, I think that when you look at the
22 testimony of the customers -- and that's why we started
23 off this discussion by talking about what sort of
24 evidence should be looked at. I truly do think -- and I
25 think it has to be quantitative evidence here, because

1 the qualitative evidence -- you know, this is like the
2 Oracle case, and the qualitative evidence that they rely
3 on, when you look at the witnesses that were on the
4 stand from these customers, look at the cross
5 examinations, look at how their testimony holds up.

6 You know, we see these witnesses coming in with
7 these agendas, and they try to hide it and they try to
8 couch it that it doesn't exist. That's just not the
9 case. Their testimony doesn't hold up, and that's why,
10 you know, we're left with a qualitative nature of the
11 case by Complaint Counsel and nothing more.

12 COMMISSIONER ROSCH: Well, now, wait a second.
13 Certainly you're correct with respect to the customers;
14 however, should we simply blink at the evidence as it
15 relates to what the parties thought? That is to say,
16 what the board was told before it made its decision to
17 acquire Microporous?

18 MR. WELSH: But, again, I think we've already
19 talked about this point, but I think what you have to
20 look at in terms of what the -- you look at what the
21 board did, you look at their decision, you look at the
22 testimony of the decision-makers here, and that
23 testimony is unrefuted. If you want to look at a
24 document that went to the board, well, let's look at the
25 totality of the document, not just a piece, because the

1 totality of the document talks about taking Microporous
2 because of its rubber products.

3 There was an announcement -- you know,
4 pre-acquisition, okay, there's a document that was
5 actually in the file from Daramic, but it doesn't find
6 it into the 347 pages of the ALJ's decision, but that
7 document talks about -- it's an announcement about the
8 reason for the acquisition, pre-acquisition. It talks
9 about we're getting a product line that we didn't have
10 before. We're excited about it. We're getting the
11 Flex-Sil product, the product that the customers have
12 asked us for and we couldn't deliver. We're looking to
13 expand this. That's what the record shows.

14 COMMISSIONER ROSCH: Let me ask you two other
15 questions, and then I'll quit.

16 MR. WELSH: Yes, sir.

17 COMMISSIONER ROSCH: First of all, do you think
18 that proof of a relevant market in this case is a gating
19 item in the sense that we should not go on to consider
20 competitive effects until a relevant market is proved,
21 or can we consider competitive effects first and then
22 determine, from our determination with respect to
23 competitive effects, what the relevant market is?

24 MR. WELSH: I think that under the case law, I
25 think under the Merger Guidelines as they exist now, I

1 think that it is required to look at the markets now
2 before you get to looking at competitive effects.

3 COMMISSIONER ROSCH: Now, what is your
4 authority, your best authority for that proposition as
5 it relates to a consummated merger?

6 MR. WELSH: I don't have a case in front of me
7 right now. There are cases in our brief on the point.

8 COMMISSIONER ROSCH: Well, there aren't. That's
9 why I am asking you about it.

10 MR. WELSH: Well, I think that maybe the cases
11 don't address it in a consummated merger context, but
12 certainly in a merger context, the cases -- there are
13 quite a few that we have, including, I believe, the
14 Goodrich case being one, that talks about markets and a
15 product market, for example, being a critical part of
16 the analysis. It's a first step. We have to look and
17 determine what a product market is. We then have to
18 look at what the geographic market is to determine this.

19 Complaint Counsel's burden here is on the
20 markets. There's no question about that under the law.
21 They've got to come in and show that first, and as you
22 know from our briefs, we believe strongly that they have
23 failed in that for a whole host of reasons. The product
24 markets are not the four that they claim, and certainly
25 the geographic market is not North America, for all the

1 reasons we've stated earlier.

2 If you look at all these facts here, let's talk
3 about these product markets themselves. The markets --
4 you know, we know -- again, getting back to the
5 quantitative evidence that we're talking about, we know
6 that Complaint Counsel has just been abysmal, frankly,
7 in that part. They produced Dr. Simpson to try to bring
8 in this portion of their case. Dr. Simpson simply
9 failed in all respects. He failed on the product market
10 side. He didn't follow the Merger Guidelines. He
11 claimed he did, and if you look at cross examination on
12 him, he made clear that he didn't.

13 He started with Complaint Counsel's product
14 markets. That's exactly what he did. He started with
15 the conclusion and he wound up with the conclusion.
16 That's like my saying the earth is flat; there, I just
17 proved it. That just absolutely proves nothing. He has
18 to start with the SSNIP test and he has to start with
19 the products narrowly defined. That's what the Merger
20 Guidelines say. He didn't do it.

21 Complaint Counsel tells us absolutely nothing
22 about the products --

23 COMMISSIONER ROSCH: Counsel, is there any case
24 out there with respect to a consummated merger that
25 requires that product examination up front?

1 MR. WELSH: I don't have that citation in front
2 of me right now. I would be more than happy, after the
3 hearing, to see if I can find that and get it to you.

4 COMMISSIONER ROSCH: Okay. Anything else?

5 COMMISSIONER KOVACIC: Could I ask, on the
6 question of effects, if you have in mind the authority
7 that best supports your point that in this type of
8 transaction, it's important to have quantitative
9 evidence of adverse effects rather than qualitative
10 evidence?

11 MR. WELSH: Looking at facts?

12 COMMISSIONER KOVACIC: Back to the question of
13 the requisite showing of adverse effects, you had
14 mentioned before, if I understand correctly, that there
15 has to be quantitative evidence of adverse effects.

16 MR. WELSH: Yes.

17 COMMISSIONER KOVACIC: What do you see to be the
18 best case or cases that says that evidence of
19 quantitative effects, as part of a requisite showing of
20 adverse competitive impact, is necessary in a case such
21 as this?

22 MR. WELSH: I think the Oracle case, for
23 example, is one where the Court talked about having
24 quantitative evidence, and it went through a whole
25 analysis. It looked at qualitative, sure, but it came

1 down and said that the qualitative evidence was of no
2 value for a variety of different reasons in that case.

3 CHAIRMAN LEIBOWITZ: Is that a consummated
4 merger case?

5 MR. WELSH: I'm sorry?

6 CHAIRMAN LEIBOWITZ: Is that a consummated
7 merger case? The answer is no.

8 MR. WELSH: I'm not sure about that. I'm not
9 sure that it is.

10 But the point of the matter is, in that case,
11 the Court looked at the qualitative nature, it said it
12 was based highly on this qualitative type of evidence,
13 and it discounted the evidence dramatically because it
14 was not credible on the issues before it. It then
15 proceeded to look at the quantitative evidence and said
16 that that was important to look at. And there, as here,
17 the quantitative evidence did not hold up. They used an
18 expert there, and that expert was criticized for having
19 failed to look at a variety of different factors.

20 And I think here, when you look at the evidence,
21 when you look at Dr. Simpson and what he did, whether
22 it's on the product market, whether it's on the
23 geographic market, whether it's even looking at
24 anticompetitive effects, whatever, I think you'll see
25 even the Judge, the Administrative Law Judge, was

1 critical of him in certain respects. Dr. Simpson simply
2 failed. There was not the sort of evidence that I would
3 hope -- I would sure hope would be in front of the
4 Commission to make such an important decision here for
5 my client.

6 This is a consummated merger. They have moved
7 on. They have made decisions. They got this merger for
8 a reason, because they wanted this Flex-Sil product to
9 help develop and to help their customers out there, and
10 since then, they have made decisions that have impacted
11 their business, because of the economy, because of
12 what's going on around us with this recession, this
13 horrible recession.

14 As a result of that and as a result of having
15 lost a lot of business from several of its customers to
16 the competition, meaning prior to this merger and
17 after -- and that's in the record, that they have lost
18 business -- as a result of that, they had to close a
19 plant in Italy for the European business, in Potenza,
20 Italy. When they did that, they moved what was left on
21 their contracts over to the plant in Austria, Feistritz,
22 which you no doubt have heard about.

23 You know, that is why I think we have to
24 require, we have to look at quantitative evidence here.
25 I think it is incumbent upon the Commission to do that,

1 to make sure that Complaint Counsel meets its burden,
2 because to make these sorts of decisions now where
3 Respondent has had to deal with the competition, sure,
4 and to deal with this recession, and to make decisions
5 which have impacted its business in Europe, as well as
6 decisions that impact the business here, I think it's
7 important for the Commission to understand that and to
8 weigh that and to look at that carefully and to
9 understand the repercussions of those things.

10 I think that that, you know, really comes back
11 to the point that we've made in several places in our
12 brief about the importance of the relief aspect. I
13 think that that -- I want to spend a few minutes, if I
14 can, talking about that, because I think it highlights a
15 couple things here. I think the relief highlights one
16 thing. I think that there's a manifest error, a huge
17 error, that's occurred in this order as to the relief
18 and the full divestiture as it relates to the --

19 COMMISSIONER KOVACIC: Could I ask one other
20 question about the legal foundations for your argument
21 before you turn to remedy issues?

22 MR. WELSH: Yes.

23 COMMISSIONER KOVACIC: And that is, if you were
24 to point us to a single appellate opinion that focuses
25 on the evidentiary standard and underscores the need for

1 quantitative evidence of adverse effects, what would you
2 say we ought to read most carefully? You mentioned
3 Oracle. Any appellate decisions that underscore this
4 point to you and attach the same emphasis as you just
5 described?

6 MR. WELSH: I think when you look at Baker
7 Hughes, talking about the burdens that Complaint Counsel
8 has here, I think that that speaks to these issues as
9 well, and I think that there's other cases that, you
10 know, we have in our briefs in front of the Commission
11 on the point, too.

12 Coming back to the point that I was getting
13 to --

14 COMMISSIONER ROSCH: Was Baker Hughes a
15 consummated merger case, by the way, Counsel?

16 MR. WELSH: I'm sorry. I missed the question,
17 Commissioner.

18 COMMISSIONER ROSCH: Was Baker Hughes a
19 consummated merger case?

20 MR. WELSH: No, it was not, but I don't think
21 that the fact of a consummated merger in terms of when
22 we're looking at this need for quantitative evidence, I
23 think that the need here for quantitative evidence is
24 even greater than if you were looking at it in an
25 unconsummated transaction. I think that there's

1 evidence that -- there was evidence out there, and the
2 fact of the matter is, Complaint Counsel failed to prove
3 its case of anticompetitive effects with the evidence
4 that was in front of them.

5 A great example: If we look at Dr. Simpson,
6 Dr. Simpson came in to talk about whether there was some
7 anticompetitive pricing post-acquisition. When you look
8 at what Dr. Simpson did, though, none of it held up to
9 any sort of analysis. He came in with a
10 difference-in-difference approach. That's what he
11 called it. It was all dismissed, because it had no
12 validity. The Administrative Law Judge didn't even rely
13 on it.

14 So, what does he do instead? Well, then he
15 looks at, of course, prices sought, not prices obtained,
16 and then he doesn't even look at actual costs of
17 Daramic. So, it tells you absolutely nothing about
18 whether there's a price increase.

19 What Dr. Simpson did do is he looked at some
20 statistics from the Bureau of Labor Statistics. When
21 you read the transcript, though, what's clear is that he
22 relied on the wrong statistics for a whole section of
23 it. So, it tells us absolutely nothing about this
24 post-merger alleged price increases.

25 He gets a bit of a pass on that by the

1 Administrative Law Judge in the decision. The
2 Administrative Law Judge just simply doesn't even note
3 the fact that he failed and looked at the wrong
4 statistics. He just moves on, and he says, well, he got
5 the right statistics on something else. This tells us
6 nothing.

7 Why aren't they using the actual figures out
8 there? Why aren't they coming in and trying to prove
9 their case with the evidence that should be in front of
10 the Commission, not looking at things or looking at it
11 through some customer testimony that is not holding up
12 to cross examination or looking at it through selected
13 presentations of documents and ignoring a whole host of
14 others.

15 We know from the record --

16 COMMISSIONER RAMIREZ: Counsel, with regard to
17 the point about customer testimony, are you taking the
18 position that it's always unreliable?

19 MR. WELSH: I'm not saying it's always
20 unreliable, no, but I think in this case, when you look
21 at the cross examinations -- and I invite you to do
22 that. I think it's really important to get in there and
23 to look at those cross examinations and look at the
24 exhibits and then question, you know, is this testimony
25 consistent? Is it really holding up? Is the testimony

1 that they say in the deposition the same as their
2 testimony here in the courtroom?

3 COMMISSIONER RAMIREZ: But when it comes to the
4 remedy, don't you rely on customer testimony to argue
5 against the remedy in the ALJ's decision?

6 MR. WELSH: We do in a couple places, sure. For
7 example, one of the customers has testified in the
8 courtroom that -- and I think there's actually an
9 historical document that was consistent, and that's why
10 he testified that way in the courtroom, because he had
11 no other choice -- but he testified that having a plant
12 in Europe and having a plant in North America is a
13 preference, okay? It is not a requirement for doing
14 business with that customer, and that's really an
15 important concession and admission by that third party,
16 because we hear a lot about, you know, the need for
17 having the Feistritz plant.

18 But I want to come back to that point, because
19 that's a central error, I think, and it shows some of
20 the problems, whether it's customer testimony or whether
21 it's other things, but it shows some of the problems
22 with the Administrative Law Judge's opinion.

23 COMMISSIONER RAMIREZ: Let's focus on the remedy
24 point. Why don't you get to your argument on that.

25 MR. WELSH: Okay. When we look at what the

1 order has said, it says it's going to be full
2 divestiture. What we know here from the Feistritz plant
3 is that -- well, first of all, when you look at the
4 initial decision, the portion of the decision that deals
5 with Feistritz is one paragraph out of 347 pages.
6 That's the level of detail that went into this. We had
7 24 days of hearing, we had 35 live witnesses, a number
8 of people put on through deposition, and we get this
9 analyzed in one paragraph.

10 The problem with the Feistritz plant is that
11 there is no evidence, credible evidence in the record,
12 that shows that the Feistritz plant had any impact on
13 North America. Complaint Counsel's case from the git-go
14 here has been that we are looking at a North America
15 geographic market. They have never swayed away from
16 that. They have always stayed on that point. Feistritz
17 is in Austria. It's across the pond. There is no
18 evidence in the record, not one piece, that Feistritz
19 was created for the purposes of supplying separators to
20 North America.

21 They cite to a business plan that was done by
22 Microporous to build that plant. Look at the business
23 plan. The business plan talks about it's going to
24 supply separators for Europe. We're talking about two
25 different markets. Complaint Counsel can't say

1 otherwise, because that's been their position all along,
2 two different markets. We've got Europe; we've got
3 North America.

4 COMMISSIONER ROSCH: Just a second. If I may,
5 Counsel, I think what the Administrative Law Judge
6 found -- and it may be unsupported, I don't know -- but
7 what the Administrative Law Judge found was that the
8 Microporous plant post-acquisition was to shift
9 production which it had been sending overseas from
10 Piney Flats, and so instead to supply that production in
11 the United States in North America. Is that not
12 correct?

13 MR. WELSH: Well, let me address that. Again,
14 the Feistritz plant in Austria, there is no evidence
15 that it was going to shift from Europe to North America.
16 I just wanted to repeat that, okay?

17 COMMISSIONER ROSCH: Right. I understand that.

18 MR. WELSH: Now, I think there's evidence in the
19 record that when the plant was opened, then there was
20 production moved -- which is European production -- was
21 moved from Piney Flats, Tennessee, to Feistritz,
22 Austria, okay? Again, European production. We have got
23 a European market and we have got a North American
24 market.

25 COMMISSIONER ROSCH: What were they going to do

1 with the rest of the capacity at Piney Flats?

2 MR. WELSH: The rest of the capacity was,
3 frankly, unused. We know, again, from the record -- and
4 this is in there -- that after this occurred, that
5 plant, the Piney Flats plant, was running at 38 percent
6 of capacity, that line, 38 percent. It wasn't being
7 gobbled up or utilized by anyone. There was no need for
8 it.

9 COMMISSIONER ROSCH: Would that not have meant
10 that Microporous sharply reduced the prices of the
11 output of Piney Flats --

12 MR. WELSH: I think what it meant is --

13 COMMISSIONER ROSCH: -- and undercut whatever
14 competition there was with respect to Microporous'
15 product?

16 MR. WELSH: I think what it would have meant is
17 that Microporous would have been in some very serious
18 financial trouble, because we know that Microporous,
19 with its Feistritz operation, that it had \$46 million of
20 debt going into this deal, that this plant was running
21 at 38 percent capacity after, that if you took the
22 Feistritz plant post-acquisition -- said no, this merger
23 didn't occur, and we kept this plant -- as a stand-alone
24 plant, what it would mean? \$1.9 million negative to its
25 income.

1 This plant was a draw. The plant in Feistritz
2 only had -- it had two lines, two PE lines. One of them
3 had a contract on it and it was not filled, okay, it was
4 not 100 percent utilized. The other line, at the time
5 of the acquisition, had zero contracts on it. Zero.
6 These lines are 11 million square meters. It had zero
7 on it.

8 COMMISSIONER ROSCH: Are those lines severable?

9 MR. WELSH: Are they what?

10 COMMISSIONER ROSCH: Severable? Aren't they
11 both in the same plant?

12 MR. WELSH: They are in the same plant.

13 COMMISSIONER RAMIREZ: So, it is not feasible to
14 divest a single line from either a business or technical
15 perspective?

16 MR. WELSH: I think it could be, but we're not
17 asking for that. That's not our argument. Our argument
18 is we have to look at what -- starting with what should
19 be, I think, the complaint that Complaint Counsel has
20 argued all along, which is we've got a North America
21 market. Okay, you know, the law says, when you're
22 looking at relief, and, you know, when you look at
23 divestiture as an appropriate remedy of relief, you have
24 to look at whether you're restoring competition to the
25 level in the market. That's your job. That's the task.

1 COMMISSIONER BRILL: Just to be clear, you're
2 not asking -- it's all or nothing for you. Either the
3 Austria plant is divested or it's not divested. You're
4 not asking to split that baby. I just want to be clear.

5 MR. WELSH: If you would like to split the baby,
6 that's fine.

7 COMMISSIONER BRILL: I want to know what your
8 position is.

9 MR. WELSH: My position is no, that we don't
10 believe that the Feistritz plant should be part of the
11 equation. I'll make it clearer, too. I don't want to
12 jump over things here, that, you know, we don't think
13 that you should get to the relief here in the first
14 place.

15 COMMISSIONER BRILL: I understand.

16 MR. WELSH: But if you do, and I think when you
17 look at the allegations, when you look at the
18 evidence -- and that's obviously very important here --
19 then I think you have to say, okay, the Feistritz plant,
20 being in Europe, it's a European business. No question
21 about it.

22 COMMISSIONER RAMIREZ: It has no impact on the
23 North American market?

24 MR. WELSH: It has no impact on the North
25 American market. There was no separator going from

1 there to here. In fact, one of the arguments that
2 Complaint Counsel has made all along is that, well,
3 local supply is important. That's why we have a North
4 America geographic market, because the customers don't
5 want to go to Europe. The ALJ has even found -- and
6 Complaint Counsel has argued all along, too -- that
7 foreigners can't come in and compete effectively in
8 North America. How can you find that and then say that,
9 well, gosh, we need to have Feistritz; we need to have
10 that plant come in, because it somehow has some impact
11 in North America?

12 They can't have it both ways, and I think that
13 the evidence shows that the Feistritz plant just did not
14 have any impact on the North America market. There were
15 no separators coming in, and any capacity needs that,
16 Commissioner Rosch, you mentioned earlier or anything
17 like that could certainly be handled by the existing PE
18 line. We're talking 38 percent of capacity at the time
19 of the merger. There's huge capacity that could be
20 filled there.

21 But on top of that, we know from the order -- if
22 you look at it, there's something called the line in the
23 box, okay? Well, the line in the box is this. It's
24 another PE line. It's 11 million square meters that had
25 been purchased prior to the merger. It's sitting there

1 and it's ready to go. It's ready to be installed. The
2 ALJ had found that there was actual work done in the
3 Piney Flats facility in Tennessee to put that line in
4 there. There's a little segment in the middle of the
5 plant where they would put it down. And that line could
6 go in there.

7 So, even if you were to say, well, gosh,
8 wouldn't there be, you know, this additional demand
9 somehow for it -- which there is absolutely no evidence
10 in the record that that would happen, and I'll come back
11 to that in a second -- but even if you were to say that,
12 well, you have got one line that's in place that's at 38
13 percent of capacity; you've got another line that you
14 can stick in that's already been purchased. That's
15 another 11 million square meters.

16 COMMISSIONER ROSCH: Well, Counsel, let me just
17 ask you, yes or no: Prior to the acquisition, was
18 Microporous shipping any of the product from Piney Flats
19 over to Europe?

20 MR. WELSH: Was Microporous shipping from
21 Piney Flats to Europe? Oh, absolutely.

22 COMMISSIONER ROSCH: Yes.

23 MR. WELSH: They were shipping to Europe. They
24 were shipping to China. They were shipping all over the
25 world, which, again, goes to our argument that this is a

1 global market, but that is not what Complaint Counsel
2 has argued, and that's not what the ALJ found. He found
3 a North America market. The fact that they were
4 shipping out of Piney Flats, I think, is supportive of
5 us. The point is, we're talking about what competition
6 levels are in North America --

7 COMMISSIONER ROSCH: Well, let's talk about
8 imports for just a second. Are you aware of any imports
9 that occurred in the five-year period prior to the
10 acquisition from Asia or from Europe into the United
11 States?

12 MR. WELSH: I believe that there are imports,
13 certainly from Europe.

14 COMMISSIONER ROSCH: Where does the record show
15 that?

16 MR. WELSH: From Europe, there are.

17 COMMISSIONER ROSCH: Where does the record show
18 that?

19 MR. WELSH: I don't have a citation in hand, but
20 I know it's in the record, that there were imports, some
21 small imports from a company called Amer-Sil, I believe,
22 and I think that when you look at the totality of the
23 record when it comes to Asia, competition in Asia, you
24 will see a lot of interaction between customers here and
25 Asian competitors.

1 COMMISSIONER ROSCH: Imports is what I'm asking
2 about.

3 MR. WELSH: And I'm saying that with respect to
4 that, when you look at what the findings are by the
5 Administrative Law Judge on who is in these alleged
6 markets and who's out, you're going to find the most
7 arbitrary findings that I've ever seen, and I think if
8 the Commission's going to say that the Administrative
9 Law Judge is fine in finding that Microporous could
10 possibly be in this supposed UPS market because it had a
11 product that had been sent out for testing and that's
12 where it was, or if you're going to find that
13 Microporous was somehow in an SLI market because it was
14 having some discussion with a customer, even though its
15 board, the IGP board, said you're not going to get into
16 SLI -- and that's a pretty darned definitive statement
17 there, which should indicate a lot there -- but if you
18 are going to say that they're somehow in that, then why
19 aren't we looking at the competition in Asia and saying
20 that those connections, those discussions, are just as
21 equally as important? We know from the competition and
22 we know from Daramic's own documents pre-acquisition
23 that they considered the Asian competitors to be a
24 factor, to be a factor in North America today. We can't
25 ignore all that.

1 So, while I may not be able to cite you chapter
2 and verse about some products actually being shipped in
3 from Asia, there is no reason why they can't. We know
4 that these customers, these large, sophisticated
5 customers, have discussions with these folks all the
6 time, and they've done alliances with these same folks,
7 and they could bring them in. They've done it in the
8 past. They could do it. So, I think we would have to
9 look at the totality of this situation.

10 You know, I mentioned on capacity and when we
11 look at who's in and who's out of these markets, and
12 let's look for a minute on one of the customers here,
13 because I know Complaint Counsel has said a lot, that,
14 well, gosh, if it weren't for this, then this particular
15 customer would have signed a contract with Microporous,
16 but, again, you have to look, look closely at the
17 evidence, and look at what these witnesses say, whether
18 it's the witnesses at Daramic or look at the customers,
19 look at their own documents. This transaction wasn't
20 going to occur, was not even close.

21 The former Microporous employee, now a Daramic
22 employee, wrote in an email prior to the merger that as
23 to those transactions -- this was about ten days before
24 the merger, ten days before -- and he wrote in that
25 email about how those negotiations or discussions or

1 whatever were going with that customer, discussions that
2 had gone on for a long time in the past and had bore him
3 no fruit, and he said, well, that and \$1.25 will get you
4 a cup of coffee, and that was accurate. But instead, we
5 have volumes in the initial decision that say, okay, you
6 know, they were going to get into this.

7 CHAIRMAN LEIBOWITZ: Doesn't the ALJ, though,
8 get to assess the credibility of the witnesses and the
9 evidence?

10 MR. WELSH: He does, but when you look at the
11 record and you look at the initial decision, there's not
12 a single finding on credibility in there, and I think
13 that it's now incumbent upon the Commission to look
14 closely at those cross examinations, look at the
15 documents, look at the testimony, and view the
16 credibility yourself. Thank you.

17 CHAIRMAN LEIBOWITZ: Thank you so much,
18 Mr. Welsh.

19 Mr. Robertson?

20 MR. ROBERTSON: Thank you, Mr. Chairman.

21 COMMISSIONER ROSCH: Mr. Robertson, I'm kind of
22 curious about a couple of things here, that just struck
23 me from your brief as being weird.

24 First of all, how could you possibly allege the
25 existence of a PE relevant market, even in the

1 alternative -- which apparently Complaint Counsel did --
2 when some of Microporous' products are manifestly not PE
3 products because they're made of rubber? That's the
4 first question.

5 And the second is akin to it: How can you
6 possibly allege that there are four relevant separator
7 product markets corresponding to four different kinds of
8 batteries when some battery customers use one kind of
9 separator in multiple batteries?

10 MR. ROBERTSON: Well, let me answer the first
11 question that was alleged in the complaint, which was an
12 alternative theory for a PE world market, a PE market.
13 We did allege that. We did not try that. I have said
14 in all of our briefs and I've said here to this
15 Commission that it really doesn't matter. You could use
16 their market and we would still have changes of HHIs way
17 above 200; in fact, about 695. So, it doesn't really
18 matter.

19 That's why we said -- that's not a defense by
20 them, but that was not the theory that we tried the case
21 on, and the reason was the facts didn't support it. The
22 facts didn't support a PE market when as, Mr. Rosch,
23 you're right, for deep-cycle batteries. We had two
24 batteries in here, the greatest selling battery in the
25 market, period, by Exide, two identical batteries, two

1 identical warranties, the same price, but one had
2 Flex-Sil in it, which is a rubber product, and one had a
3 PE product, HD made by Daramic. To the customer out
4 there, you and I, they wouldn't know the difference.
5 They are used for exactly the same purpose. So, saying
6 there's a separate PE market makes no sense.

7 Now, to answer your second question, was there
8 overlap? Did a customer use one separator for a
9 different product? The answer is in 0.017 percent of
10 the time. We counted them. That's how small, in all
11 the millions of separators that were sold. We went to
12 their database, which is PX-1450, and actually counted
13 them. There is no overlap other than that. And they
14 started out this case with theory that there was some
15 massive overlap. That's all it is. It's less than a
16 percent. It's 0.017 percent.

17 Instead, what we did is we asked the customers
18 and we went to the company documents to find out how
19 they actually categorized these products, and if you
20 look at PX-78, for example, which is Microporous' own
21 analysis, just two weeks prior to the merger -- they
22 thought the merger wasn't going to go through, they were
23 selling themselves out to other people -- they put
24 together a presentation, PX-78. They separated the
25 products in exactly the way that we did, and there's a

1 good reason for that, because a deep-cycle product has
2 to be tested for years, has to be designed and tested
3 for a particular purpose.

4 You can't take a PE separator from a car battery
5 and put it in a deep-cycle battery and have it last more
6 than a month. Nobody does that in this country, not a
7 single manufacturer did that, and that's why the
8 manufacturers came in here and testified and said, "We
9 only use either Flex-Sil or HD." Mr. Godber from
10 Trojan, for example, at page 152 of the transcript,
11 testified at length about the only competition that he
12 was interested in looking at, they only work in their
13 batteries, they have 50 percent of the mark, Trojan
14 does, was Flex-Sil, which was the Microporous product,
15 and not PE, and HD, which was a Daramic product. That's
16 it. There were no other choices. He said so very
17 clearly on the record. Actually, that transcript is in
18 the handout that we passed out, but it's very clear.
19 Every other customer said the same thing. We brought in
20 95 percent of the market here. These are not random
21 customers. It's 95 percent of the market.

22 COMMISSIONER ROSCH: But Mr. Welsh says we ought
23 to ignore that testimony because it comes from
24 customers. Is your position different in that regard
25 that there are no alternatives?

1 MR. ROBERTSON: It absolutely is. If we had one
2 complaining customer, two complaining customers, and
3 business documents, internal business documents didn't
4 match what they said, we would have the Oracle case. We
5 didn't have that. We had every customer coming in here,
6 including the ones that they brought in. Their own
7 witnesses, Crown and East Penn, both testified that
8 Daramic was their only choice at this point. Before
9 that, they had Microporous, and now they said it's only
10 Daramic. It was their witnesses who said the same
11 thing. Their internal documents said the same thing as
12 well.

13 I heard, starting off -- did I answer your
14 question, sir?

15 COMMISSIONER ROSCH: Yes.

16 MR. ROBERTSON: Starting off --

17 COMMISSIONER ROSCH: You answered that question.

18 MR. ROBERTSON: I'm sure there will be more.

19 But we started off with this, a salesman wrote
20 some documents? Let's be real clear here. The person
21 who wrote the documents that we keep talking about was
22 the head of Daramic. He was the general manager of the
23 whole company. It was Pierre Hauswald who wrote those
24 documents, and they were actually not only approved by
25 the board, but one of the documents in camera that you

1 can look at later was PX-462, you will see whether the
2 CEO of Polypore --

3 COMMISSIONER KOVACIC: Is that in your slide
4 deck?

5 MR. ROBERTSON: Yes, sir. And unfortunately,
6 what we gave you was what we gave the ALJ, and not all
7 the page numbers came out right, but we gave exactly
8 what he had given us, but PX-462.

9 COMMISSIONER KOVACIC: Okay.

10 MR. ROBERTSON: It's in camera, but you will see
11 exactly what the CEO -- whether he accepted Pierre
12 Hauswald's expectation or not.

13 All the exhibits, by the way, on this price
14 increase, PX-174, PX-275 at 17 -- and I hate to do
15 chapter and verse, but I think that's what evidence
16 really is -- PX-1823 at page 8 and at page 13. These
17 were not just presentations to the board. It was their
18 annual budget. They actually budgeted a price increase
19 if they bought Microporous, and if they failed to buy
20 Microporous, they budgeted a loss not only in terms of
21 prices that would have to go down but a loss of market
22 share.

23 Now, that's pretty important, because that
24 market share was going to fill these plants. These
25 plants that they claim are having trouble being filled,

1 the one in Austria, for example? You wonder why they're
2 fighting so hard not to give it up if it's such a bad
3 plant, and they think it's a gift that they moved some
4 business into that plant?

5 COMMISSIONER ROSCH: We will get to that in a
6 moment.

7 MR. ROBERTSON: Yes, sir.

8 COMMISSIONER ROSCH: But let me ask you, this is
9 a consummated transaction, correct?

10 MR. ROBERTSON: Yes, sir. Absolutely.

11 COMMISSIONER ROSCH: How do you prove
12 competitive effects in a consummated transaction?
13 What's your best authority?

14 MR. ROBERTSON: Well, I think, unfortunately,
15 for most consummated mergers, you have got to go back to
16 the 1960s. You have to go back to Philadelphia National
17 Bank, Phillipsburg National Bank, Brown Shoe, all those
18 basic, fundamental cases and look at what you have to
19 show. First, you can show a structural case, which we
20 did in Chicago Bridge. We did not show effects in
21 Chicago Bridge. I thought I had, but the Commission
22 didn't buy it, frankly.

23 COMMISSIONER ROSCH: I'm talking about effects,
24 because Counsel's position is that you have to show
25 effects, even in a consummated merger case, through, as

1 I think he put it -- what was that evidence? -- it was
2 quantitative evidence --

3 MR. ROBERTSON: Well --

4 COMMISSIONER ROSCH: -- as opposed to
5 qualitative evidence. What's your best authority that
6 you can take into account qualitative evidence over
7 quantitative evidence in that context?

8 MR. ROBERTSON: Well, I think ^ Phillipsburg
9 National Bank is a very good piece of authority, because
10 there was a small segment of the market, a small segment
11 of four customers that actually were saying they were
12 affected. There was no econometrics back then. That
13 case was relied upon by Whole Foods, and Judge Brown --
14 which is a premerger case -- said that you could back
15 into the market definition. You don't have to do market
16 definition first and effects second. You can prove it
17 through effects. And that was this Commission's
18 position in the Whole Foods case, in the brief.

19 But we did more than that. We actually showed
20 effects here. He said that there's no post-acquisition
21 evidence of prices going up? Look in the initial
22 decision at page 562 to 63 and 904. Exide's prices went
23 up. They didn't stay the same. They actually went up.
24 Bulldog had a 10 percent price increase. At the initial
25 decision, 613 to 614, a 10 percent price increase. This

1 is important, because this was a small company, not a
2 power buyer, a small company who came in here, and when
3 this counsel kept saying to the Judge, "Oh, all these
4 people are all biased, they're all in here lying," and
5 the Judge looked at him and said, "Even Bulldog?"

6 Well, Bulldog, in the previous five years, had
7 only had an aggregate of 3 percent increases in price
8 when the costs were going up faster than they were
9 post-acquisition. Costs were actually falling after the
10 acquisition when they instituted a 10 percent in one
11 year price increase. They got two price increases
12 post-acquisition. Trojan, at the initial decision at
13 page 552 to 561, the Judge goes at length through the
14 price increase Trojan got.

15 CHAIRMAN LEIBOWITZ: So, is this at the level of
16 the price increases that the Commission found in, say,
17 Evanston?

18 MR. ROBERTSON: These are very clear, and I
19 think they are far better than even in Evanston.

20 CHAIRMAN LEIBOWITZ: In going back to Whole
21 Foods, what I see in Evanston, payers were paying two
22 and three times the amount, and it may have been several
23 years later, so I don't know if this rises to the level
24 of that kind of quantitative evidence, and going back to
25 your quantitative evidence, what was the District

1 Court's determination with respect to quantitative
2 evidence in Whole Foods, as you said?

3 MR. ROBERTSON: Well, nobody ever really did
4 much to put that evidence on, so it's hard to say
5 whether there was a determination of that. I wish they
6 had. I wish we had in that case.

7 CHAIRMAN LEIBOWITZ: Well, no, I think the
8 Commission put into evidence the fact that the CEO of
9 the company said, you know, if you let us -- to the
10 board, if you allow us to do these -- to buy Wild Oats,
11 we'll be able to avoid nasty little price wars, and he
12 ticked off a half dozen different cities, and then he
13 also said, as I recall, that no one will be able to
14 compete with us if we buy this other company.

15 So, I don't think the District Court -- and the
16 District Court wasn't overturned on this matter -- took
17 the qualitative evidence to be as strong as you might
18 hope it would be in this case.

19 MR. ROBERTSON: Well, let me make a point there,
20 which is you're right, but in that case, that CEO never
21 went on the stand. That CEO never testified. There was
22 great evidence there.

23 In this case, we put the CEO on the stand. We
24 showed his documents to him. We actually did cross
25 examine the CEO. We cross examined Mr. Hauswald, the

1 head of the company, but we actually put that evidence
2 in here and showed their intent.

3 And I think going back to Brown Shoe, intent,
4 what the company is planning on doing, is important,
5 especially when you see that they actually did it. They
6 actually got away with it. They actually did raise
7 prices. And they went back and actually determined to
8 raise prices back before this acquisition started. That
9 was the reason for it. And they were also very
10 concerned about the expansion of the company and that
11 they would take away the --

12 CHAIRMAN LEIBOWITZ: So, the citations for your
13 proposition, the best citations you can find are Brown
14 Shoe and Philadelphia National Bank?

15 MR. ROBERTSON: Oh, I love those cases, but --

16 CHAIRMAN LEIBOWITZ: We all love those cases,
17 but they are pre-Chicago School and pre-1965.

18 MR. ROBERTSON: Well, Chicago Bridge. In
19 Chicago Bridge, the Commission looked at it and said,
20 well, if we had it, then that would be great evidence.
21 It happened that the Commission didn't buy it in that
22 case, but it also said it didn't need it to find
23 liability, which was your first question, and you didn't
24 need to because you had a structural case.

25 When you have a merger to monopoly in three

1 markets and a three to two merger in one, counsel's
2 position in the whole case was that, well, two
3 competitors are enough. Well, that's not the law. It
4 happens in a lot of our cases in three-to-two mergers,
5 because they end up being pretty serious --
6 CCC/Mitchell, for example -- but that doesn't mean that
7 two is okay or that even three is okay.

8 COMMISSIONER RAMIREZ: Can we talk about one of
9 those markets? And I would like to focus on the UPS
10 market. And can you explain to me Microporous' role in
11 that market?

12 MR. ROBERTSON: I'm sorry, what role?

13 COMMISSIONER RAMIREZ: In the UPS market.

14 MR. ROBERTSON: Yes, in UPS, and this is one of
15 the areas where we focused on in terms of innovation,
16 because Microporous had a great research and development
17 plant in Tennessee, which Daramic dismantled as soon as
18 they got the acquisition, and one of the things they
19 came up with is what is called white PE or Leno -- and
20 it doesn't stand for Jay Leno, it has to do with light
21 oil -- and a reduction in what's called carbon black.

22 Daramic's product has carbon black in it, which
23 causes scum, black scum in the battery. UPS is a very
24 important battery. We have a bunch of them in the first
25 floor of this building. Now, they're in hospitals.

1 They put the lights on when the lights go out. And what
2 Microporous had done is come up with a product that
3 resolved the black scum issue. It was a slight
4 variation on CellForce, which is patented, which is, by
5 the way, made from Ace-Sil. They say that's not a part
6 of the case, but it's a key ingredient to CellForce in
7 Tennessee and in Austria.

8 Now, what happened was they went to Enersys, and
9 Enersys said, we will buy the product. Brilmyer, who
10 was the head of the program, at 1881 to 2, 1909, and
11 1839 to 47 -- those are transcript cites, I'll repeat
12 them again, 1881 to 2, 1909, and 1839 to 47 -- said that
13 they were going to sell that product to Enersys, and
14 then we had --

15 COMMISSIONER RAMIREZ: But they never sold that
16 product.

17 MR. ROBERTSON: -- Mr. Berger and Mr. Ash from
18 Enersys at 2325 --

19 CHAIRMAN LEIBOWITZ: Mr. Robertson, as the
20 Commissioner just said, they never sold that product to
21 Enersys, correct?

22 MR. ROBERTSON: No, they did not, but they
23 agreed to do so.

24 CHAIRMAN LEIBOWITZ: Wasn't this for shipment to
25 Europe? It was not for shipment in the United States,

1 was it?

2 MR. ROBERTSON: That's what counsel said. That
3 is not accurate at all. There were two types of
4 batteries that they were selling for. One was a gel
5 battery in Europe. The other was for a flooded
6 lead-acid battery in the United States, and that's what
7 Mr. Brilmyer's testimony actually talks about. We asked
8 that on the stand, so what they said is not accurate at
9 all.

10 COMMISSIONER RAMIREZ: So it's your position
11 that the argument that the focus was, in fact, European,
12 gel-based, that's not supported by the record?

13 MR. ROBERTSON: It's not. It was for both. The
14 same company, EnerSys, but it was for both, and we asked
15 Mr. Brilmyer that over and over and over again. It's
16 right in the record. As soon as this transaction
17 happened, they stopped making that product. They shut
18 down the operation, Mr. Brilmyer no longer works there,
19 and so customers today are still stuck with an inferior
20 product and a higher price, and what their internal
21 documents say was that they didn't want to innovate
22 because it would cannibalize their PE product, which
23 they were getting a high margin on.

24 COMMISSIONER RAMIREZ: Let me ask you this:
25 Just for the purposes of argument, if we were to accept

1 Respondent's argument that Microporous was not a
2 potential competitor in the UPS market, what impact
3 would that have on the issue of competitive effects and
4 the remedy in this case?

5 MR. ROBERTSON: It wouldn't have a single effect
6 at all. We believe it's important for Microporous to
7 have all the capabilities to make all of its product
8 line to have a successful divestiture, because that's
9 what they had, and we think under the Ford case, United
10 States Supreme Court Ford case, that what the object of
11 this whole exercise is is to restore competition to
12 where Microporous would be today, not where it was, as
13 they would like, six years before the acquisition, but
14 where they would be today, and that means all these
15 products.

16 They also made other things that were not even
17 part of this case, that were part of that plant, and UPS
18 was one of those areas where they were about ready to
19 sell, they had already innovated, they had already
20 agreed with EnerSys to sell that product. Mr. Brilmyer
21 said that he was already on the line to sell it, he had
22 already budgeted for it. But even if you say, well,
23 maybe it wouldn't have happened, these guys were afraid
24 of them. They were afraid of them, and the only way to
25 replace that perceived competition is to put Microporous

1 back in the same position it was in, where it was
2 capable of being a competitor, if it's a perceived
3 competition case. Otherwise, they are not going to
4 believe that they are a perceived competitor unless they
5 know they can do it. They have to have the capability
6 to do that, and that includes having global scale, which
7 was essential to what Microporous was trying to do, and
8 that includes Austria, which is why they're so afraid of
9 losing Austria.

10 COMMISSIONER ROSCH: No, they are talking about
11 customer preferences with respect to Austria, and
12 customer preferences are not a test at all, are they? I
13 mean, it is necessity, it is essentiality. Isn't that
14 what matters?

15 MR. ROBERTSON: I think it's more important for
16 essentiality, but let me give you an example. Counsel
17 said, well, they never ever shipped anything from that
18 plant back to this country. That actually is not
19 accurate. What happened -- we say that you have to have
20 a backup supply. That's what the customers want.
21 There's a reason for that, and that is during this
22 litigation, Daramic had a strike in its Kentucky plant.
23 It was shut down completely, and, in fact, the manager
24 tried to run it and he couldn't run it. That shows how
25 special this is, how you need to keep people to make

1 this product.

2 What Enersys did is they went over to the
3 Microporous Feistritz plant -- this is
4 post-acquisition -- and got the product and shipped it
5 back over here so they could keep their battery lines
6 running. That's what they wanted. That's what EnerSys
7 wanted, was to make sure they had a place to go in their
8 contracts, that Microporous needed to have both plants,
9 and if you look at their contract, which is RX-207-10 --
10 and it's in camera, I can't go into it -- but I can say
11 what the ALJ said, which is is that Microporous could
12 not comply with the EnerSys contract unless they had
13 both the Austrian plant and the Tennessee plant.

14 COMMISSIONER KOVACIC: Could I go back for a
15 moment to the question of effects? All of the pre-Hart
16 Scott cases tended to involve consummated transactions.

17 MR. ROBERTSON: Yes, sir.

18 COMMISSIONER KOVACIC: Hart Scott introduced the
19 element of prediction much more directly into the
20 evaluation of cases.

21 Do you recall in any of the pre-Hart Scott
22 cases, where the parties had combined assets, where the
23 transaction had been completed, if any of the cases
24 touched upon the relevance of effects evidence beyond
25 the presumptions that you've been referring to before?

1 MR. ROBERTSON: Yes, sir. I believe the best
2 description of that interplay is found in General
3 Dynamics, a case and law that the defense bar likes, but
4 if you read the case, it actually supports the
5 Philadelphia National Bank --

6 COMMISSIONER KOVACIC: 1974?

7 MR. ROBERTSON: Yes, '74, but it recaps a
8 history of analyzing whether you need to have effects.
9 There's a section in there where the Court describes,
10 what if there are no effects at all? And it says, well,
11 that -- and this was applied in Chicago Bridge, for
12 example, both in the Commission decision and the Fifth
13 Circuit decision. If you have no effects at all, does
14 that mean you have no case? And the answer is no,
15 because if you have a structural case with no defenses,
16 you have to assume that the buyer can control what the
17 outcome is in terms of, are prices being raised during
18 the post-acquisition period? Are they moving product to
19 the Feistritz plant or not in order to make the case
20 look better or worse? That kind of thing.

21 And what the Court said was that you don't have
22 to rely on that evidence if it's not there, but by
23 golly, if you have it, then you've got a very good case,
24 and that's what we have here. We have actual
25 post-acquisition evidence here. So, I think --

1 COMMISSIONER KOVACIC: I'm wondering how much
2 the case depends on the availability of that kind of
3 evidence. Assume for a second that it didn't exist, and
4 to think about the significance of these earlier
5 decisions, two separate theories of liability,
6 unilateral effects and coordinated effects. I gather
7 that you would be saying that looking at the coordinated
8 effects case, where you're left with, say, two
9 participants --

10 MR. ROBERTSON: Yes, sir.

11 COMMISSIONER KOVACIC: -- that even if those
12 effects haven't manifested themselves as of the time of
13 the trial or the decision, the logic of the earlier
14 cases is those effects could very well manifest
15 themselves later, and that's the reason for --

16 MR. ROBERTSON: That's right, and I think the
17 theory, although it's a preacquisition case, was applied
18 in Heinz and also CCC/Mitchell.

19 COMMISSIONER KOVACIC: Yes.

20 MR. ROBERTSON: And the Court has been very firm
21 about the coordinated effects theory, but one thing that
22 --

23 COMMISSIONER KOVACIC: Would you say, to look at
24 unilateral effects for a second, would the view --
25 again, based on thinking a bit about the logic of the

1 earlier cases, that if you have what is assumed to be
2 the dramatic example of a merger to monopoly, and just
3 assume that that's the circumstance, notwithstanding
4 Counsel's arguments to the contrary, assume it is a
5 merger to monopoly, is the theory there in a unilateral
6 effects case that even if adverse consequences have not
7 manifested themselves -- prices, innovation, quality --
8 that there is still the danger that that could transpire
9 in the future and that that's reason to be concerned and
10 to have a continuation of the single-firm structure in
11 the future?

12 MR. ROBERTSON: Absolutely, and that's what this
13 Commission held in Chicago Bridge. We did not have
14 evidence, as the Commission found, that there were
15 post-acquisition price increases, but found because of
16 the structure of the markets, that it was a merger to
17 monopoly -- happened to be four markets just like this
18 case -- that because of that, that there was a danger of
19 unilateral effects. That is the law. It's been a law
20 since the 1960s. It's still the law today. It's good
21 law.

22 But also, as far as coordinated effects, to not
23 miss that point, we actually had evidence of coordinated
24 effects here, not hypothetical, but actual evidence from
25 the company's own documents, saying that they were

1 following the leader and that they were not aggressively
2 pricing against each other. Those were the two
3 companies before Microporous came on the scene.

4 When Microporous came on the scene, things
5 changed, and that's when the internal documents of
6 Daramic, where their people were saying, for the first
7 time, we're seeing an aggressive competitor, and in
8 their brief, Counsel said -- in their reply, they said,
9 oh, but JCI, they took business away from Daramic after
10 the acquisition. That is not accurate. That's not true
11 at all. I hate to say that, I'm not supposed to say
12 it's not true, but it's just absolutely false.

13 The contract with JCI was signed in 2007, before
14 the acquisition, when Microporous was competing for SLI
15 to try to get that contract, against Entek and against
16 Daramic, and that's when competition happened, and
17 that's when prices went down, and that's when a good
18 deal was made, and we want to restore that competition.

19 CHAIRMAN LEIBOWITZ: So, are you saying that
20 Microporous is sort of a maverick here or could have
21 been a maverick?

22 MR. ROBERTSON: It was, absolutely.

23 CHAIRMAN LEIBOWITZ: And what's the relevant
24 legal standard for maverick status?

25 MR. ROBERTSON: I think the standard is do you

1 see evidence of their not doing -- behaving in an
2 oligopoly kind of way? Are they just following the
3 leader or are they lowering prices in order to capture
4 sales? And that, in fact, is what they were doing.
5 They talk about that briefly in the Merger Guidelines,
6 the new ones, but that's what we're talking about and
7 that's what happened here.

8 In all of these products, both in SLI and
9 motive, especially, we have evidence here that
10 Microporous was lowering prices to capture sales, and it
11 was shaking Daramic up. That's what all these board
12 documents are about. They are analyzing what the
13 effects of that will be.

14 CHAIRMAN LEIBOWITZ: Is there case law to that
15 effect? Is there case law that describes what a
16 maverick is or can you get us the relevant cites?

17 MR. ROBERTSON: That one, I can't, but I can --

18 CHAIRMAN LEIBOWITZ: That seems to be a common
19 sense approach.

20 MR. ROBERTSON: It is a common sense approach,
21 but it is --

22 CHAIRMAN LEIBOWITZ: I'm just wondering if there
23 is any legal precedence beyond the guidelines.

24 MR. ROBERTSON: It has been our practice here
25 for years and it's in the Merger Guidelines talking

1 about it, and it's -- you don't have to call it a
2 maverick.

3 COMMISSIONER KOVACIC: Do you remember when
4 those new Merger Guidelines were issued? I haven't seen
5 them.

6 MR. ROBERTSON: Well, no, sir, I apologize. I'm
7 just jumping the gun here, but --

8 COMMISSIONER KOVACIC: There are so many
9 developments to keep track of.

10 MR. ROBERTSON: My view of the new Merger
11 Guidelines was that they just incorporate our past
12 practice, and I think that's what the Commission's
13 position has been. It's certainly been my experience.
14 You don't have to call it a maverick. I think the whole
15 point of this exercise is were they lowering prices
16 before and are prices going to go up now that they are
17 no longer in existence? We don't have to prove that.
18 We can prove it through a structural case in terms of
19 probabilities. We happened to have proved it because it
20 actually happened here.

21 CHAIRMAN LEIBOWITZ: You mentioned the Feistritz
22 plant before and also the notion of opening the door for
23 competition and I want to come to the remedy for just a
24 little bit of discussion, because I just want to
25 understand better the rationale for requiring

1 divestiture the Feistritz plant in a case involving
2 competition in North America, because Feistritz, it's in
3 Austria; Austria is in Europe. So, could you explain a
4 little more about this?

5 MR. ROBERTSON: I certainly want to do that. I
6 think it's very important here, because if we don't do
7 that, then we might as well all go home. It's a nice
8 place, Austria.

9 It would happen to be Feistritz where the former
10 competitor Jungfer was. Daramic bought them and shut
11 down their plant. Microporous saw this as an
12 opportunity. The same people that worked in the Junger
13 plant now work in the Feistritz plant. If you look at
14 the analysis -- Counsel mentioned it. "Well, you ought
15 to look at their analysis." Please do. It's at PX-611
16 at page 9 of 28. That's the Microporous analysis.

17 Daramic analyzed this issue as well in PX-265 at
18 11, and PX-485 is actually the notes from -- that their
19 CEO, where they talk about a global scale being
20 important. What Microporous believed was that they had
21 to have global scale in order to compete with the big
22 boys, in order to get the big contracts.

23 Now, let me give you an example. They say,
24 well, that's inconsistent with the market definition and
25 all that. It is not. Let me give you just a very real

1 world example. Major law firm, you want to get
2 international offices so you can get more business here.
3 Does that mean that the prices for lawyers in Indiana --

4 COMMISSIONER KOVACIC: And lose lots of money in
5 the international offices.

6 MR. ROBERTSON: Oh, there sure are, but a lot of
7 times you do it -- we did it in my old firm -- to get
8 business here, and it expanded your business
9 opportunities here, but it doesn't mean the price of
10 lawyers in Indiana is the same as in Germany.

11 CHAIRMAN LEIBOWITZ: No, I understand, but there
12 is something called the fallacy of analogy -- even
13 though that's a very good analogy in some ways.

14 What's the price effects in North America? Is
15 it direct? Is it indirect? Disciplined or
16 undisciplined?

17 MR. ROBERTSON: Here's where it's direct: It
18 has to do with -- when I say it has to do with global
19 scales, it's economies of scale. It's having a large
20 enough operation so that they can pay less for the
21 transportation to ship things over to Europe, which is
22 what they were doing before, but let me give you another
23 real example, which is key to this issue.

24 Half of what's made in Austria is CellForce,
25 okay? It's motive. It's batteries about the size of

1 the podium that go in forklifts, okay? CellForce was
2 there. CellForce was in Tennessee. The key ingredient,
3 what makes that product is Ace-Sil. Ace-Sil is made in
4 Tennessee. It's under a patent that Microporous owned.
5 That Ace-Sil is shipped in Austria to make that product.
6 So, when Commissioner Rosch asked if anything was being
7 shipped from that Tennessee plant to Austria, you bet
8 your life on it.

9 Without that, there is no reason for Ace-Sil.
10 It used to be used to make submarine batteries. They
11 don't anymore. And there was testimony from their own
12 witnesses, Mr. Trevathan, who runs the plant, who said
13 that that's the purpose of Ace-Sil, is to make CellForce
14 in Tennessee and in Europe. Well, if you have enough
15 scale, you have enough business, like the EnerSys
16 contract, which spanned both Europe and the United
17 States, for motive, which gave Microporous 50 percent of
18 the motive market, right before the acquisition, having
19 a way to make that Ace-Sil plant efficient, where they
20 have the output for it, they have the capacity for it,
21 that makes the whole operation less costly and helps
22 Microporous be more competitive, which is exactly how
23 they got that business in the first place.

24 COMMISSIONER RAMIREZ: Wasn't Microporous
25 competitive and a vigorous competitor before

1 commencement of operations in Austria?

2 MR. ROBERTSON: Yes, they were, but to get that
3 Enersys contract, which this is RX-207 at 10, Enersys
4 said, yeah, we'll give you this big contract, but you
5 have got to give us a European plant, all right? They
6 can't comply with that contract without having the
7 Austrian plant, and the reason for that is otherwise,
8 you have to make it in Tennessee and ship it across to
9 Europe, which is what they were doing before, and they
10 were very close to where the Enersys plant is in Europe,
11 but it also gave Enersys and Exide, who was going to
12 make SLI separators for car batteries, the ability to
13 have a second source if one plant went down, which
14 actually happened.

15 COMMISSIONER RAMIREZ: And let me ask you the
16 same question that I posed to Respondent's counsel: Is
17 divestiture of both lines necessary for an effective
18 remedy here?

19 MR. ROBERTSON: It is. It is. It is one plant
20 in Europe, and there are two lines there right now. The
21 line in the box is supposed to go in Tennessee, not in
22 Austria.

23 COMMISSIONER RAMIREZ: But let's focus on the
24 plant first. And those two lines can't be separated?

25 MR. ROBERTSON: No, it's in one building, unless

1 you are going to take the equipment out and put it in
2 some other plant, and then there wouldn't be any reason
3 to have that plant. They built the plant with the
4 economies of scale believing they had to have at least
5 two lines in it, one for CellForce and the other for
6 SLI, for car batteries in Europe, and that's how they
7 made it. They actually did a study to determine whether
8 it was economical -- a lot of that's described in
9 PX-611 -- and they needed both plants in order to make
10 this work.

11 And they can say all day long about how it's a
12 bad deal and they had \$48 million in debt. They got
13 that debt to build that plant by a private equity firm,
14 IGP, thinking it was a good deal, thinking that that was
15 a good deal, and these folks assumed that debt when they
16 bought the deal, thinking it was a good deal. Now they
17 don't want to give the plant up because they don't want
18 to hurt the new Microporous. They don't want to hurt
19 themselves. They have three other plants in Europe.
20 They can use them and give Microporous a chance to have
21 global scale, compete like Entek and like Daramic, which
22 both have plants in Europe.

23 COMMISSIONER RAMIREZ: Can you also walk me
24 through why it's necessary to divest the line in the
25 box?

1 MR. ROBERTSON: Well, the line in the box was
2 meant to help expand what was called the backfill in
3 Tennessee. They had contracts, for example, for East
4 Penn. They were working with East Penn. The East Penn
5 project was shut down, as Mr. Trevathan actually
6 testified at trial. He was the plant manager for
7 Microporous and then became the plant manager for
8 Daramic. It was shut down only because of the
9 acquisition, and so that was destined to do that. They
10 could not fulfill that deal with East Penn without the
11 line in the box.

12 They actually, as Counsel say -- he finally
13 admitted, went round and round on this for weeks -- but
14 they actually did have the footings in the plant in
15 Tennessee, ready to receive these big pieces of
16 machinery that take years to order and specially design.
17 They have them there, they need to install them, they
18 would have been up and in operation here for a year and
19 a half, but they're still sitting in a box.

20 COMMISSIONER BRILL: Did they use those lines in
21 a box in any communications with customers or to try to
22 get any contracting? I mean what was the competitive
23 effect of those lines in a box?

24 MR. ROBERTSON: Absolutely. That's why they
25 bought the equipment in the first place, because they

1 went out to make the sales to the competitors -- the
2 customers, the customers were saying, look, you only
3 have one PE line in Tennessee, and the other one is
4 Flex-Sil and Ace-Sil. You don't have space for us, and
5 I'm afraid that you don't have enough capacity. We
6 can't give you all of our business.

7 And so what Microporous promised, they promised
8 Energys they would expand in Europe, add another line in
9 Tennessee, and also promised that to Exide, we're going
10 to add another line in Tennessee, promised that to East
11 Penn, and that was the importance of what the line in
12 the box is. It was also part of phase two and a phase
13 three direction to add an additional line in Tennessee
14 that we don't even talk about. You can't divest
15 something that doesn't exist.

16 COMMISSIONER BRILL: Okay. So, with respect to
17 using the line in the box in the marketplace in order to
18 attract customers, it was with respect to Energys,
19 Exide, and East Penn? Is that what you're saying?

20 MR. ROBERTSON: Those were the biggest
21 customers, because, for example, in SLI and also in
22 motive, Exide and Energys are the only two real
23 customers out there. They have over 90 percent of the
24 market. And East Penn and Exide are -- besides JCI, are
25 the other bigger players in SLI car batteries. And

1 there are other smaller customers out there as well, but
2 if you are going to fill a whole line, you need some big
3 customers, which is why you also need global scale,
4 because if you want to go and get that business from a
5 big customer, to allow you to add enough scale where you
6 can take on more smaller customers, you have to promise
7 that we'll be able to get your separators there.

8 These customers do not keep these separators in
9 big cabinets. They actually order them on three or four
10 days' supply, but it is a critical piece of a battery.
11 If you don't have any, you can't make a battery.

12 COMMISSIONER BRILL: What would happen to your
13 case if you had alleged a global market rather than a
14 North American market?

15 MR. ROBERTSON: We would still be standing here
16 today and I would be the appellee. I mean, that's why I
17 keep saying, it doesn't really matter.

18 COMMISSIONER BRILL: You don't think it would
19 have mattered in terms of the concentration levels? I
20 mean, it wouldn't have affected them at all or it
21 wouldn't have affected them as much?

22 MR. ROBERTSON: Oh, we would be talking about a
23 change of 695 instead of 4000 in one market, but, you
24 know, I don't do things just to get the right numbers, I
25 do things to get it right. I could have taken the easy

1 way out, just agreed with them and said, let's call it a
2 day, you have a liability and let's have a remedy.

3 I wanted to do it right, and frankly, my expert,
4 John Simpson, who is a great economist, and he has
5 testified in many cases -- he testified in Chicago
6 Bridge, also, by the way, and Swedish Match. And also,
7 despite what Counsel said, the SSNIP test, which is what
8 the Merger Guidelines suggest in this case, he didn't do
9 econometrics, okay, nobody did them here. He didn't use
10 the Elzinga test, as he said in the brief. Dr. Elzinga
11 wouldn't do the Elzinga test in this case either, as he
12 testified in Evanston, when you have different prices in
13 different localities. He would never even use his test
14 here.

15 He did it the right way, and frankly, if you
16 knew Dr. Simpson, you would know that nobody can tell
17 him how to do it. He went out there and did it what he
18 thought was the right way, came up with the best
19 evidence, and told us and told the Judge what the answer
20 was, and that's what he's supposed to do, unlike a lot
21 of other economists out here who get paid a million
22 dollars to come in here and use the exhibits that were
23 created by the company at issue here and not by him,
24 didn't even know where they came from. That is the
25 test.

1 So, we have a very bright economist here who did
2 exactly what the Merger Guidelines suggested and exactly
3 what the law requires. So, that's nothing that -- I
4 hate to hear that, but I needed to respond to it.

5 Anything else, ma'am?

6 COMMISSIONER BRILL: You have answered that
7 question. Thank you.

8 COMMISSIONER ROSCH: I have one final question.

9 MR. ROBERTSON: Yes, sir.

10 COMMISSIONER ROSCH: Is your position that you
11 don't need to -- and I'm talking about the staff now --
12 that Complaint Counsel does not need to prove a relevant
13 market?

14 MR. ROBERTSON: I think at the end of the day,
15 you have to show some line of commerce under the law.
16 Does that mean you have to start with the Merger
17 Guidelines style of the structural case and work your
18 way down, barriers to entry and all that -- which is
19 what we did. I think if you show effects, then the case
20 law tells you from the effects, you can see what line of
21 commerce you're talking about, where the overlap is and
22 where the direct, immediate effect is.

23 We had a phrase like that in Philadelphia
24 National Bank for the geographic market, for example,
25 and I think that that is the style of analysis that the

1 Commission has continued to use, even in the Whole Foods
2 case. You could find other people who shopped at
3 Walgreen's, but what you're interested in is those
4 customers that look at those two companies -- and in
5 this case, Daramic and Microporous -- as their first and
6 second choice.

7 Here, we had 95 percent of the customers, of the
8 market, come in here and testify that they were their
9 only choice, and I think that we went far beyond what
10 the case law requires and far beyond what anybody would
11 suggest that we would have to do to prove this case.

12 CHAIRMAN LEIBOWITZ: Thank you, Mr. Robertson.

13 MR. ROBERTSON: And let me --

14 CHAIRMAN LEIBOWITZ: Oh, I thought you were
15 stepping down.

16 MR. ROBERTSON: I will do what the Chairman
17 suggested, and quick, before the thing goes red, but
18 I'll see if I can do that real quickly.

19 I just want to add that this is a merger to
20 monopoly in a three-to-two market, three markets --
21 three-to-two-to-one market. We believe that prices have
22 gone up here. I think the evidence is clear. I
23 mentioned some of the citations for that. And I think
24 the injury here is dramatic and, frankly, crying out for
25 a remedy.

1 We didn't have just one or two complaining
2 customers. In fact, most of them weren't complaining.
3 We were dragging them in here, and they were angry, but
4 they were afraid to testify because they would get
5 nailed by Daramic. In fact, a couple of them, we
6 weren't even sure what they were going to say when we
7 put them on the stand, but every one of them said that
8 this was bad. They only had a choice between
9 Microporous and Daramic, and now that choice was gone,
10 and now they're paying higher prices.

11 I think that there is talk in this town about
12 Part 3 reforms and whether the Commission can really
13 rapidly respond to competitive cases like this or merger
14 cases like this, and I know that maybe that's not
15 important, but it's important to the customers in this
16 case. They're paying higher prices now. They're being
17 forced to enter into contracts now because they have no
18 choice, and this is a test case.

19 This is the case, and I ask the Commission,
20 please, to restore competition quickly and completely,
21 and that includes Austria and everything that
22 Microporous had and every advantage they had to compete
23 against Daramic and Entek worldwide. Thank you very
24 much.

25 CHAIRMAN LEIBOWITZ: Thank you, Mr. Robertson.

1 Mr. Welsh, you can come up. We won't start the
2 clock until you're ready.

3 MR. WELSH: Thank you.

4 COMMISSIONER BRILL: Mr. Welsh, I had a quick
5 question for you. I'm sorry. I know you want to use
6 your time, but was there any customer who testified in
7 favor of this merger at the trial?

8 MR. WELSH: That depends I guess on how you
9 would describe in favor. I think if you look at the
10 testimony, for example, of Jim Douglas of Douglas
11 Battery, I think his testimony about his great
12 relationship with Daramic and how he believes Daramic
13 has been a good partner for it in its business and how
14 the merger doesn't, I don't think, cause him concern.
15 That's certainly one that pops to mind.

16 COMMISSIONER BRILL: Okay. So, you have got one
17 customer who does find in favor of the merger?

18 MR. WELSH: That's correct. And I think if you
19 look at the testimony of Mr. Balcerzak at Crown, I think
20 also he was supportive of it, and I guess a related
21 point here that Counsel was talking about, but if you
22 look at East Penn, for example, ^ Dale Eyster, I
23 believe, is the gentleman that testified in that
24 situation, ^ Mr. Eyster testified that there is
25 competition every day between Daramic and the

1 competition, Entek.

2 COMMISSIONER BRILL: Okay, and -- oh, I'm sorry.

3 MR. WELSH: That's fine. And the point of that
4 is --

5 COMMISSIONER ROSCH: Should we not be concerned
6 if this ends up a three to two instead of a two to one?

7 MR. WELSH: Well, you know, I think we're
8 placing labels on things where labels aren't due, and I
9 think -- I heard complaint counsel say twice that this
10 created a three-to-two, two-to-one merger to monopoly
11 and merger to duopoly, and we don't get that. We have
12 to start by looking at did it meet the burden, did they
13 get there, did they show the product markets and did
14 they show the geographic market? I don't believe that
15 they have.

16 I heard, for example, about this UPS market.
17 Look closely at the evidence on that. I don't think
18 there is a market. No one's been able to define that
19 market, how big it is, who the participants are.
20 Dr. Simpson couldn't do it. He didn't even give us any
21 HHI numbers on that. There is nothing there.

22 I heard Counsel say, in response to a question,
23 that this UPS -- Microporous doing UPS, that that was
24 going to come back somehow to North America. I disagree
25 totally. I think Counsel, unfortunately, is mistaken,

1 and I would refer you to our response to Complaint
2 Counsel's Finding of Fact 514. There is no credible
3 evidence that Microporous was doing product for "UPS"
4 that was going to be coming back to North America. This
5 was for a gel battery that was going to compete with
6 Darak. Darak was a product in Europe. It wasn't being
7 sold in North America. There is no connection there.
8 This UPS market doesn't exist, and they have failed to
9 prove it.

10 You know, Dr. Simpson, I deposed him and I
11 examined him on the stand, and he seems like an awful
12 nice guy, and I am sure he's done some work in the past
13 that's been, you know, really good, but in this case,
14 look at what he did. It doesn't hold up. It is
15 not credible work.

16 I mean, I heard Counsel say a minute ago, well,
17 there's this global scale, and that supports wanting to
18 have Feistritz as part of this. Where is the analysis?
19 Where is there any analysis about there being some sort
20 of global scale and having an impact on North America?
21 There isn't any. What the evidence shows is that
22 Feistritz has no impact on North America.

23 Now, Counsel said that I was not accurate in the
24 statement about Microporous selling back from Europe,
25 from Feistritz back to North America. There is no

1 evidence that that occurred, and there was no evidence
2 that it intended to ship. Look at the Microporous
3 business plan. It was never intending to ship from
4 Europe to North America.

5 The point here, as Counsel has alluded to
6 previously, is that this is a situation of local supply.
7 For counsel to say in its argument that this was somehow
8 going to lead to product coming from Europe to North
9 America is simply not supported anywhere in the record.
10 It is complete, utter speculation and, frankly, goes
11 contrary to the entirety of their case. They have
12 argued that it's local supply. They have argued that
13 you can't compete effectively from abroad into North
14 America. It simply doesn't hold up. There is just no
15 connection here between the Feistritz plant.

16 And I heard an awful lot of pejorative sort of
17 statements being thrown at my client about its reason
18 and its rationale for wanting to keep the Feistritz
19 plant, that they're scared or something like that.
20 That's got nothing to do with this. That's the point
21 that I made earlier. They have made some difficult
22 decisions in this economy. This is a tough economy with
23 the recession. They closed their Potenza, Italy plant
24 because they lost -- guess what? -- business to the
25 competition, and when that happened, they had to make

1 some tough calls. They closed the plant. They moved --
2 what existing contracts they had left for Europe, they
3 moved it over to the Feistritz plant.

4 COMMISSIONER RAMIREZ: Counsel, could you
5 respond specifically to the point made by Complaint
6 Counsel that you need to have a European presence in
7 order to effectively do business here in the United
8 States?

9 MR. WELSH: I don't think there's anything in
10 the record at all to support that, and like I said a
11 minute ago, Dr. Simpson did absolutely no analysis on
12 that point either. I think he even testified that he
13 didn't even look at Europe.

14 Now, all this is based upon is the customer
15 preference, and that's it, and as we know from the case
16 law, customer preferences in Oracle, customer preference
17 is not something that should win the day. Let's look at
18 the competitive situation, the competitive analysis.
19 Unfortunately, Complaint Counsel hasn't given us that.

20 Briefly, on coordinated effects, I think we all
21 know under the law that there are a number of things
22 that have to be shown. Now, Complaint Counsel says
23 there's actual evidence of coordinated effects here, and
24 this would be in, I guess, -- their SLI market. There
25 is no evidence of that. Look closely at the record.

1 There is none.

2 Look at whether there has been any sort of
3 punishment on deviation, right? That's part of the
4 test. When the competition took a lot of business from
5 my client, which is in the record, 55 million square
6 meters lost, look for any retaliation. None. I would
7 submit that they have failed on their coordinated
8 effects case, as well as their unilateral.

9 Thank you.

10 CHAIRMAN LEIBOWITZ: Counsel, thank you.

11 Does anybody have any additional questions?

12 Thank you so much.

13 MR. WELSH: Okay.

14 (Whereupon, at 3:26 p.m., the arguments were
15 concluded.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9327

3 CASE TITLE: IN THE MATTER OF POLYPORE INTERNATIONAL

4 DATE: JULY 28, 2010

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before the
9 FEDERAL TRADE COMMISSION to the best of my knowledge and
10 belief.

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DATED: 7/30/2010

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SUSANNE BERGLING, RMR-CRR-CLR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the transcript
21 for accuracy in spelling, hyphenation, punctuation and
22 format.

23

24

25

SARA J. VANCE, CMRS