FEDERAL TRADE COMMISSION

INDEX

ORAL ARGUMENT: PAGE:

BY MR. WELSH 6, 71

MR. ROBERTSON 36
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
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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, 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
rebuttal?

MR. WELSH: I do. Five minutes.

CHAIRMAN LEIBOWITZ: Okay.

You may begin.

MR. WELSH: Thank you.

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

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

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

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

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

MR. WELSH: It is.

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

MR. WELSH: That is correct.

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

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

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

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

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

When you look at --

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

First of all, let me ask you, in terms of weighing the post-acquisition price increases, what actually happened, can we look to the parties' intent
with respect to those price increases as they existed prior to the transaction? leading up to the transaction? presentations to the board?

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

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

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

So, yes, let's look at the documentation. Let's
look at the testimony that came into this hearing about what was the intent of the acquisition, and those are the people that made the decision. A salesman didn't make the decision to buy Microporous. Whatever he says, frankly, is irrelevant.

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

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

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

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

But we come back to the issue, who made the
decisions here? Well, the decisions were made by the
directors of the company. What was their testimony,
which is unrefuted --

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

MR. WELSH: -- unrefuted --

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

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

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

MR. WELSH: Yes, sir.

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

MR. WELSH: These are -- what the evidence shows
is that the pricing issues with customers in this business is one that is a very protracted process. The companies, the separator company, my client, would enter into discussions and into negotiations with a customer. They would announce a price increase, and from an historical relationship with these customers, it is evident that what they're asking for, that the customers are pushing back. These are very strong, sophisticated, they are powerful customers that --

COMMISSIONER ROSCH: Is that true of all of them?

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

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

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

We know that from examples in the record. We know that some of the customers out there have gone to competition. We know that they have gone and engaged in
alliances or joint ventures or other relationships that
are tantamount to sponsorships of expansion to entry.

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

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

COMMISSIONER ROSCH: Didn't some of these
customers testify that they did not have an option?

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

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

So, again, I think that when you look at the
testimony of the customers -- and that's why we started
off this discussion by talking about what sort of
evidence should be looked at. I truly do think -- and I
think it has to be quantitative evidence here, because
the qualitative evidence -- you know, this is like the
Oracle case, and the qualitative evidence that they rely
on, when you look at the witnesses that were on the
stand from these customers, look at the cross
examinations, look at how their testimony holds up.

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

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

MR. WELSH: But, again, I think we've already
talked about this point, but I think what you have to
look at in terms of what the -- you look at what the
board did, you look at their decision, you look at the
testimony of the decision-makers here, and that
testimony is unrefuted. If you want to look at a
document that went to the board, well, let's look at the
totality of the document, not just a piece, because the
totality of the document talks about taking Microporous because of its rubber products.

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

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

MR. WELSH: Yes, sir.

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

MR. WELSH: I think that under the case law, I think under the Merger Guidelines as they exist now, I
think that it is required to look at the markets now before you get to looking at competitive effects.

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

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

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

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

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

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

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

Complaint Counsel tells us absolutely nothing about the products --

COMMISSIONER ROSCH: Counsel, is there any case out there with respect to a consummated merger that requires that product examination up front?
MR. WELSH: I don't have that citation in front of me right now. I would be more than happy, after the hearing, to see if I can find that and get it to you.

COMMISSIONER ROSCH: Okay. Anything else?

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

MR. WELSH: Looking at facts?

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

MR. WELSH: Yes.

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

MR. WELSH: I think the Oracle case, for example, is one where the Court talked about having quantitative evidence, and it went through a whole analysis. It looked at qualitative, sure, but it came
down and said that the qualitative evidence was of no value for a variety of different reasons in that case.

CHAIRMAN LEIBOWITZ: Is that a consummated merger case?

MR. WELSH: I'm sorry?

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

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

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

And I think here, when you look at the evidence, when you look at Dr. Simpson and what he did, whether it's on the product market, whether it's on the geographic market, whether it's even looking at anticompetitive effects, whatever, I think you'll see even the Judge, the Administrative Law Judge, was
critical of him in certain respects. Dr. Simpson simply
failed. There was not the sort of evidence that I would
hope -- I would sure hope would be in front of the
Commission to make such an important decision here for
my client.

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

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

You know, that is why I think we have to
require, we have to look at quantitative evidence here.
I think it is incumbent upon the Commission to do that,
to make sure that Complaint Counsel meets its burden,
because to make these sorts of decisions now where
Respondent has had to deal with the competition, sure,
and to deal with this recession, and to make decisions
which have impacted its business in Europe, as well as
decisions that impact the business here, I think it's
important for the Commission to understand that and to
weigh that and to look at that carefully and to
understand the repercussions of those things.

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

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

MR. WELSH: Yes.

COMMISSIONER KOVACIC: And that is, if you were
to point us to a single appellate opinion that focuses
on the evidentiary standard and underscores the need for
quantitative evidence of adverse effects, what would you say we ought to read most carefully? You mentioned Oracle. Any appellate decisions that underscore this point to you and attach the same emphasis as you just described?

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

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

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

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

COMMISSIONER ROSCH: Was Baker Hughes a consummated merger case?

MR. WELSH: No, it was not, but I don't think that the fact of a consummated merger in terms of when we're looking at this need for quantitative evidence, I think that the need here for quantitative evidence is even greater than if you were looking at it in an unconsummated transaction. I think that there's
evidence that -- there was evidence out there, and the
fact of the matter is, Complaint Counsel failed to prove
its case of anticompetitive effects with the evidence
that was in front of them.

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

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

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

He gets a bit of a pass on that by the
Administrative Law Judge in the decision. The

Administrative Law Judge just simply doesn't even note

the fact that he failed and looked at the wrong

statistics. He just moves on, and he says, well, he got

the right statistics on something else. This tells us

nothing.

Why aren't they using the actual figures out

there? Why aren't they coming in and trying to prove

their case with the evidence that should be in front of

the Commission, not looking at things or looking at it

through some customer testimony that is not holding up

to cross examination or looking at it through selected

presentations of documents and ignoring a whole host of

others.

We know from the record --

COMMISSIONER RAMIREZ: Counsel, with regard to

the point about customer testimony, are you taking the

position that it's always unreliable?

MR. WELSH: I'm not saying it's always

unreliable, no, but I think in this case, when you look

at the cross examinations -- and I invite you to do

that. I think it's really important to get in there and

to look at those cross examinations and look at the

exhibits and then question, you know, is this testimony

consistent? Is it really holding up? Is the testimony
that they say in the deposition the same as their

COMMISSIONER RAMIREZ: But when it comes to the

remedy, don't you rely on customer testimony to argue

against the remedy in the ALJ's decision?

MR. WELSH: We do in a couple places, sure. For

example, one of the customers has testified in the
courtroom that -- and I think there's actually an

historical document that was consistent, and that's why

he testified that way in the courtroom, because he had

no other choice -- but he testified that having a plant

in Europe and having a plant in North America is a

preference, okay? It is not a requirement for doing

business with that customer, and that's really an

important concession and admission by that third party,
because we hear a lot about, you know, the need for

having the Feistritz plant.

But I want to come back to that point, because

that's a central error, I think, and it shows some of

the problems, whether it's customer testimony or whether

it's other things, but it shows some of the problems

with the Administrative Law Judge's opinion.

COMMISSIONER RAMIREZ: Let's focus on the remedy

point. Why don't you get to your argument on that.

MR. WELSH: Okay. When we look at what the
order has said, it says it's going to be full

divestiture. What we know here from the Feistritz plant
is that -- well, first of all, when you look at the
initial decision, the portion of the decision that deals
with Feistritz is one paragraph out of 347 pages.

That's the level of detail that went into this. We had
24 days of hearing, we had 35 live witnesses, a number
of people put on through deposition, and we get this
analyzed in one paragraph.

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

They cite to a business plan that was done by
Microporous to build that plant. Look at the business
plan. The business plan talks about it's going to
supply separators for Europe. We're talking about two
different markets. Complaint Counsel can't say
otherwise, because that's been their position all along, two different markets. We've got Europe; we've got North America.

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

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

COMMISSIONER ROSCH: Right. I understand that.

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

COMMISSIONER ROSCH: What were they going to do
with the rest of the capacity at Piney Flats?

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

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

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

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

MR. WELSH: I think what it would have meant is that Microporous would have been in some very serious financial trouble, because we know that Microporous, with its Feistritz operation, that it had $46 million of debt going into this deal, that this plant was running at 38 percent capacity after, that if you took the Feistritz plant post-acquisition -- said no, this merger didn't occur, and we kept this plant -- as a stand-alone plant, what it would mean? $1.9 million negative to its income.
This plant was a draw. The plant in Feistritz only had -- it had two lines, two PE lines. One of them had a contract on it and it was not filled, okay, it was not 100 percent utilized. The other line, at the time of the acquisition, had zero contracts on it. Zero. These lines are 11 million square meters. It had zero on it.

COMMISSIONER ROSCH: Are those lines severable?

MR. WELSH: Are they what?

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

MR. WELSH: They are in the same plant.

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

MR. WELSH: I think it could be, but we're not asking for that. That's not our argument. Our argument is we have to look at what -- starting with what should be, I think, the complaint that Complaint Counsel has argued all along, which is we've got a North America market. Okay, you know, the law says, when you're looking at relief, and, you know, when you look at divestiture as an appropriate remedy of relief, you have to look at whether you're restoring competition to the level in the market. That's your job. That's the task.
COMMISSIONER BRILL: Just to be clear, you're not asking -- it's all or nothing for you. Either the Austria plant is divested or it's not divested. You're not asking to split that baby. I just want to be clear.

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

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

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

COMMISSIONER BRILL: I understand.

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

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

MR. WELSH: It has no impact on the North American market. There was no separator going from
there to here. In fact, one of the arguments that Complaint Counsel has made all along is that, well, local supply is important. That's why we have a North America geographic market, because the customers don't want to go to Europe. The ALJ has even found -- and Complaint Counsel has argued all along, too -- that foreigners can't come in and compete effectively in North America. How can you find that and then say that, well, gosh, we need to have Feistritz; we need to have that plant come in, because it somehow has some impact in North America?

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

But on top of that, we know from the order -- if you look at it, there's something called the line in the box, okay? Well, the line in the box is this. It's another PE line. It's 11 million square meters that had been purchased prior to the merger. It's sitting there
and it's ready to go. It's ready to be installed. The
ALJ had found that there was actual work done in the
Piney Flats facility in Tennessee to put that line in
there. There's a little segment in the middle of the
plant where they would put it down. And that line could
go in there.

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

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

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

COMMISSIONER ROSCH: Yes.

MR. WELSH: They were shipping to Europe. They
were shipping to China. They were shipping all over the
world, which, again, goes to our argument that this is a
global market, but that is not what Complaint Counsel has argued, and that's not what the ALJ found. He found a North America market. The fact that they were shipping out of Piney Flats, I think, is supportive of us. The point is, we're talking about what competition levels are in North America --

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

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

COMMISSIONER ROSCH: Where does the record show that?

MR. WELSH: From Europe, there are.

COMMISSIONER ROSCH: Where does the record show that?

MR. WELSH: I don't have a citation in hand, but I know it's in the record, that there were imports, some small imports from a company called Amer-Sil, I believe, and I think that when you look at the totality of the record when it comes to Asia, competition in Asia, you will see a lot of interaction between customers here and Asian competitors.
COMMISSIONER ROSCH: Imports is what I'm asking about.

MR. WELSH: And I'm saying that with respect to that, when you look at what the findings are by the Administrative Law Judge on who is in these alleged markets and who's out, you're going to find the most arbitrary findings that I've ever seen, and I think if the Commission's going to say that the Administrative Law Judge is fine in finding that Microporous could possibly be in this supposed UPS market because it had a product that had been sent out for testing and that's where it was, or if you're going to find that Microporous was somehow in an SLI market because it was having some discussion with a customer, even though its board, the IGP board, said you're not going to get into SLI -- and that's a pretty darned definitive statement there, which should indicate a lot there -- but if you are going to say that they're somehow in that, then why aren't we looking at the competition in Asia and saying that those connections, those discussions, are just as equally as important? We know from the competition and we know from Daramic's own documents pre-acquisition that they considered the Asian competitors to be a factor, to be a factor in North America today. We can't ignore all that.
So, while I may not be able to cite you chapter and verse about some products actually being shipped in from Asia, there is no reason why they can't. We know that these customers, these large, sophisticated customers, have discussions with these folks all the time, and they've done alliances with these same folks, and they could bring them in. They've done it in the past. They could do it. So, I think we would have to look at the totality of this situation.

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

The former Microporous employee, now a Daramic employee, wrote in an email prior to the merger that as to those transactions -- this was about ten days before the merger, ten days before -- and he wrote in that email about how those negotiations or discussions or
whatever were going with that customer, discussions that
had gone on for a long time in the past and had bore him
no fruit, and he said, well, that and $1.25 will get you
a cup of coffee, and that was accurate. But instead, we
have volumes in the initial decision that say, okay, you
know, they were going to get into this.

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

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

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

Mr. Robertson?

MR. ROBERTSON: Thank you, Mr. Chairman.

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

First of all, how could you possibly allege the
existence of a PE relevant market, even in the
alternative -- which apparently Complaint Counsel did --
when some of Microporous' products are manifestly not PE
products because they're made of rubber? That's the
first question.

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

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

That's why we said -- that's not a defense by
them, but that was not the theory that we tried the case
on, and the reason was the facts didn't support it. The
facts didn't support a PE market when as, Mr. Rosch,
you're right, for deep-cycle batteries. We had two
batteries in here, the greatest selling battery in the
market, period, by Exide, two identical batteries, two
identical warranties, the same price, but one had Flex-Sil in it, which is a rubber product, and one had a PE product, HD made by Daramic. To the customer out there, you and I, they wouldn't know the difference. They are used for exactly the same purpose. So, saying there's a separate PE market makes no sense. Now, to answer your second question, was there overlap? Did a customer use one separator for a different product? The answer is in 0.017 percent of the time. We counted them. That's how small, in all the millions of separators that were sold. We went to their database, which is PX-1450, and actually counted them. There is no overlap other than that. And they started out this case with theory that there was some massive overlap. That's all it is. It's less than a percent. It's 0.017 percent.

Instead, what we did is we asked the customers and we went to the company documents to find out how they actually categorized these products, and if you look at PX-78, for example, which is Microporous' own analysis, just two weeks prior to the merger -- they thought the merger wasn't going to go through, they were selling themselves out to other people -- they put together a presentation, PX-78. They separated the products in exactly the way that we did, and there's a
good reason for that, because a deep-cycle product has
to be tested for years, has to be designed and tested
for a particular purpose.

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

COMMISSIONER ROSCH: But Mr. Welsh says we ought
to ignore that testimony because it comes from
customers. Is your position different in that regard
that there are no alternatives?
MR. ROBERTSON: It absolutely is. If we had one
complaining customer, two complaining customers, and
business documents, internal business documents didn't
match what they said, we would have the Oracle case. We
didn't have that. We had every customer coming in here,
including the ones that they brought in. Their own
witnesses, Crown and East Penn, both testified that
Daramic was their only choice at this point. Before
that, they had Microporous, and now they said it's only
Daramic. It was their witnesses who said the same
thing. Their internal documents said the same thing as
well.

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

COMMISSIONER ROSCH: Yes.

MR. ROBERTSON: Starting off --

COMMISSIONER ROSCH: You answered that question.

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

But we started off with this, a salesman wrote
some documents? Let's be real clear here. The person
who wrote the documents that we keep talking about was
the head of Daramic. He was the general manager of the
whole company. It was Pierre Hauswald who wrote those
documents, and they were actually not only approved by
the board, but one of the documents in camera that you
can look at later was PX-462, you will see whether the
CEO of Polypore --

COMMISSIONER KOVACIC: Is that in your slide
deck?

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

COMMISSIONER KOVACIC: Okay.

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

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

Now, that's pretty important, because that
market share was going to fill these plants. These
plants that they claim are having trouble being filled,
the one in Austria, for example? You wonder why they're fighting so hard not to give it up if it's such a bad plant, and they think it's a gift that they moved some business into that plant?

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

MR. ROBERTSON: Yes, sir.

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

MR. ROBERTSON: Yes, sir. Absolutely.

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

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

COMMISSIONER ROSCH: I'm talking about effects, because Counsel's position is that you have to show effects, even in a consummated merger case, through, as
I think he put it -- what was that evidence? -- it was quantitative evidence --

MR. ROBERTSON: Well --

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

MR. ROBERTSON: Well, I think ^ Phillipsburg National Bank is a very good piece of authority, because there was a small segment of the market, a small segment of four customers that actually were saying they were affected. There was no econometrics back then. That case was relied upon by Whole Foods, and Judge Brown -- which is a premerger case -- said that you could back into the market definition. You don't have to do market definition first and effects second. You can prove it through effects. And that was this Commission's position in the Whole Foods case, in the brief. But we did more than that. We actually showed effects here. He said that there's no post-acquisition evidence of prices going up? Look in the initial decision at page 562 to 63 and 904. Exide's prices went up. They didn't stay the same. They actually went up. Bulldog had a 10 percent price increase. At the initial decision, 613 to 614, a 10 percent price increase. This
is important, because this was a small company, not a power buyer, a small company who came in here, and when this counsel kept saying to the Judge, "Oh, all these people are all biased, they're all in here lying," and the Judge looked at him and said, "Even Bulldog?"

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

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

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

CHAIRMAN LEIBOWITZ: In going back to Whole Foods, what I see in Evanston, payers were paying two and three times the amount, and it may have been several years later, so I don't know if this rises to the level of that kind of quantitative evidence, and going back to your quantitative evidence, what was the District
Court's determination with respect to quantitative evidence in Whole Foods, as you said?

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

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

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

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

In this case, we put the CEO on the stand. We showed his documents to him. We actually did cross examine the CEO. We cross examined Mr. Hauswald, the
head of the company, but we actually put that evidence
in here and showed their intent.

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

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

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

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

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

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

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

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

COMMISSIONER RAMIREZ: In the UPS market.

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

Daramic's product has carbon black in it, which causes scum, black scum in the battery. UPS is a very important battery. We have a bunch of them in the first floor of this building. Now, they're in hospitals.
They put the lights on when the lights go out. And what
Microporous had done is come up with a product that
resolved the black scum issue. It was a slight
variation on CellForce, which is patented, which is, by
the way, made from Ace-Sil. They say that's not a part
of the case, but it's a key ingredient to CellForce in
Tennessee and in Austria.

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

COMMISSIONER RAMIREZ: But they never sold that
product.

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

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

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

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

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

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

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

COMMISSIONER RAMIREZ: Let me ask you this: Just for the purposes of argument, if we were to accept
Respondent's argument that Microporous was not a potential competitor in the UPS market, what impact would that have on the issue of competitive effects and the remedy in this case?

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

They also made other things that were not even part of this case, that were part of that plant, and UPS was one of those areas where they were about ready to sell, they had already innovated, they had already agreed with EnerSys to sell that product. Mr. Brilmyer said that he was already on the line to sell it, he had already budgeted for it. But even if you say, well, maybe it wouldn't have happened, these guys were afraid of them. They were afraid of them, and the only way to replace that perceived competition is to put Microporous
back in the same position it was in, where it was
capable of being a competitor, if it's a perceived
competition case. Otherwise, they are not going to
believe that they are a perceived competitor unless they
know they can do it. They have to have the capability
to do that, and that includes having global scale, which
was essential to what Microporous was trying to do, and
that includes Austria, which is why they're so afraid of
losing Austria.

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

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

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

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

MR. ROBERTSON: Yes, sir.

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

Do you recall in any of the pre-Hart Scott
cases, where the parties had combined assets, where the
transaction had been completed, if any of the cases
touched upon the relevance of effects evidence beyond
the presumptions that you've been referring to before?
MR. ROBERTSON: Yes, sir. I believe the best description of that interplay is found in General Dynamics, a case and law that the defense bar likes, but if you read the case, it actually supports the Philadelphia National Bank --

COMMISSIONER KOVACIC: 1974?

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

And what the Court said was that you don't have to rely on that evidence if it's not there, but by golly, if you have it, then you've got a very good case, and that's what we have here. We have actual post-acquisition evidence here. So, I think --
COMMISSIONER KOVACIC: I'm wondering how much the case depends on the availability of that kind of evidence. Assume for a second that it didn't exist, and to think about the significance of these earlier decisions, two separate theories of liability, unilateral effects and coordinated effects. I gather that you would be saying that looking at the coordinated effects case, where you're left with, say, two participants --

MR. ROBERTSON: Yes, sir.

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

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

COMMISSIONER KOVACIC: Yes.

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

COMMISSIONER KOVACIC: Would you say, to look at unilateral effects for a second, would the view --

again, based on thinking a bit about the logic of the
earlier cases, that if you have what is assumed to be
the dramatic example of a merger to monopoly, and just
assume that that's the circumstance, notwithstanding
Counsel's arguments to the contrary, assume it is a
merger to monopoly, is the theory there in a unilateral
effects case that even if adverse consequences have not
manifested themselves -- prices, innovation, quality --
that there is still the danger that that could transpire
in the future and that that's reason to be concerned and
to have a continuation of the single-firm structure in
the future?

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

But also, as far as coordinated effects, to not
miss that point, we actually had evidence of coordinated
effects here, not hypothetical, but actual evidence from
the company's own documents, saying that they were
following the leader and that they were not aggressively
pricing against each other. Those were the two
companies before Microporous came on the scene.

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

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

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

MR. ROBERTSON: It was, absolutely.

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

MR. ROBERTSON: I think the standard is do you
see evidence of their not doing -- behaving in an oligopoly kind of way? Are they just following the leader or are they lowering prices in order to capture sales? And that, in fact, is what they were doing. They talk about that briefly in the Merger Guidelines, the new ones, but that's what we're talking about and that's what happened here.

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

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

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

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

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

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

MR. ROBERTSON: It has been our practice here for years and it's in the Merger Guidelines talking
about it, and it's -- you don't have to call it a
maverick.

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

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

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

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

CHAIRMAN LEIBOWITZ: You mentioned the Feistritz
plant before and also the notion of opening the door for
competition and I want to come to the remedy for just a
little bit of discussion, because I just want to
understand better the rationale for requiring
divestiture the Feistritz plant in a case involving competition in North America, because Feistritz, it's in Austria; Austria is in Europe. So, could you explain a little more about this?

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

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

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

Now, let me give you an example. They say, well, that's inconsistent with the market definition and all that. It is not. Let me give you just a very real
world example. Major law firm, you want to get

international offices so you can get more business here.

Does that mean that the prices for lawyers in Indiana --

COMMISSIONER KOVACIC: And lose lots of money in

the international offices.

MR. ROBERTSON: Oh, there sure are, but a lot of
times you do it -- we did it in my old firm -- to get

business here, and it expanded your business

opportunities here, but it doesn't mean the price of

lawyers in Indiana is the same as in Germany.

CHAIRMAN LEIBOWITZ: No, I understand, but there

is something called the fallacy of analogy -- even

though that's a very good analogy in some ways.

What's the price effects in North America? Is

it direct? Is it indirect? Disciplined or

undisciplined?

MR. ROBERTSON: Here's where it's direct: It

has to do with -- when I say it has to do with global

scales, it's economies of scale. It's having a large

enough operation so that they can pay less for the

transportation to ship things over to Europe, which is

what they were doing before, but let me give you another

real example, which is key to this issue.

Half of what's made in Austria is CellForce,

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

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

COMMISSIONER RAMIREZ: Wasn't Microporous competitive and a vigorous competitor before
commencement of operations in Austria?

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

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

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

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

MR. ROBERTSON: No, it's in one building, unless
you are going to take the equipment out and put it in
some other plant, and then there wouldn't be any reason
to have that plant. They built the plant with the
economies of scale believing they had to have at least
two lines in it, one for CellForce and the other for
SLI, for car batteries in Europe, and that's how they
made it. They actually did a study to determine whether
it was economical -- a lot of that's described in
PX-611 -- and they needed both plants in order to make
this work.

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

COMMISSIONER RAMIREZ: Can you also walk me
through why it's necessary to divest the line in the
box?
MR. ROBERTSON: Well, the line in the box was meant to help expand what was called the backfill in Tennessee. They had contracts, for example, for East Penn. They were working with East Penn. The East Penn project was shut down, as Mr. Trevathan actually testified at trial. He was the plant manager for Microporous and then became the plant manager for Daramic. It was shut down only because of the acquisition, and so that was destined to do that. They could not fulfill that deal with East Penn without the line in the box.

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

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

MR. ROBERTSON: Absolutely. That's why they bought the equipment in the first place, because they
went out to make the sales to the competitors -- the customers, the customers were saying, look, you only have one PE line in Tennessee, and the other one is Flex-Sil and Ace-Sil. You don't have space for us, and I'm afraid that you don't have enough capacity. We can't give you all of our business.

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

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

MR. ROBERTSON: Those were the biggest customers, because, for example, in SLI and also in motive, Exide and Enersys are the only two real customers out there. They have over 90 percent of the market. And East Penn and Exide are -- besides JCI, are the other bigger players in SLI car batteries. And
there are other smaller customers out there as well, but if you are going to fill a whole line, you need some big customers, which is why you also need global scale, because if you want to go and get that business from a big customer, to allow you to add enough scale where you can take on more smaller customers, you have to promise that we'll be able to get your separators there.

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

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

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

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

MR. ROBERTSON: Oh, we would be talking about a change of 695 instead of 4000 in one market, but, you know, I don't do things just to get the right numbers, I do things to get it right. I could have taken the easy
way out, just agreed with them and said, let's call it a
day, you have a liability and let's have a remedy.

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

He did it the right away, and frankly, if you
knew Dr. Simpson, you would know that nobody can tell
him how to do it. He went out there and did it what he
thought was the right way, came up with the best
evidence, and told us and told the Judge what the answer
was, and that's what he's supposed to do, unlike a lot
of other economists out here who get paid a million
dollars to come in here and use the exhibits that were
created by the company at issue here and not by him,
didn't even know where they came from. That is the
test.
So, we have a very bright economist here who did exactly what the Merger Guidelines suggested and exactly what the law requires. So, that's nothing that -- I hate to hear that, but I needed to respond to it.

Anything else, ma'am?

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

COMMISSIONER ROSCH: I have one final question.

MR. ROBERTSON: Yes, sir.

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

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

We had a phrase like that in Philadelphia National Bank for the geographic market, for example, and I think that that is the style of analysis that the
Commission has continued to use, even in the Whole Foods case. You could find other people who shopped at Walgreen's, but what you're interested in is those customers that look at those two companies -- and in this case, Daramic and Microporous -- as their first and second choice.

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

CHAIRMAN LEIBOWITZ: Thank you, Mr. Robertson.

MR. ROBERTSON: And let me --

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

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

I just want to add that this is a merger to monopoly in a three-to-two market, three markets -- three-to-two-to-one market. We believe that prices have gone up here. I think the evidence is clear. I mentioned some of the citations for that. And I think the injury here is dramatic and, frankly, crying out for a remedy.
We didn't have just one or two complaining customers. In fact, most of them weren't complaining. We were dragging them in here, and they were angry, but they were afraid to testify because they would get nailed by Daramic. In fact, a couple of them, we weren't even sure what they were going to say when we put them on the stand, but every one of them said that this was bad. They only had a choice between Microporous and Daramic, and now that choice was gone, and now they're paying higher prices.

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

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

CHAIRMAN LEIBOWITZ: Thank you, Mr. Robertson.
Mr. Welsh, you can come up. We won't start the

clock until you're ready.

MR. WELSH: Thank you.

COMMISSIONER BRILL: Mr. Welsh, I had a quick

question for you. I'm sorry. I know you want to use

your time, but was there any customer who testified in

favor of this merger at the trial?

MR. WELSH: That depends I guess on how you

would describe in favor. I think if you look at the

testimony, for example, of Jim Douglas of Douglas

Battery, I think his testimony about his great

relationship with Daramic and how he believes Daramic

has been a good partner for it in its business and how

the merger doesn't, I don't think, cause him concern.

That's certainly one that pops to mind.

COMMISSIONER BRILL: Okay. So, you have got one

customer who does find in favor of the merger?

MR. WELSH: That's correct. And I think if you

look at the testimony of Mr. Balcerzak at Crown, I think

also he was supportive of it, and I guess a related

point here that Counsel was talking about, but if you

look at East Penn, for example, ^ Dale Eyster, I

believe, is the gentleman that testified in that

situation, ^ Mr. Eyster testified that there is

competition every day between Daramic and the
competition, Entek.

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

MR. WELSH: That's fine. And the point of that

is --

COMMISSIONER ROSCH: Should we not be concerned

if this ends up a three to two instead of a two to one?

MR. WELSH: Well, you know, I think we're

placing labels on things where labels aren't due, and I

think -- I heard complaint counsel say twice that this

created a three-to-two, two-to-one merger to monopoly

and merger to duopoly, and we don't get that. We have

to start by looking at did it meet the burden, did they

get there, did they show the product markets and did

they show the geographic market? I don't believe that

they have.

I heard, for example, about this UPS market.

Look closely at the evidence on that. I don't think

there is a market. No one's been able to define that

market, how big it is, who the participants are.

Dr. Simpson couldn't do it. He didn't even give us any

HHI numbers on that. There is nothing there.

I heard Counsel say, in response to a question,

that this UPS -- Microporous doing UPS, that that was

going to come back somehow to North America. I disagree

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

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

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

Now, Counsel said that I was not accurate in the statement about Microporous selling back from Europe, from Feistritz back to North America. There is no
evidence that that occurred, and there was no evidence
that it intended to ship. Look at the Microporous
business plan. It was never intending to ship from
Europe to North America.

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

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

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

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

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

Briefly, on coordinated effects, I think we all
know under the law that there are a number of things
that have to be shown. Now, Complaint Counsel says
there's actual evidence of coordinated effects here, and
this would be in, I guess, -- their SLI market. There
is no evidence of that. Look closely at the record.
There is none.

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

Thank you.

CHAIRMAN LEIBOWITZ: Counsel, thank you.

Does anybody have any additional questions?

Thank you so much.

MR. WELSH: Okay.

(Whereupon, at 3:26 p.m., the arguments were concluded.)
CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9327

CASE TITLE: IN THE MATTER OF POLYPORE INTERNATIONAL

DATE: JULY 28, 2010

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

DATED: 7/30/2010

SUSANNE BERGLING, RMR-CRR-CLR

CERTIFICATION OF PROOF READER

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

SARA J. VANCE, CMRS