United States of America

FEDERAL TRADE COMMISSION

Docket No. 9327

In the Matter of

POLYPORE INTERNATIONAL, INC.,

a corporation.

RESPONDENT'S REPLY BRIEF

PUBLIC DOCUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used in this Reply Brief:

CCAB	Complaint Counsel's Answering Appeal Brief
CCFOF	Complaint Counsel's Proposed Findings of Fact
CCPTB	Complaint Counsel's Post-Trial Brief
CCPTRB	Complaint Counsel's Post-Trial Reply Brief
ID	Initial Decision (reference to page number)
IDFOF	Finding of Fact in Initial Decision (reference to finding number)
PX	Complaint Counsel's Exhibit
RAB	Respondent's Appeal Brief
RFOF	Respondent's Proposed Findings of Fact
RPTB	Respondent's Post-Trial Brief
RPTRB	Respondent's Post-Trial Reply Brief
RPTBRH	Respondent's Post-Trial Brief for the Reopened Hearing
RRCCFOF	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
RX	Respondent's Exhibit

I. INTRODUCTION

The global battery separator market – over two years after the Acquisition – remains intensely competitive, and this Acquisition has not impaired and does not threaten to adversely affect that competition. (RAB 1-6). Complaint Counsel complain about monopoly and duopoly markets but must strain to do so by improperly defining the markets, and relying on speculative evidence, to produce such structural outcomes. Although Complaint Counsel and the ALJ acknowledge the importance of valid economic analysis in a Section 7 case, Complaint Counsel's Answering Brief confirms that their case was devoid of sound, economic analysis and evidence.[1] Instead, Complaint Counsel rely on a patchwork of biased customer testimony, snippets from documents, conjecture and speculation.

The best example of the defective nature of Complaint Counsel's case is the portion of the ALJ's order requiring divestiture of the plant in Feistritz, Austria, which Respondent contends is wholly and particularly unsupported by the evidence and the law. Complaint Counsel admit that the pertinent issue is whether "[d]ivestiture of [the] Feistritz Plant is necessary to restore competition in North America." (CCAB 55). Respondent has shown that no competition in need of "restoration" has been lost in North America and that the Feistritz plant has never contributed in the production of separators or otherwise to competition in North America. When production of CellForce was shifted from the Microporous plant in Piney Flats, Tennessee to Feistritz after the Acquisition, { }. As of the time of the hearing, the CellForce line in Piney Flats was operating at approximately { } of capacity. Any acquirer of the Piney Flats plant can compete effectively without the Feistritz plant in the North American

[1] For instance, rather than rebut Respondent's telling display of the defects in Dr. Simpson's economic analysis, on which Complaint Counsel rely, they criticize Respondent for having thoroughly detailed all of those deficiencies. (CCAB 2, 16).

market advocated by Complaint Counsel. Accordingly, Respondent is addressing this issue first because, not only is the ALJ's decision on Feistritz in error, but it is an error that emphatically manifests the overall fault lines throughout the ALJ's decision.

Among a number of erroneous conclusions, two particularly egregious examples of the unsupportable conclusions of the ALJ include:

- Finding Microporous to be a participant in an SLI market even though it was not producing separators for SLI applications, had no prospect for doing so and was told by its owners that it should not begin making separators for SLI applications.

- Finding Microporous to be an actual participant or uncommitted entrant in a supposed UPS market when it had no such product for sale and no customer had even approved such a product. Yet, the ALJ did not find Respondent's competitor, Entek, to be a participant or uncommitted entrant in two of Complaint Counsel's alleged markets (motive and deep cycle), even though Entek had made separators for such use and {
  }.

The reasons for this Acquisition were not the anticompetitive motivations Complaint Counsel claim, but an interest at Daramic in extending its product lines. Again by way of example, Complaint Counsel and the ALJ ignore evidence that consistently identified the reason for the Acquisition – Respondent's interest in expanding its product line:

> ***[W]e are pleased to announce that we signed today with Microporous, a LOI, for the acquisition of their business. We are very excited as it will allow Daramic to have access to a different technology of making separators, for specific lead acid batteries, niche market where we are either hardly or not at all present today.*** (RX01630).

Michael Graff, the Chairman of Polypore's Board of Directors, testified:

> ***The rationale of the acquisition was as I stated before. It allowed us to be more competitive as a company by broadening our product line, to include rubber separators, which we didn't have and our customers were interested in.*** (Graff, Tr. 4877, *in camera*).

Robert Toth, the Chief Executive Officer of Respondent and a member of the Board, also testified that the strategic reason for the Acquisition was to expand Daramic's product line:

> ***We're interested in the rubber technology and the rubber platform and access to the deep-cycle subsegment of the market....*** (Toth, Tr. 1552, 1554-55).

The testimony of Graff and Toth remains unrefuted. Instead of addressing that testimony, Complaint Counsel avoid it by citing out-of-context segments of Board presentations which discuss the financial implications of the Acquisition. (CCAB 10).

At the time of the Acquisition, Microporous produced Ace-Sil, Flex-Sil and CellForce, the first two being pure-rubber with CellForce, a PE/rubber product. Daramic's pure-PE separators were not competitive with Microporous' products. (RAB 2). In the proper all-PE market, even when looking only at North America, the Acquisition of Microporous added an insignificant market share of { }. Accordingly, to the extent the Acquisition was not pure market extension, it was of no competitive consequence. (RAB 2-3). Flex-Sil was alone without competition in its own separate market. When it was transferred from Microporous to Daramic, it had no competitive impact.[2]

The ALJ's Initial Decision reflects a provincial and limited view of this industry, both in terms of its products and geography. It is only when the ID concludes that any divestiture in this case must include the Feistritz plant that it speaks of the global aspects of the industry. At that point, certain important facts are conveniently ignored, including that Entek is a major worldwide suppliers with only two plants (Oregon and the U.K.) and that, according to Complaint Counsel, Microporous was a "worldwide maverick" in the separator industry when it had only one plant in Piney Flats.

Complaint Counsel improperly attempt to place the burden on Respondent to prove the merger did not violate Section 7. They incorrectly hide behind concentration levels, contending that once they have shown "an undue increase in concentration" in each alleged market, the

[2] Respondent also showed, and Complaint Counsel do not disagree, that Ace-Sil separators belong in a market by themselves in which they have no competition, and the Acquisition had no competitive effect.

"burden then switches to the respondent to show why . . . particular facts and circumstances in each market clearly show that the transaction is unlikely to have such [anticompetitive] effects." (CCAB 30). Complaint Counsel misstate the law – the burden does not switch. Complaint Counsel always bear the burden of persuasion. United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (DC Cir. 1990); Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324, 1340 (7th Cir. 1981).

Even if Complaint Counsel had established their markets and high concentration levels, Respondent need only show that the "concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the market." Baker Hughes, 908 F.2d at 991 (quoting United States v. Marine Bancorporation, 418 U.S. 602, 631 (1974); see also United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120 (1975); FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001) ("To rebut the presumption, the defendants must produce evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." (quoting Citizens & Southern Nat'l Bank, 422 U.S. at 120)). Respondent need only "cast doubt" on the "the persuasive quality of the statistics to predict future anticompetitive consequences," and can do so by offering evidence of non-entry factors including, for example, changing market conditions. See H.J. Heinz, 246 F.3d at 715, fn. 7 (evidence to cast doubt on statistical evidence includes evidence related to ease of entry and "continuation of active price competition"); United States v. General Dynamics Corp., 415 U.S. 486, 503-04 (1974); Baker Hughes, 908 F.2d 984 (noting non-entry factors used to successfully rebut *prima facie* case); United States Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (April 2, 1992, revised April 8, 1997) (hereinafter the "Merger Guidelines"), Sec. 1.52. After Respondent makes its case, the burden of producing additional evidence of anticompetitive effects shifts to

Complaint Counsel and "merges with the ultimate burden of persuasion, which always remains with" Complaint Counsel. Baker Hughes, 908 F.2d at 982-83.

As Respondent has shown, Complaint Counsel's statistical case fails. (See RAB 25-28). Respondent's evidence casts substantial doubt on the concentration ratios as accurate depicters of the economic characteristics of the alleged markets, thereby rebutting any presumption of illegality. Among other things, the evidence shows that Complaint Counsel's product and geographic markets are wrong. (See RAB 10-24). Instead, the proper product market is an all-PE market with a separate Flex-Sil market, and the proper geographic market is global. (See RAB 15-18, 23-24 and *infra* pp. 19-22). Indeed, Complaint Counsel's alleged geographic market is not even supported by the Elzinga-Hogarty test, which is cited approvingly by the ALJ in the ID. (RAB 23). Complaint Counsel, though, is silent on this point in their Answering Brief, thus conceding that the geographic market borne out by this test is global, not North America.

Beyond Complaint Counsel's flawed markets, which invalidate their HHI numbers, Respondent has demonstrated that Daramic continues to face robust competition from Entek and Asian competitors. (See RAB 39-41, 43-44 and *infra* pp. 37-40). There is no dispute that { } (RAB 39) and competed with and beat Daramic in obtaining business from East Penn (RFOF 784). Moreover, { } ***after*** the merger. (RAB 39). This evidence is compelling, especially in the vacuum left by Complaint Counsel's failure to do any valid post-Acquisition economic analysis.[3]

[3] Complaint Counsel attempts to dismiss this evidence. However, these facts are unrefuted: (1) As part of Daramic's acquisition of the Corydon facility from Exide, { } (RFOF 518-527, 1500); (2) { } (RFOF 1501); (3) { } (RFOF 1549); and (4) { } (RAB 49). {

For all of these reasons and others contained in Respondent's Appeal Brief and herein, the case presented by Complaint Counsel and largely adopted by the ALJ cannot be affirmed by the Commission.

II. DIVESTITURE OF THE FEISTRITZ PLANT IS IMPROPER BECAUSE IT IS NOT NECESSARY TO FULLY RESTORE COMPETITION ALLEGEDLY LOST IN NORTH AMERICA.

The most striking example of the lack of objective analysis in this case is the ALJ's decision to order the Respondent to divest the Feistritz plant. Accordingly, without conceding liability, Respondent highlights the Feistritz divestiture issue first to show the shortcomings of Complaint Counsel's case and the ALJ's error in accepting it. Without offering much argument or evidence, Complaint Counsel would like the Commission to rubber-stamp a divestiture. Careful, close examination of the record, however, reveals that such a remedy would not be appropriate in this case even if liability were found.

The power to fashion a remedy based on an antitrust violation is not limitless. The remedy must be "reasonable in relation to the unlawful practices found to exist," FTC v. National Lead Co., 352 U.S. 419, 428-29 (1957), citing Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), and complete divestiture is not always appropriate. See In the Matter of Diamond Alkali, 72 F.T.C. 700, 1967 WL 94030, *27-28 (1967)("The Commission is of course not concerned with wreaking vengeance [nor] is it interested in adopting a purely formalistic remedy."); RSR Corp. v. FTC, 602 F.2d 1317, 1320, 1325-26 (9th Cir. 1979) (Respondent was allowed to keep one of the four plants it acquired).[4] In this case, Complaint Counsel have requested, and the ALJ has ordered, a remedy which exceeds the limits of the Commission's authority by divesting the

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}. Accordingly, at the very time that Complaint Counsel allege the merger to violate Section 7, { }.

[4] Complaint Counsel concede the point that total divestiture is not always appropriate by citing these cases in their Answering Brief.

Feistritz facility – an asset which is located outside of and has no effect on competition within the relevant geographic market found by the ALJ.[5] Although Complaint Counsel argue that "complete divestiture is the presumptive relief for the unlawful acquisition," they ultimately acknowledge that divestiture of assets located outside the relevant market is appropriate only "if necessary to restore competition in the relevant markets." (CCAB 52-54)(emphasis added). Therefore, assuming *arguendo* that Complaint Counsel have met their burden and are entitled to relief, the critical issue in this matter is whether the divestiture of the Feistritz plant is necessary to restore competition in North America. It is not.

Complaint Counsel's argument that divestiture of the Feistritz plant is necessary to restore competition in North America lacks merit. In support of their argument, they claim that: (1) Feistritz allowed Microporous to free up capacity in Piney Flats; (2) a "global footprint" is necessary to compete in North America; (3) customers prefer multiple plants in case of a possible outage; and (4) an acquirer needs "scale" to compete effectively. Complaint Counsel's overreaching relief is not supported in the relevant case law, nor is it borne out by the facts of this case. As with their case-in-chief, Complaint Counsel's reliance on speculation, supposition and conjecture to support their request for divestiture does not overcome the facts regarding the Feistritz plant.

Complaint Counsel cite RSR Corp. and OKC Corp. in support of their argument that the Feistritz facility should be divested. RSR Corp. v. FTC, 602 F.2d 1317 (9th Cir. 1979); OKC Corp. v. FTC, 455 F.2d 1159 (10th Cir. 1972). In those cases, the Ninth and Tenth Circuits, respectively, upheld FTC orders divesting assets which were outside the relevant ***product*** markets when those additional products were necessary to ensure the viability of NewCo. See

[5] Respondent acknowledges that the Commission has the authority to divest assets located outside the relevant geographic market if such action is necessary to restore competition within the geographic market. Contrary to Complaint Counsel's contention, Respondent is not "object[ing] to divestiture of the Feistritz plant merely because it is in Europe." (CCAB 55).

RSR Corp., 602 F.2d at 1326, fn. 5; OKC Corp., 455 F.2d at 1161. Neither of those cases discusses the issue applicable here – the divestiture of an asset which is outside the relevant market and which will detract from rather than enhance the viability of NewCo. As Respondent has shown, the Feistritz plant would be a drain on the financial viability of NewCo. (RAB 54-56; see also *infra* p. 16). Unlike the situation in RSR Corp. and OKC Corp., divesting the Feistritz plant would not provide NewCo with additional products that are necessary to NewCo's viability.

Complaint Counsel further rely on Yamaha and the El Paso cases[6] to support their divestiture argument. Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (8th Cir. 1981); Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129 (1967); Utah Public Service Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969); see also United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). Neither case helps their cause. In Yamaha, Brunswick (a United States company) entered into a joint venture with Yamaha (a Japanese company) under which Brunswick acquired stock and the exclusive right to sell Yamaha's outboard motors in the United States. Yamaha, 657 F.2d at 974. The Eighth Circuit affirmed an FTC order divesting the joint venture and forcing Brunswick to sell the stock it acquired back to Yamaha. Id. at 982. The remedy included divestiture of an asset which was located outside the relevant geographic market – the United States. Id. at 983. Of particular importance to the FTC and the Eighth Circuit was the fact that at the time of the joint venture, Yamaha was ***actually selling relevant products directly into the United States***. Id. at 974. In fact, Yamaha was exporting 40% of its products to the United States. Id. Additionally, Yamaha had made two unsuccessful attempts to enter the United States market. Id. at 978-79. Based on these facts, the Eighth Circuit concluded

[6] There are several companion El Paso cases, cited here, which involve the same underlying facts.

that Yamaha had a direct effect on competition in the United States and upheld the FTC's order divesting assets located outside the relevant geographic market.

In the El Paso case, El Paso Natural Gas Co. acquired the stock and assets of Pacific Northwest Pipeline Corp. 376 U.S. at 655. At the time of the acquisition, El Paso was the only out-of-state supplier of natural gas into California. Pacific Northwest had been unable to secure regulatory authority to operate in California, but it "was the only other important interstate pipeline west of the Rocky Mountains," and it had entered into a tentative contract with Southern California Edison to supply gas to a point on the California/Oregon border. Id. at 659. Deciding that the acquisition violated Section 7, the United States Supreme Court reversed the lower court decisions dismissing the complaint and directed the District Court to order divestiture of assets located outside the relevant geographic market (California) because Pacific Northwest had been a "substantial factor in the California market at the time it was acquired by El Paso." Id. at 658. Pacific Northwest had a direct effect on competition in the relevant geographic market, a fact which gave the court authority to include it in a divestiture order. Id. at 658-59.

Here, the Feistritz plant did not have, does not have and will not have any direct impact on competition in North America, the ALJ's geographic market. The Feistritz plant was not commercially producing or selling separators at the time of the Acquisition. (RFOF 337). Further, it is undisputed that separators produced in Feistritz were never expected to be, and have never been, shipped into the United States. (Gaugl, Tr. 4559-60). No contract existed which required the supply of separators from Microporous' Feistritz plant for delivery in North America. Indeed, the very notion that Feistritz would provide separators for Microporous in North America contradicts Complaint Counsel's argument regarding the need for "local supply." (CCAB 57-58). Microporous' strategic plan in March 2006 – a document relied on by Complaint Counsel – made it clear that the Feistritz plant would supply customers in ***Europe***, not

North America. (RX00271, *in camera*; CCAB 56).[7] Simply stated, the Feistritz plant was and is meant to manufacture separators for European customers, and there was no competitive overlap between the Feistritz separators and those produced in North America.[8]

The evidence proves that divestiture of Feistritz is not necessary to allow NewCo to effectively compete in North America. Michael Gilchrist, Microporous' former CEO, testified that the Feistritz plant was ***not necessary*** for Microporous to be a viable competitor, and that Microporous for years had manufactured and shipped separators out of Piney Flats to Europe and Asia. (Gilchrist, Tr. 511, *in camera*, 540-41).[9] Jim Douglas, Executive Vice President of Douglas Battery, testified that Douglas is {

}. (RFOF 837). Trojan did business with Microporous, its sole separator supplier, for decades even though Microporous had only one plant. (RFOF 742). Likewise, US Battery did business with Microporous for more than 15 years even though Microporous had only the Piney Flats plant. (RFOF 854). In fact, even Complaint Counsel have consistently argued that prior to the Acquisition, when it had a single plant, Microporous was "a strong, worldwide competitor" and "a worldwide, competitive threat." (CCPTB 2, 69; RAB 54).

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[7] Contrary to the ALJ's findings and Complaint Counsel's assertions, this strategic plan also indentifies the separator market as a global market. (RX00271).

[8] The Feistritz plant has no "competitive overlap" with the relevant North American market and therefore should not be divested. Steven Tenn and John M. Yun, The Success of Divestitures in Merger Enforcement, Working Paper No. 296, p. 2 (April 8, 2009) ("The typical remedy in a merger case requires divestiture of the competitive overlap. Since the divested products are sold to firms with little or no presence in the overlap market, this outcome maintains market concentration at the pre-merger level.")

[9] This testimony contradicts Gilchrist's testimony cited by Complaint Counsel, indicating that "Microporous built the [Feistritz] plant because it had determined that if it wanted to be a 'major supplier' to world-wide companies like EnerSys, it needed to 'become a global player.'" (CCAB 56). Prior to the Acquisition, Microporous was already a "global player," as evidenced by the fact that it shipped separators from Piney Flats to customers in Mexico, South America, Europe, Asia, and Africa. (RFOF 342). This is another example of the inconsistencies contained in Gilchrist's testimony.

Complaint Counsel assert that EnerSys, the world's largest manufacturer of batteries for industrial applications, wishes to have multiple separator plants because separators are very important to its business. (CCAB 58). Indeed, Larry Axt of EnerSys testified that he would not { } (IDFOF 1276; Axt, Tr. 2143, *in camera*). Respondent pointed out the questionable nature of this testimony in its Appeal Brief. (RAB 54). In addition to the credibility issue, there is no question that the majority of EnerSys' motive business is located in Europe, and that Feistritz, not Piney Flats, would supply its European plants. (Gaugl, Tr. 4559-60). Moreover, Larry Burkert of EnerSys explained that although EnerSys preferred that Microporous have the Feistritz plant, it was ***not a requirement*** of doing business with Microporous. (Burkert, Tr. 2385; RAB 53). The reality is that EnerSys entered into an exclusive long-term agreement with Microporous because of its tremendous dislike for Daramic. Ironically, that exclusive long-term contract would do nothing to foster competition in North America. In any event, not only is Complaint Counsel's assertion on this issue based on speculation and conjecture, but it also contradicts their unequivocal argument that local supply is necessary. (CCAB 28). Divestiture of the Feistritz plant would not accomplish EnerSys' goal of having an additional plant from which to obtain separators if something happened to disrupt production in Piney Flats, because, according to Complaint Counsel's own arguments, EnerSys' North American plants could not be supplied from Feistritz without separate testing and approvals.[10] Fundamentally, Piney Flats is irrelevant to EnerSys' European operations, and Feistritz is irrelevant to its North American facilities. Complaint Counsel also ignore the ability of customers to warehouse separators to protect themselves against an unforeseen potential disruption – { }. (RFOF 1529, 1533).

[10] Complaint Counsel argue that during a labor strike at Daramic's Owensboro, KY plant, customers were unable to obtain separators from any other region of the world. (CCAB 28-29).

Similarly, Complaint Counsel rely on customer testimony indicating a preference for two manufacturing locations in the event of a possible outage. (CCAB 58-59). Possible future events which may or may not occur, however, are too speculative to support divestiture of the Feistritz facility. United States v. General Electric Co., 115 F.Supp. 835, 868 (D.N.J. 1953). The idea that an outage, work stoppage or some other ***potential*** event ***may*** occur to disrupt production on Piney Flats' existing PE line is remote and speculative and could nevertheless be addressed by obtaining separators from the "third line." In any event, as already explained, North American customers would be able to obtain supply from Daramic, Entek or other suppliers in Asia if an outage occurred in Piney Flats. Additionally, a customer with such concerns could warehouse separators to use if a disruption occurs.

The Commission is left to consider customer testimony and evidence of customer preferences because Dr. Simpson performed no economic analysis addressing whether Feistritz is part of the relevant geographic market, or determining the impact (if any) of Feistritz on competition in the United States. However, the customer testimony here must be considered carefully because the appropriate issue is not whether customers would like multiple plants because their operations are global, as Complaint Counsel contend. Indeed, it is notable that Complaint Counsel cite no case for this novel proposition, demonstrating the lack of merit to such a claim. The sole pertinent issue is the impact on competition in North America, regardless of whether customers in North America have multinational operations or whether those customers would prefer to have the same supplier for their operations in North America and abroad. See United States v. Waste Management, 588 F. Supp. 498, 514 (S.D.N.Y. 1983), rev'd on other grounds, 743 F.2d 976 (2d Cir. 1984); In the Matter of Chicago Bridge & Iron Co., No. 9300, 138 F.T.C. 1024, 1160 (Op of Comm'n)(Dec. 22, 2004). This is especially true where, as here, Complaint Counsel argued for, and the ALJ found, a North American geographic market.

In fact, the evidence shows that companies in the separator industry enter into contracts which cover specific regions of the world. (See e.g. RX00962; RX00964; RX00976). Dr. Simpson never considered whether the geographic market was global, or the competitive effects in Europe. He never looked at whether EnerSys' needs in Europe could be met by Asian producers, even though the evidence shows that Asian companies are selling in Europe. (RFOF 1109, 1111). Absent any expert analysis, the customer testimony relied on by Complaint Counsel and the ALJ does not withstand scrutiny. The whims and desires of powerful, multinational corporations are not sufficient to support divestiture of the Feistritz plant, especially where there is no evidence that the Feistritz plant is necessary for NewCo to be an effective competitor in North America.

Complaint Counsel further argue that the Feistritz plant allowed Microporous to free up capacity in Piney Flats, which allowed Microporous to obtain additional business from EnerSys, Exide, Trojan and US Battery. (CCAB 57). Again, Complaint Counsel's contention is inaccurate. (RAB 55-56). Contrary to Complaint Counsel's assertion, transferring production from Piney Flats to Feistritz did not lead to additional sales in North America. (RAB 55-56). Significantly, the evidence shows that Microporous (or NewCo) would have been able to handle all of the ***North American*** needs of EnerSys, Trojan and US Battery from Piney Flats with the existing { } PE line and the additional "line in boxes." (RX00677, *in camera*; RFOF 1104; PX0063 at 003). In 2008, CellForce production totaled nearly { }. (RX00677).[11] Under its original 2007 supply agreement with Microporous, EnerSys committed { } of CellForce to Microporous {

}. (RX00207). Under the amended contract, EnerSys committed an additional {

[11] At the time of the hearing in 2009, CellForce production in Feistritz was only { }, causing this production figure to be { }. (RFOF 301).

}.

(RX000207). Therefore, if the Acquisition had not occurred, Microporous would have supplied an additional { } of CellForce to EnerSys in North America by August 2009.[12] Microporous would have had well more than adequate capacity to satisfy its commitments to Enersys.[13]

Rick Godber of Trojan testified that Trojan wanted to increase its use of CellForce by 5-10%, to 21% of its total separator usage. (Godber, Tr. 226-27; RFOF 751; PX1741).[14] Godber explained that this would amount to an additional 38 million pieces (equating to 1.1 msm). Id. Similarly, US Battery indicated that it wanted to increase its use of CellForce in two of its batteries. (Wallace, Tr. 1977; Qureshi, Tr. 2037; PX1741). To accomplish this goal, US Battery would need an additional 0.14 msm of CellForce. (PX1741).

It is entirely speculative to assume that either Trojan or US Battery would actually increase their use of CellForce, or to assume the actual volume of CellForce either company may take. These assertions are not based on credible evidence, and there are no strategic analyses or planning documents to support the statements by Trojan or US Battery. In any event, divesting the existing Piney Flats PE line and the "line in boxes," which has a capacity of 11 msm (PX0063 at 003), would provide { } of PE capacity in Piney Flats, more than sufficient scale to handle the existing needs and any potential incremental increases of North American customers. As Axt testified, the key to EnerSys' amended supply agreement with Microporous

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[12] This figure does not take into account the fact that EnerSys' business { }. (RFOF 720).

[13] This fact also refutes the argument that an alleged anticompetitive effect in Complaint Counsel's motive market was the elimination of Microporous' expansion plans in Piney Flats. (CCAB 38). The freed-up capacity at Piney Flats was never used, and { }.

[14] Interestingly, taking Godber's assertions as true proves that Trojan is only willing to convert to a limited amount of its separator needs to CellForce, casting doubt on Complaint Counsel's argument that CellForce is interchangeable with Flex-Sil.

was the { }. (Axt, Tr. 2153, *in camera*). Further, if the Piney Flats plant and the additional PE "line in boxes" are divested as ordered by the ALJ, NewCo would have significant available capacity (approximately { }) to compete for additional North American business. This excess capacity will provide NewCo with sufficient scale to alleviate Complaint Counsel's concerns regarding NewCo's ability to compete for business and obtain cost advantages due to economies of scale. (CCAB 59).

Complaint Counsel continue to make the speculative assumption that Microporous would have obtained business from Exide, even when the evidence demonstrates precisely the opposite. In fact, during the course of discussions that dragged over many months, Exide never made a commitment to purchase a single separator from Microporous. (RFOF 580-81). The Memorandum of Understanding between Microporous and Exide expired in August 2007 before it was even signed by Exide, and it was renewed only weeks before the Acquisition to make Microporous appear more profitable for purposes of the Acquisition. (RFOF 382, 414). No supply agreement was ever finalized, and in fact, Exide failed to even comment on the draft supply contract prepared by Microporous. (RFOF 580(a)). Microporous had two unproductive meetings with Exide in early 2008, neither of which advanced the ball towards a supply relationship. (RFOF 417, 418). Complaint Counsel offered no credible, objective evidence to demonstrate, as they must, that Microporous would have obtained business from Exide. Simply stated, Exide had no intention of purchasing separators from Microporous, and at the time of the Acquisition, Microporous did not believe that it would obtain Exide's business. (RFOF 419, 580(l)). In addition, Microporous' Board of Directors mandated that Microporous should not begin producing separators for SLI applications and should not become another player in the crowded PE market. (RX00401; PX2300 (Heglie, IHT 194-95)). The speculation concerning

the potential future business relationship between Exide and Microporous cannot trump the facts which show that the relationship was going nowhere. FTC v. Arch Coal, 329 F.Supp.2d 109, 116 (D.D.C. 2004). Complaint Counsel cannot rely on speculation and conjecture to prove their case.

Complaint Counsel cite Chicago Bridge to support their argument that total divestiture should be ordered because that "combination of assets has made a saleable package in the past." Chicago Bridge, 138 F.T.C. at 1164 (Op of Comm'n); (CCAB 60). However, Complaint Counsel ignore the market realities which have occurred in the two years since the Acquisition, including the evidence which demonstrates that the Feistritz plant was a financial drag on Microporous' business. At the time of the Acquisition, Microporous was financially unstable and had accumulated debt in the amount of $46,139,000.00. (RRCCFOF 976, 1198). The evidence shows that if Feistritz were operating as a stand-alone entity, if would have had a projected net income in 2009 of { }. (RRCCFOF 1198; RFOF 301). Similarly, the 2009 projected net income for Piney Flats, if it were operated as a stand-alone entity, would have been { }. (RFOF 301). At the time of the hearing, CellForce production in Piney Flats was { }, and CellForce production in Feistritz was { }. (RFOF 301, 1145). The reality is that both Piney Flats and Feistritz would have been {

}. The { } of those facilities is directly relevant to whether the combination of those assets is meaningful for divestiture. These facts demonstrate that saddling NewCo with Feistritz {

}.

Assuming Complaint Counsel have met their burden as to liability, which they have not, the divestiture of the Feistritz plant is not necessary to restore competition allegedly lost in North

America. The divestiture of all assets except the Feistritz facility would address any competitive concerns created by the Acquisition. Assuming *arguendo* that Complaint Counsel have shown anticompetitive effects, the proper remedy would include divestiture of the Piney Flats plant, the line in boxes, personnel, research and development facilities, and Microporous' former intellectual property, including the CellForce product. Divestiture of these assets would recreate Complaint Counsel's so-called "maverick" in North America as it previously existed plus some, and it would provide all that Complaint Counsel seek in North America. This divestiture of the United States business would also provide sufficient excess capacity to allow NewCo to expand, if necessary, as it competes for additional business in North America. In short, divestiture of the United States business, which includes all assets other than the Feistritz plant, would fully meet competition concerns ***in North America*** – the ALJ's relevant geographic market.[15]

III. COMPLAINT COUNSEL FAILED TO ESTABLISH A *PRIMA FACIE* CASE OR DEMONSTRATE ANTICOMPETITIVE EFFECTS IN THEIR ALLEGED MARKETS.

Complaint Counsel claim that they established a *prima facie* case by "proving" four product markets with a North American geographic market for each, and that the concentration levels in each of these markets is sufficiently high to entitle them to a *presumption* that the Acquisition violated Section 7 of the Clayton Act. (CCAB 15-16, 30). This neat formula ignores the warnings that "[t]he Herfindahl-Hirschman Index cannot guarantee litigation victories," Baker Hughes, 908 F.2d at 992, that "determining the existence or threat of

[15] Complaint Counsel incorrectly suggest that Respondent concedes that some relief is warranted on their Section 7 claim. Respondent has conceded nothing and continues to believe that Complaint Counsel have failed to meet their burden and that no relief is necessary or appropriate. As to the portions of the ALJ's Order discussed in Respondent's opening brief, Complaint Counsel concede the validity of Respondent's challenge to the Order including pre-Acquisition contracts, and where Complaint Counsel argue that the Order correctly requires Respondent to maintain a Microporous workforce of the same size as the one prior to the Acquisition, Complaint Counsel and the ALJ simply ignore the impact of the recession on Piney Flats' business and the fact that many employees quit Respondent's employment. Forcing Respondent to maintain other employees is punitive. Similarly, Complaint Counsel's request for expedited treatment of this appeal is unsupported and inappropriate given the record and the important issues raised by Respondent in this appeal.

anticompetitive effects has not stopped at calculation of market shares," United States v. Oracle Corp., 331 F. Supp.2d 1098, 1111 (N.D. Cal. 2004) and that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." Baker Hughes, 908 F.2d at 984. Indeed, Respondent has shown that Complaint Counsel's claimed "market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market." Oracle, 331 F.Supp.2d at 1110.

As Respondent pointed out in its Appeal Brief, the product and geographic markets adopted by the ALJ are unsupported by the evidence. Daramic and Microporous were not effective competitors in any of the alleged markets. For at least two of the alleged markets – UPS and automotive/"SLI" – Complaint Counsel failed to make a *prima facie* case of anticompetitive effects because the Acquisition did not increase concentration since Microporous had no pre-Acquisition sales and no market share. A *prima facie* case is established only when the merger "would produce 'a firm controlling an undue percentage share of the relevant market and [would] result[] in a *significant increase in the concentration* of firms in that market.'" H. J. Heinz, 246 F.3d at 715 (emphasis added; quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963)). Where the acquired firm has no market share, as here, the Acquisition cannot increase concentration.

Moreover, the authorities indicate that Complaint Counsel are not entitled to the *prima facie* presumption in cases involving differentiated products where the anticompetitive effect presumed is the unilateral effect outlined in the Merger Guidelines. Sec. 2.2. "The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases." Oracle, 331 F. Supp.2d at 1121. "[A] strong presumption of anticompetitive effects based on market concentration is

especially problematic in a differentiated products unilateral effects context." Id. at 1122. This principle applies to all of Complaint Counsel's alleged markets.

A. Complaint Counsel Failed to Establish Relevant Product Markets.

Rather than relying on sound economic analysis, Complaint Counsel rely heavily on the alleged perceptions of industry participants about product markets in this case, arguing that "markets are best defined by the firms that operate within them." (CCAB 16). Significantly, this principle espoused by Complaint Counsel, besides being at variance with the traditional formula of the cases[16] and the Merger Guidelines, [17] was actually ignored by the ALJ in the ID. For example, when considering the geographic market, the ALJ ignored substantial pre-Acquisition documentation from Respondent, Microporous and Entek demonstrating that the market is in fact global in reach. (RX00260 at 003, *in camera*, RX00124, *in camera*, RX00117, *in camera*, RX01068, *in camera*, RX01073, *in camera*, RX01074, *in camera*, RX01078, *in camera*, PX0013). When considering the product market, the ALJ ignored substantial pre-Acquisition documentation that demonstrated an all-PE market rather than the four end-use markets of Dr. Simpson and now the ALJ. (RAB 18). Even the Microporous business plan cited by Complaint Counsel does not support the ALJ's and Complaint Counsel's supposed "motive," "UPS" and "deep-cycle" markets, nor its North American market. (RX00271, *in camera*). When confronted with evidence of views that were different from those advanced by Complaint

[16] The formulation in Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) uses the two factors: (1) "the reasonable interchangeability of use" and (2) "the cross-elasticity of demand between the product itself and substitutes for it." In FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997), the test posed was "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other."

[17] The Guidelines SSNIP test defines a product market as "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price." Guidelines, Sec. 1.11. The Guidelines incorporate the concepts of reasonable interchangeability of use and cross-elasticity of demand. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1037-38 (D.C. Cir. 2008); FTC v. Arch Coal, Inc., 329 F. Supp.2d 109, 119-20 (D.D.C. 2004).

Counsel, the ALJ dismissed them as "more contrived than real." (ID 226). Both the ALJ and Complaint Counsel, however, ignore that this evidence was offered by Complaint Counsel's own witness, a former Microporous employee. (Brilmeyer, Tr. 1831). Complaint Counsel's attempt to build its case on the evidence of the "firms that operate within them" is actually derailed by that same evidence.

Of course, product markets are not to be determined on the basis of such an insubstantial showing. Indeed, it is for this reason that the Merger Guidelines speak of economic analysis to determine the relevant product markets. Unfortunately, Complaint Counsel chose not to present any economic analysis, including evidence of cross-elasticity of demand, (RAB 10-12), even though they concede the validity of such test here. (CCAB 15). In addition, contrary to the Guidelines, which require that the SSNIP test "begin with each product (narrowly defined)," (Merger Guidelines, Sec. 1.11), Dr. Simpson applied the test by starting with end-use categories of separators. (RAB 12; CCAB 17-22).[18] In doing so he relied heavily on customer testimony, ignoring the warnings of numerous authorities cautioning against such reliance[19] and despite the evident bias of those witnesses. Had Dr. Simpson performed the SSNIP test properly, he would have arrived at the same all-PE market as did Respondent's expert economist, Dr. Kahwaty. Complaint Counsel's case is built on biased testimony and incomplete references to documents

[18] Dr. Simpson's report shows that he refers to end-use categories of separators, not individual separators. For example, the report states: "Several types of evidence indicate that for each battery separator (deep-cycle, motive, UPS, and SLI) a hypothetical monopolist of production in North America would lose few sales if it increased price to North American customers." (PX0033 at 006). And: "Several types of evidence indicate that a five to ten percent price increase by a hypothetical monopolist of rubber or PE/rubber deep-cycle battery separators would prompt very little shifting, at most, to other products such as PE or AGM separators." (Id. at 012).

[19] See RAB 13-14; see also FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999); United States v. Oracle Corp., 331 F. Supp.2d at 1131; United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 675-76 (D. Minn. 1990); IIB Phillip Areeda & Herbert Hovenkamp, Antitrust Law ("Areeda & Hovenkamp") ¶ 538b (3d ed. 2007); J. Thomas Rosch (Commissioner, FTC), Litigating Merger Challenges: Lessons Learned, at 12 (June 2, 2008) ("[C]ourts tend to perceive customers as having built-in bias against a merger because customers generally favor lower prices and are inclined to think that mergers lead to higher prices.").

with no firm economic foundation. They have failed to meet their burden of proving their four product markets.[20]

B. Complaint Counsel Failed to Establish Any Relevant Geographic Market.

Similarly, as discussed in Respondent's Appeal Brief, the North American geographic market adopted by the ALJ is defective in numerous ways. (RAB 19-24). Although Dr. Simpson's support for a North American market was based on a price discrimination theory, he testified that he didn't look at pricing in different parts of the world (RFOF 1206), a somewhat surprising fact considering that Complaint Counsel bear the burden here. Moreover, no evidence was presented to show that Daramic's costs were uniform throughout the world, a showing necessary to support a price discrimination theory.[21] Rather than finding Dr. Simpson's opinion "compelling," as claimed by Complaint Counsel (CCAB 27), the ALJ in fact criticized it as "less precise[]" than the concept of price discrimination "generally used by economists." (ID 240). Although Dr. Kahwaty testified that arbitrage could defeat price discrimination (Kahwaty, Tr. 5164-65, *in camera*), the ALJ rejected that testimony without citing any evidentiary support. (IDFOF 274).

Moreover, Complaint Counsel's claim that no customers imported separators when prices were raised in 2007 is not supported by their citation to the record, and neither are their claims regarding imports during periods of force majeure. (CCAB 28-29). In any event, Dr. Kahwaty's testimony in support of a global market was not based on the ability of North American customers to import separators but was keyed to the Guidelines' SSNIP procedure, which asks whether customers, wherever located, of a North American hypothetical monopolist would look to other sources in response to a North American price increase. Dr. Kahwaty testified that

[20] Respondent's Appeal Brief addressed numerous other defects in the product markets advocated by Complaint Counsel and adopted by the ALJ. (RAB 16-19).

[21] United States v. Eastman Kodak Co., 63 F.3d 95, 106-07 (2d Cir. 1995).

Asian producers could profitably ship PE separators to North America (RAB 23-24; Kahwaty, Tr. 5169-70, *in camera*)[22] and that if North American prices were to increase by 5% while prices elsewhere were held constant, "customers in South America and elsewhere would choose to switch suppliers from North America." (RX00945 at 059). The viability of Asian imports into North America is supported by a 2007 Daramic document cited by the ALJ, which notes that North American competition could "increase in [the] future due to Asia." (IDFOF 435 (citing PX0265, *in camera*)). And while Complaint Counsel contend that Entek did not consider Asian separator manufacturers a threat (CCAB 27), the evidence shows the contrary to be true. As Dan Weerts of Entek testified:

{

} (Weerts, Tr. 4468-69, *in camera*).

Complaint Counsel and the ALJ ignore substantial evidence that Entek, like Respondent, viewed the market as global and that Asian separator companies are strong competitors. (See RX00115, *in camera*, RX00127, *in camera*, RX001512, RX00117, *in camera*, RX00124, *in camera*, RX00271, *in camera*; Weerts, Tr. 4473, *in camera*). The North American market adopted by the ALJ is not supported by the record.

[22] Citing the Initial Decision at page 243 and finding number 361, Complaint Counsel complain that Dr. Kahwaty for this analysis improperly used production costs at Daramic's Thailand plant, which, they claim, is "Daramic's state-of-the art, lowest-cost facility in Thailand." (CCAB 29). Finding number 361of the Initial Decision contains no finding that this plant was the "lowest-cost facility" and Dr. Simpson's testimony, as relied upon by the ALJ, was merely that the Daramic plant's costs were "not the cost for what independent rivals would have in Asia" (sic) without specifying what those costs would be. (ID 243). Dr. Kahwaty made it clear that he relied on the costs of a plant in Thailand, as opposed to one in China. (Kahwaty, Tr. 5168-70, *in camera*; RFOF 1357).

C. Complaint Counsel's Failure to Prove Relevant Product Markets Deprives Them of a *Prima Facie* Case and a Showing of Anticompetitive Effects.

Contending that they have established their product and geographic markets, which they have not, Complaint Counsel nevertheless claim entitlement to a "presumption" that the Acquisition was illegal in their alleged markets because, as they argue, the supposed pre-Acquisition duopoly in their SLI market was stronger after the Acquisition (CCAB 32-34), Daramic retained a pre-Acquisition monopoly in their UPS market (CCAB 32),[23] and the merger produced a monopoly in each of their deep-cycle and motive markets. (CCAB 31). Complaint Counsel then argue that following the Acquisition, there have been actual anticompetitive effects in these markets. (CCAB 36-43). To the contrary, Respondent has shown that Complaint Counsel failed to prove anticompetitive effects in any of these markets. (RAB 25-41).

1. Complaint Counsel have failed to prove an SLI separator market and failed to show an anticompetitive effect in such a market.

    a. This alleged market was a duopoly before the Acquisition and it remains a duopoly after the Acquisition. Microporous was neither an actual competitor nor an uncommitted entrant into the sale of SLI separators.

Notwithstanding their admission that at the time of the Acquisition, "Microporous had not yet begun supplying [SLI] separators" (CCAB 32), Complaint Counsel continue to claim that Microporous was an "actual competitor" in their alleged SLI market. Microporous' only sale of such a product had been an isolated sale of a small, non-commercial quantity in 2003-04, and it is undisputed that Microporous had no contracts for the sale of such products as of the time of the Acquisition.

The facts are simple. The one run of SLI product made by Microporous originally for JCI was not sold to JCI but to Voltmaster in 2004. (RFOF 336). That is the only actual sale of separators for SLI applications made by Microporous at any point in time. (McDonald, Tr.

[23] Complaint Counsel fail to explain how the Acquisition added to Daramic's pre-existing monopoly position.

3796-98). Subsequent discussions with JCI ended in 2007, various efforts involving one or more MOUs with Exide expired in 2007 with no contract, and discussions with East Penn were merely preliminary. (RAB 25-27). Perhaps the most decisive fact is that, in November 2007, the Microporous board ordered management not to begin producing SLI separators.[24] (RAB 27).

Against these facts the ALJ concluded "[t]here is no question that Microporous was bidding for SLI business" (ID 259), and Complaint Counsel claim that Microporous "was bidding for business." (CCAB 33-34). These assertions are not supported by the facts. As regards JCI, the ALJ's findings reveal that discussions in 2005 did not lead to a contract for various reasons, including JCI's concern that Microporous would not have the requisite capacity by the end of 2008. (IDFOF 684-93). As regards Exide, the ALJ's own findings show that the original MOU expired in 2007, that Exide did not return a draft supply contract and that Microporous would have had to construct a line before it could produce the product. (IDFOF 697-715). In fact, Microporous did not believe it would ever supply Exide. (RFOF 417-19, 580). As for East Penn, the ALJ found that Microporous "did not have the machinery or the tooling to produce the volumes that East Penn requested." (IDFOF 720). It is a massive and unsupportable stretch for these facts to be summarized as showing that Microporous "was bidding for SLI business."

Complaint Counsel also continue to rely on the Areeda/Hovenkamp treatise on this issue but, notwithstanding Respondent's showing that Microporous was not a "bidder," successful or otherwise, they now rely on the statement that "[u]nsuccessful bidders are no less competitors

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[24] Complaint Counsel assert the definitive quality of such a corporate decision to argue that { } (CCAB 34). Once again, however, the ID findings cited by Complaint Counsel do not support their broad claim. The findings merely recite that Entek used to sell industrial separators, { } (IDFOF 1027, 1029–30). None of these findings, however, state that { } as claimed by Complaint Counsel. And while Complaint Counsel assert that { }. (Weerts, Tr. 4490, *in camera*).

than the successful one" (CCAB 33), and jettison any reliance on the quote that a firm is "an 'actual' rival once the entry decision has been made." (CCPTRB 29). This change in focus by Complaint Counsel can presumably be traced to the fact that the Microporous board had not made a decision to enter – but a decision *not* to enter. Professors Areeda and Hovenkamp do not speak to whether a firm should be considered an actual competitor if it has decided not to enter, but their judgment on that point can easily be surmised.

The only case relied upon by Areeda & Hovenkamp in this context, United States v. El Paso Natural Gas Co., involved very different facts. 376 U.S. 651 (1964). As discussed *supra* at p. 9, El Paso was the only out-of-state supplier of natural gas into California. Pacific Northwest ("PN"), the only other competitor for business in California, had entered into a tentative contract to supply gas to a point on the California/Oregon border. Id. at 659. Unlike Microporous with SLI separators, PN was a major seller of natural gas in the western area and was completely capable of delivering it to California. Accordingly, PN's position as an "actual competitor" was far stronger than Microporous' position as an SLI supplier given that Microporous had made only one small historical sale of the product and did not have the necessary capacity, machinery or tooling at the time of the Acquisition.

b. Complaint Counsel have been unable to show probable or actual anticompetitive coordinated interaction in the alleged SLI market.

Without any factual evidence of coordinated interaction in their SLI market past, present or future, Complaint Counsel again resort to reliance upon a presumption – this one that coordinated interaction is likely in concentrated markets, which they claim exist here. (CCAB 41). In attempting to rely on this presumption, Complaint Counsel ignore Professor Areeda, when he said: "Even in a duopoly market competition is possible and may sometimes be quite robust." IV Areeda & Hovenkamp ¶ 911a (3d ed.) . Complaint Counsel also ignore the ALJ who was unable to find any coordination before or after the Acquisition. (ID 265-66). Even

Complaint Counsel do not complain about coordinated interaction preceding the Acquisition, but merely contend that competition between Daramic and Entek was not aggressive. (CCAB 42).[25] Importantly, neither the ALJ nor Complaint Counsel find or claim express collusion between Daramic and Entek in the past, the factor listed in the Guidelines as forming the basis for concern about post-Acquisition coordinated interaction. Merger Guidelines, Sec. 2.1; see also United States v. Archer-Daniels-Midland, Co., 781 F.Supp. 1400, 1421 (S.D. Iowa 1991) ("The evidence fails to show, however, any form of coordinated pricing or price leadership in the HFCS industry with respect to actual transaction prices, and fails to show any likelihood of it. There is no evidence of a pattern of disciplined or coordinated pricing. Indeed, the evidence reveals precisely the opposite – a vigorous, competitive struggle for business by negotiated, competitive pricing.").

Complaint Counsel argue that their presumption must stand since Respondent, as they claim, has failed to rebut it by showing "structural barriers" to coordinated interaction. To the contrary, Respondent has shown that the market structure in the alleged SLI market rebuts any likelihood of coordination. Structural factors include "the nature of transacting in a market, the size and sophistication of buyers, and other factors." IV Philip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 916b (2d ed. 2006). The presence of "sophisticated customers" can defeat concerns over coordination. Archer-Daniels-Midland, 781 F. Supp. at 1422 ("There is no question that the size and sophistication of buyers in the HFCS industry is a powerful 'other

[25] Complaint Counsel actually attempt to turn their complaint about nonaggressive competition into a claim of pre-Acquisition coordinated interaction. (CCAB 42). This attempt is extreme and is not supported by the facts relied upon or by the FTC's own definition of coordinated interaction. Complaint Counsel cite four findings from the Initial Decision, one of which, (636), is totally irrelevant to the issue, two of which (655 and 660) refer to views of JCI in 2002 and 2003 that Daramic was not aggressively seeking its business, and the final one (435), which refers to nonaggressive rivalry. These facts hardly support a claim of coordinated interaction, which was described by the FTC itself in the B. F. Goodrich case as "developing a consensus concerning price and output levels, and a means of enforcing its terms." The FTC noted that firms participating in such activity "must be able to monitor rival firm conduct, . . . must be able to detect cheating . . [and] must also be able to retaliate effectively if and when cheating occurs." In the Matter of B. F. Goodrich, 110 F.T.C. 207, 294-95 (1988). The facts relied upon by Complaint Counsel fall far short of showing the coordination system described by the FTC itself in B.F. Goodrich.

factor' that strongly mitigates against the possibility of any attempt by HFCS suppliers to raise prices anticompetitively"). Even the Merger Guidelines note structural factors that hamper coordination, including those "by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects of their rivals' businesses," where "key information about specific transactions . . . is [not] available routinely to competitors" or "where large buyers . . . engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market." Merger Guidelines, Sec. 2.11 & 2.12. One major structural barrier is that {

}. Further, substantial excess capacity encourages deviations from any understanding between suppliers. Merger Guidelines, Sec. 2.12. Respondent has shown that all of these structural factors now exist in the SLI segment.

The battery separator industry is characterized by a fairly small number of large, sophisticated customers that negotiate one-on-one for long-term contracts with the result that firms do not have good information about their rivals' business. See Archer-Daniels-Midland, 781 F.Supp. at 1417-18. Examples of such recent negotiations involve {

}. (RAB 41). Information about these transactions is not "available routinely to competitors." Merger Guidelines, Sec. 2.12. Moreover, the evidence demonstrates that customers are tough negotiators, drawing out negotiations for months, sometimes years, to obtain better terms. (RRTP 53; RFOF 310, 447, 452, 472, 570, 616, 627, 653). Some customers, { }, have threatened to find alternative sources and have in fact done so. (RFOF 475, 491). These factors make it difficult for the terms of coordination to be reached and for deviations from any terms to be detected.

Complaint Counsel now claim that Daramic and Entek know the details of each other's customer contracts. (See CCAB 42, citing IDFOF 729-33). But these findings support no such conclusion. They show only that the companies have information about plant openings (IDFOF 731); that Daramic had information about customers Microporous was supplying (IDFOF 732); and that, in one case, Daramic had information about a price Microporous had offered one customer. (IDFOF 733). These findings support no claim whatsoever that Daramic and Entek are able to obtain the details about each other's customer contracts. Entek, in this action, has repeatedly asserted the confidentiality of its business plans and customer contracts and pricing, to which Complaint Counsel has never objected. See, e.g., Third Party Entek International , LLC's Motion and Memorandum for In Camera Treatment of Documents Previously Designated as Confidential Pursuant to 16 C.F.R. § 345(b) (April 9, 2009); Third Party Entek International, LLC's Supplemental Motion for In Camera Treatment of Documents Previously Designated as Confidential Pursuant to 16 C.F.R. § 345(b) (May 6, 2009). The facts do not support Complaint Counsel's assertions.

Far from showing coordination, Respondent has shown with substantial evidence the vigorous competition between it and Entek in the wake of the Acquisition, with {

}. (RAB 39). And Respondent and Entek continue to compete for East Penn's business in the United States. (RFOF 784). During contract negotiations, { } both demonstrated their ability to obtain terms that would defeat any attempted coordination by Daramic and Entek. (RFOF 478, 1505-28).

Finally, although ignored by Complaint Counsel, courts have in fact found that some mergers do not violate Section 7 because of the presence of large, sophisticated customers capable of preventing seller coordination or collusion. For example, in Baker Hughes, the DC

Circuit Court approved the district court's findings that the product cost "hundreds of thousand of dollars" and that customers "typically insist on receiving multiple, confidential bids for each order. This sophistication . . . was likely to promote competition even in a highly concentrated market." 908 F.2d at 986. Similarly, the court in FTC v. R.R. Donnelley & Sons Co., found that the customers' "size and economic power, and the other characteristics of the 'market,' make any anti-competitive consequences very unlikely." 1990-2 Trade Cas. (CCH) ¶ 69,239, 1990 WL 193674, *4 (D.C. Cir. 1990). The court reached a similar result in Archer-Daniels-Midland, noting that "[t]he existence of large, powerful buyers of a product mitigates against the ability to raise prices." 781 F. Supp. at 1416. Since the same market structure and characteristics exist here, Complaint Counsel have failed to show any likelihood of anticompetitive coordinated interaction between Daramic and Entek in the SLI segment.

2. Complaint Counsel have failed to show that the Acquisition had any effect in their alleged UPS market. Microporous was neither an actual competitor nor an uncommitted entrant into the sale of UPS separators.

Microporous was not, as found by the ALJ, an actual competitor or uncommitted entrant in a UPS market in North America. Besides the fact that Complaint Counsel produced no evidence of what constitutes the so-called UPS market (RAB 3, 15), the controversy on this issue appears to arise from a mistake regarding the facts on the part of the ALJ and either factual mistakes or misrepresentations on the part of Complaint Counsel. The ALJ concluded that Microporous "had been taking concrete steps to enter" the UPS market (ID 258), and Complaint Counsel claimed in their Post-Trial Reply Brief that "Microporous was an *actual competitor* in UPS and was selling into the market at the time of the acquisition." (CCPTRB 27). Both of these claims are erroneous.

As pointed out in Respondent's Appeal Brief, the ALJ apparently failed to grasp that Microporous' Project LENO was not intended to produce a UPS product for use in flooded lead

acid batteries (the type of battery involved in this case) in North America. (PX0663 at 002). Rather, it was intended to produce a UPS product that would compete with Daramic's Darak product in Europe and to be used in gel VRLA batteries in Europe and the U.S. (RAB 28). Accordingly, the ALJ erred in concluding that Microporous "had been taking concrete steps to enter" the relevant UPS market in North America.

Complaint Counsel apparently now accept these as the correct facts since they do not contest them in their Answering Brief. (CCAB 39). Instead, they make bland assertions about product testing, capital expenditures and expected revenues, and conclude by referring to "harm to customers." If Complaint Counsel are basing their position on the correct facts as stated in Respondent's Appeal Brief, which they apparently do, the customers they have in mind are *European* customers whose protection is concededly not at issue in this case.[26] Complaint Counsel's claim of a Section 7 violation in their alleged UPS market has no merit and the ALJ's findings otherwise are in error.[27]

3. Complaint Counsel have failed to establish a relevant deep-cycle market. Microporous' Flex-Sil product is in a market by itself and Daramic's HD was not effectively competitive with it.

The facts demonstrate that Flex-Sil, alone, occupies its own product market. Accordingly, contrary to Complaint Counsel and the ALJ, there is no deep-cycle market that includes Microporous' Flex-Sil and CellForce, and Daramic's HD. Daramic and Microporous

[26] In footnote 37 on page 54 of their Answering Brief, Complaint Counsel effectively admit the point made in footnote 29 on page 52 of Respondent's Appeal Brief, i.e., that the FTC's jurisdiction extends only to the protection of competition and consumers in the United States and does not extend to the protection of European consumers.

[27] Elsewhere, Complaint Counsel claim that the LENO Project included "a 'white PE' separator targeting flooded UPS batteries in North America." (CCAB 20-21). On the basis of the most pertinent authority on this point, PX0663, this "white PE separator" seems quite remote. PX0663 describes Project LENO and on the first page refers to its "market & applications" as "Stationary batteries in Europe" and "Gel batteries in the US and Europe." (PX0663 at 002). This document makes no reference to a "white PE separator," but a statement at the end of the document reads: "If we develop the right product it will also be used in the flooded UPS market in the U.S." (PX0663 at 003). Surely this does not establish that Microporous was "taking concrete steps to enter" the alleged UPS market in North America.

were not competitors in an alleged deep-cycle market prior to the Acquisition. As noted above, (*supra* pp. 19-21), Dr. Simpson's "analysis" simply assumed these three products were in the same market. He asked whether deep-cycle customers could use other end-use types of separators rather than apply the hypothetical monopolist test beginning with "each product (narrowly defined)," as called for by the Merger Guidelines.

Complaint Counsel argue that the substantially higher price of Flex-Sil is not evidence that it occupies its own market, as Respondent contends. (CCAB 23). But the case cited – United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)[28] – and the story of the case, show precisely the opposite.

In Cellophane, the government argued that cellophane was its own product market because it was three times as expensive as other materials like wrapping paper. Id. The Court, however, disagreed and found a "flexible packaging materials" market. Id. However, Complaint Counsel do not mention that the decision is viewed as having been in error and, indeed, has become known for the famous "Cellophane fallacy." "[I]f one had to choose either a cellophane market or a flexible wrapping materials market, the former was the correct one." IIB Areeda & Hovenkamp ¶ 534b (3d ed.). The court's definition of the market was too broad: "[t]he court's definition of the relevant market was probably wrong."[29]

The error arose because the Court failed to recognize that the high cross-elasticity of demand it observed derived from the fact that du Pont, with its monopoly position, was already charging a monopoly or supracompetitive price for cellophane. Under those circumstances, cross-elasticity of demand will be high and "overly broad markets [may be identified] when

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[28] Complaint Counsel give the case the short title, "du Pont," but it is usually referred to as "the Cellophane case." IIB Areeda & Hovenkamp ¶ 534b (3d ed.).

[29] Herbert Hovenkamp, Federal Antitrust Policy at 104 (2d ed. 1999); see also George W. Stocking & Willard F. Mueller, The Cellophane Case and the New Competition, 45 Am. Econ. Rev. 29 (1955).

those prices have been significantly supracompetitive." IIB Areeda & Hovenkamp ¶ 539a (3d ed.).

Here, although Flex-Sil has been sold at a price { }, it has continued to dominate HD in sales. (RFOF 66, 548-49, 745-54, 864-65, 1339; Gillespie, Tr. 2954-55). Complaint Counsel carefully avoid any claim that Flex-Sil is a superior product, contending only that Flex-Sil and HD were "substitutes for each other." (CCAB 24). If so, the question that neither the ALJ nor Complaint Counsel answer is why does HD with its price advantage not take over the sales in the alleged deep-cycle market. Instead, the evidence shows that { }. (RRCCFOF 263). Similarly, Trojan decided that Flex-Sil would continue to constitute at least { } of its purchases and U.S. Battery "wanted" to have HD constitute only 50% of its purchases. (CCPTRB 20). If the products are merely equivalent, as Complaint Counsel describe it, why, given the substantially higher Flex-Sil price, wouldn't these customers move much more decisively toward HD? The answer is that HD is not an effective competitor to Flex-Sil.[30]

While Flex-Sil, CellForce, and Daramic HD are all differentiated products, Flex-Sil has been far more successful than the others, enjoys a premium reputation, and has superior performance characteristics. In these circumstances, it is not surprising that Flex-Sil faces a downward-sloping demand curve and can be priced above a competitive level. Respondent's

[30] Complaint Counsel's argument that customers couldn't switch to HD because Daramic refused to supply them is without merit. (CCAB 12). This issue is addressed in Respondent's Appeal Brief on page 31. As we show there, in the case of U.S. Battery, there was no unmerited refusal but production problems, and in the case of Exide, the evidence cited was not of a refusal to supply but an internal memo discussing that strategy. Moreover, the instances cited by Complaint Counsel occurred after the Acquisition. The question remains why the customers referenced by Complaint Counsel did not make greater efforts to substitute HD for Flex-Sil before the Acquisition when the Flex-Sil price was high and Daramic was trying, but without much success, to sell HD. Again, the answer suggested by the evidence is that customers view HD as an unsatisfactory substitute for Flex-Sil.

expert, Dr. Kahwaty, showed that Flex-Sil had no significant competition in its own product market. (RX00945 at 041-49; Kahwaty, Tr. 5071, *in camera*). The Flex-Sil price was much higher than HD and CellForce prices, even though it may have been sub-optimal because it was driven by contracts developed in the past. (RX00945 at 040). With Flex-Sil priced above a competitive level, some customers were more interested in switching from Flex-Sil to HD than they would have been at lower prices. But less or no such switching would have occurred without the price differential, and the lesson of the Cellophane fallacy is that the cross price elasticity (evaluated at current prices) is exaggerated in such circumstances and that the resulting markets may be defined too broadly. The Cellophane fallacy's teaching of not defining an overly-broad market when some amount of market power is being exercised (as is common with differentiated products) is instructive, especially when the government's witnesses do not provide evidence of cross-elasticity that can be analyzed rigorously.[31] The ALJ defined an overly broad market here as did the Supreme Court in Cellophane.

Contrary to Complaint Counsel's assertions, separate product markets have frequently been found because of substantial product price disparities.[32] Indeed, Professor Areeda says: "The absence of close price relationships among products presumptively indicates that they are in separate markets. The prices charged by various producers of identical or nearly identical

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[31] Dr. Simpson did not estimate a cross-elasticity in this case. Complaint Counsel, however, claim to see a high cross-elasticity even though the largest customer for the product, Trojan, representing more than {70%} of Flex-Sil sales, indicated it could { }.
(Godber, Tr. 227; RX01120, *in camera*; IDFOF 546).

[32] FTC v. Warner Communications, Inc., 742 F.2d 1156, 1163 (9th Cir. 1984) (pre-recorded music determined a separate market from recorded music (including home tapes) because of significant price difference); FTC v. Swedish Match, 131 F.Supp.2d 151, 162 (D.D.C. 2000) (loose-leaf tobacco and snuff are not in the same market because of differences in price); Staples, Inc., 970 F.Supp. at 1077 (separate market of office supplies sold by office superstores recognized due to price differences between office supplies sold by superstores and other retailers); Archer-Daniels-Midland, 781 F. Supp. at 1409 (sugar and high fructose corn syrup ("HFCS") not in the same product market because the price of HFCS was 10-30% lower than the price of sugar); Consol Gas Co. v. City Gas Co., 665 F.Supp. 1493, 1517 (S.D. Fla. 1987) (natural gas found to be the product market, not including LP gas, where the price of LP gas was 100% higher than the price of natural gas).

products in the same geographic market rarely differ materially and the differences do not last long. No producer can persistently maintain a price higher than that charged by others without a fatal loss of sales." IIB Areeda & Hovenkamp ¶ 534b (3d ed.). As noted above, given the facts they posit, Complaint Counsel have failed to explain why in their deep-cycle market allegedly containing Flex-Sil, HD and Cellforce, Flex-Sil's substantially higher price has not caused it to suffer such a "fatal loss of sales."

D. Complaint Counsel Have Been Unable to Show Anticompetitive Unilateral Effects in Any of Their Alleged Markets.

In order to prove unilateral effects, Complaint Counsel must demonstrate several factors, which they have failed to do. (See RAB 32-38). These include the obvious requirement that "[i]n a unilateral effects case, a plaintiff is attempting to prove that the merging parties could unilaterally increase prices." Oracle, 331 F. Supp.2d at 1118. This seemingly simple assignment is in reality quite complicated.

The first challenge is to separate normal or "innocent" price increases from those enabled and driven by market power. (RAB 36). To constitute an anticompetitive unilateral effect, a price increase must be the result of enhanced market power that was acquired as a result of the acquisition.[33] This may require proof of what prices would have been in the "but-for world."[34] Complaint Counsel's expert economist, Dr. Simpson, recognized the need for such evidence with his attempted use of a "difference-in-differences" analysis and an effort to relate alleged price increases to Daramic's input costs. (See RAB 36-37). The ALJ also recognized the same requirement with his imperfect use of a price index for crude oil. (See RAB 37-38). Yet, in each

[33] Gregory S. Vistnes, Interpreting Evidence Regarding Price Effects in Consummated Mergers: When is Hindsight Really 20/20? at 4, 7 presented at the ABA Antitrust Law Spring Meeting, Mergers & Acquisitions Committee (April 22, 2010).

[34] Vistnes at 6 ("The need to estimate but-for prices means even 'obvious' price increases may fail to provide sufficient evidence of a price 'effect.")

case, the ALJ and Complaint Counsel failed to make this showing for the reasons previously discussed. (RAB 36-38). In addition, use of the unilateral effects theory requires a showing that the "customers are unsophisticated buyers who will not be able to rebuff a price increase." Oracle, 331 F. Supp.2d at 1171. Of course, the evidence shows convincingly that the buyers here are sophisticated and able to rebuff price increases, as they have done repeatedly in the past. (RFOF 251, 347-353, 759-62).

The price increase evidence cited by Complaint Counsel is not, in fact, evidence of actual post-Acquisition price increases but is dominated by evidence of alleged Daramic expectations regarding such increases. (CCAB 11-12, 36). As discussed in Respondent's Appeal Brief, the ALJ's findings relating to alleged price increases are actually findings that price increases were sought or were announced, not findings that price increases were put in place and paid. (RAB 36). In addition, the price increase evidence used both by Complaint Counsel and the ALJ is defective, since there is no evidence any alleged increases were actual increases after inflation and other adjustments, no evidence any increases were the result of additional market power derived from the Acquisition, and no evidence of prices that would have been in effect in the "but-for" world. Further, Dr. Simpson's difference-in-differences and input cost analyses, as well as the ALJ's similar input cost analysis, have been shown to be deficient. (RAB 36-38). In short, this case contains no solid evidence of price increases driven by acquired market power, the main and necessary point of a unilateral effects case.[35] Oracle, 331 F. Supp.2d at 1118.

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[35] Complaint Counsel hope to plug the gaps in their price increase case by citing Daramic documents they claim show plans for post-Acquisition price increases and justifying the use of such documents as showing "anticompetitive intent." (CCAB 35). Such evidence, however, loses its value in a post-consummation case where the actual evidence of alleged price increases, as here, is full of holes. Moreover, the authorities cited by Complaint Counsel don't support their broad claim. The Areeda analysis doesn't stop with Complaint Counsel's quote but states, two subparagraphs later, that such "intent" documents "may have been made by an overly exuberant acquisition proponent. " IVA Areeda & Hovenkamp ¶ 964c (2d ed.). Moreover, no pre-merger intent documents are referred to in Brown Shoe v. United States, 370 U.S. 294 (1962). It is true that Judge Tatel in FTC v. Whole Foods Market, Inc., cited both Areeda and Brown Shoe but Judge Kavanaugh, in dissent, pointed out that "a CEO's bravado with regard to one rival cannot alter the laws of economics." 548 F.3d at 1057.

Complaint Counsel have taken many unfair and unjustified liberties with the facts regarding their post-Acquisition price increase claims. They claim that Daramic believed the Acquisition would enable it to raise prices and that the Acquisition has "allowed" Daramic to raise prices. (CCAB 10-11). The first claim says nothing about an actual price increase[36] and the second claim is not supported by the citations.[37] Complaint Counsel claim there were specific price increases directed at Trojan, Exide and U.S. Battery. (CCAB 12). The facts of the Trojan and U.S. Battery situations are discussed in Respondent's Appeal Brief. (See RAB 31-32). Contrary to Complaint Counsel's claim about Trojan, price increases were not "instituted" in 2008. Rather, the ALJ's findings show that Daramic proposed a price increase to Trojan which it rejected, the companies were unable to reach agreement and {

}. (IDFOF 556-60). Also, as is explained in Respondent's Appeal Brief, Daramic did not arbitrarily force U.S. Battery to purchase Flex-Sil instead of less expensive HD. (RAB 31). Rather, Daramic was unable to produce HD separators for U.S. Battery's application because it did not have the proper tooling. (IDFOF 566). As for Exide, the ALJ's findings show that it agreed to pay Daramic a cost-justified rubber surcharge (which it had refused to pay Microporous) but refused to pay a price increase. (IDFOF 562-63). Notwithstanding these facts, both Complaint Counsel and the ALJ erroneously treated this as a pure price increase (ID 263; CCAB 12) even though the ALJ had generally treated "input price increases" as justifiable. (ID

[36] Page 269 of the Initial Decision, cited by Complaint Counsel, refers only to certain budget and other documents incorporating potential price increases. Documents referencing possible price increases are particularly worthless in this case given the many instances in which customers have simply "refused" input cost surcharges and cost-based price increases (PX0950 at 005, 014), e.g., Exide's acceptance of the cost-based rubber surcharge but refusal of a price increase referenced in text and noted in IDFOF 563.

[37] Pages 261 through 626 of the Initial Decision merely refer to certain price increases that were announced with no indication whether or to what extent they took effect. Findings 723-29, 856, 861, 867, 880-81 and 917-22 of the Initial Decision contain no evidence of implemented price increases but refer, instead, to potential price increases and Daramic cost increases.

262). Complaint Counsel also claim that Daramic raised motive separator prices but the citations (ID 263; IDFOF 611) indicate only that Daramic "announced" such increases leaving open (and unproved) the key question in this case – whether the customers accepted and paid them. As for the alleged Bulldog price increase, (CCAB 38), finding 613 of the Initial Decision indicates that if it went into effect (as to which there is no evidence), it may have been cost justified. Finally, Complaint Counsel rely on the Initial Decision at pages 264-65 for their broad claim about post-Acquisition SLI price increases, (CCAB 13), but this citation says utterly nothing about such increases. In sum, Complaint Counsel's price increase claims are wholly deficient. Complaint Counsel have failed to show that any such increases were not justified, by increased costs or otherwise, and that they were enabled by enhanced market power resulting from the Acquisition.

IV. BARRIERS TO ENTRY ARE LOW AND SUBSTANTIAL CUSTOMERS HAVE SPONSORED AND ENCOURAGED ENTRY BY FOREIGN AND DOMESTIC FIRMS.

Respondent's Appeal Brief sets forth in detail the facts and evidence showing that entry barriers into the battery separator industry are low and that substantial battery producers like { } have either sponsored or considered sponsoring entry. (RAB 41-50). It is unnecessary to recount all of these facts since Complaint Counsel, for the most part, have ignored and failed to rebut them. (CCAB 44-52). Most importantly, the evidence shows that the battery companies, which instigated and supported this action challenging the Acquisition, have consistently demonstrated that they have substantial market power and are able to protect themselves and market competition from any anticompetitive effects allegedly flowing from it.

This conclusion is borne out by the realities in the marketplace, much of which has occurred since the Acquisition. {

}.

(IDFOF 1046, 1049). Further acting to diversify its sources of supply, {

}. (IDFOF 1121).

{ } (RX00055; Hall, Tr. 2838-39, *in camera*).

In addition, shortly after the hearing in this matter, {

}. See ALJ's Order on Complaint Counsel's Motion for Official Notice (Feb. 16, 2010). Another Daramic customer, East Penn, continues to turn to Entek as competition continues to thrive between Daramic and Entek for East Penn's North American business. (RFOF 784).

Although Complaint Counsel argue that "power buyers" have no leverage unless they have alternative sources of supply (CCAB 50-51), they ignore the fact that battery manufacturers in this industry have been able to apply negotiation pressure in other ways. One of the more aggressive demonstrations of buyer power (as recorded by the ALJ's own findings) has actually come from Trojan, which purchases separators for deep-cycle applications from Daramic, a market in which Complaint Counsel argue Trojan has no alternatives. (CCAB 51). As noted in Respondent's Appeal Brief, Trojan took the position that it would accept a price increase only if it obtained a { } and thereafter {

}. (IDFOF 556-60). Other aggressive actions have been taken by battery manufacturers. (RAB 47-50). EnerSys refused to pay price increases and surcharges from Microporous and utilized a { } negotiating method with Daramic. (RFOF 625.) {

}. (RFOF 1544; ALJ's Order on Complaint Counsel's Motion for Official Notice (Feb 16, 2010)).

Complaint Counsel and the ALJ are incorrect in dismissing Asian separator suppliers. { }, as discussed above and in Respondent's Appeal Brief. {

}. (RAB 48 and citations). {

}. (RAB 49-50 and citations).

{ }. (RAB 49-50 and citations).[38]

Complaint Counsel and the ALJ give insufficient weight to the significance of this pattern of actual and proposed separator purchasing and sponsorship of new entry by the large battery manufacturers. They also give insufficient weight to the prospects for non-de novo entry, particularly the ability of {

}.[39] Entek formerly supplied separators for motive application to EnerSys and

[38] Complaint Counsel dismiss the Asian separator manufacturers, stating that while North American customers have conducted testing, testing has not been completed and none have been qualified for use in North America. (CCAB 50). But the same can be said of Microporous' LENO product. (RAB 27-28). Yet, based on the non-qualified LENO product, the ALJ found Microporous to be an actual participant in the supposed UPS market. This is another example of the ALJ's inconsistent approach to the facts in this case.

[39] Indeed, the ALJ found that the PE production lines in Feistritz could be used to manufacture separators for either SLI or industrial applications. (IDFOF 778). Notwithstanding that finding, the ALJ ignored Respondent's evidence showing that PE production lines could easily be switched from SLI to industrial, and vice versa. (RAB 34; RFOF 153-156). Most of the equipment used to construct a PE line can be purchased "off the shelf" from several different

Crown. (IDFOF 1040; RFOF 807). {

}. (RFOF 943-44, 963-72; RX00114, *in camera*; Weerts, Tr. 4490, *in camera*). Indeed, {

}. (IDFOF 1035-39, 1042, 1045). These actions belie Complaint Counsel's contention that { }. (CCAB 34).

The evidence regarding conditions of entry and the aggressive and effective actions taken by battery manufacturers shows that there need be no concern about post-Acquisition anticompetitive effects in the battery separator industry. The ALJ erred in not so concluding.

V. CONCLUSION

For the reasons set forth above and in Respondent's Appeal Brief, Respondent respectfully submits that Complaint Counsel's Complaint should be dismissed with prejudice, and that judgment should be rendered in Respondent's favor.

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vendors. (RFOF 1064). The ease with which a competitor can switch from SLI to industrial makes entry by { } and/or Asian suppliers even more likely.

Dated: June 4, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2010, I caused to be filed via hand delivery and electronic mail delivery an original and twelve (12) copies of the foregoing ***Respondent's Reply Brief (Public Version)***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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I hereby certify that on June 4, 2010, I caused to be served one copy via electronic mail delivery and two copies via overnight delivery of the foregoing ***Respondent's Reply Brief (Public Version)*** upon:

The Honorable D. Michael Chappell
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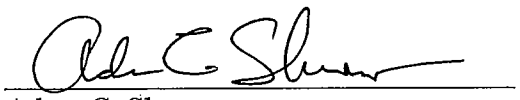

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