

ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
)
)

Docket No. 9327

Polypore International, Inc.)
a corporation)
)

PUBLIC

**RESPONDENT'S RESPONSES TO COMPLAINT COUNSEL'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

VOLUME I of III

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I. Jurisdiction

1. Daramic is, and all times relevant herein, has been engaged in “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose businesses are in or affect “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. (RX01589 at 003).

Response to Finding No. 1:

Respondent has no specific response.

II. Background

A. Overview of Transaction

2. On February 29, 2008, Daramic Acquisition Corporation, a subsidiary of Polypore, acquired 100% of the outstanding stock of Microporous Holdings Corporation, the parent of Microporous, from Industrial Growth Partners II L.P. (“IGP”) and other stockholders. (RX01589 at 003; PX0162 (Stock Purchase Agreement, *in camera*)).

Response to Finding No. 2:

Respondent has no specific response.

B. Parties

1. Polypore competes in the flooded lead acid battery separator industry through its Daramic business unit
3. Polypore International, Inc. (“Polypore”) is a leading global high technology filtration company that develops, manufactures, and markets specialized microporous membranes used in the separation and filtration processes. (PX2160 at 006). Its products and technologies are used in two primary segments, energy storage and separation media. (PX2160 at 006). The energy storage business accounted for approximately 74% of Polypore’s \$610.5 million of 2008 fiscal net sales. (PX2160 at 006, 028).

Response to Finding No. 3:

Complaint Counsel’s finding number 3 is incomplete and misleading. Polypore consists of four separate business divisions: 1) Liqui-Cel, 2) Membrana, 3) Celgard, and 4) Daramic. (Toth, Tr. 1498-99; PX0194, *in camera*; RX00635; Respondent’s Finding of Fact (hereinafter “RFOF”) 227).

4. The energy storage segment includes two businesses – {
} (PX0901 (Toth, Dep. at 22), *in camera*). The name of the electronics business is Celgard, which makes lithium ion separators for small electronics. (Toth, Tr.

1498-1499). The name of the transportation and industrial business is { }
(PX0901 (Toth, Dep. at 28-29), *in camera*).

Response to Finding No. 4:

Complaint Counsel's finding number 4 is incomplete and misleading. There are two primary applications of products in the energy storage segment: 1) membranes used in lithium batteries, and 2) membranes used in lead-acid batteries. (PX2106 at 006)(RFOF 227).

5. Polypore's separation media segment and its lithium ion electronics business segments are not at issue in this matter.

Response to Finding No. 5:

Respondent has no specific response.

6. Daramic is the business unit in Polypore that manufactures and sells separators for flooded lead-acid batteries. (Hauswald, Tr. 661). Daramic contributes about half of the revenues to Polypore. (Toth, Tr. 1386; *see also* (Hauswald, Tr. 1159 (More than half of Polypore's business is Daramic in terms of dollars.); PX0908 (Amos, Dep. at 111), *in camera* (Daramic represents approximately { }% of Polypore's revenue)).

Response to Finding No. 6:

Respondent has no specific response.

7. Daramic has three manufacturing facilities in the United States which make PE separators - Owensboro, Corydon, and Piney Flats. In addition, Daramic has PE separator manufacturing facilities in Feistritz, Austria; Prachinburi, Thailand; Tianjin, China; Bangalore, India; Selestat, France; and Potenza, Italy. (Hauswald, Tr. 711-13; PX0582 at 018).

Response to Finding No. 7:

Complaint Counsel's finding number 7 is incomplete and misleading. Daramic was forced to close its Potenza, Italy manufacturing facility in direct response to the loss of JCI's business. (RFOF 308).

8. Daramic has a history of acquiring separator plants. In approximately 1999, Daramic acquired a plant that produces SLI separators from Exide, a large battery manufacturer. (Gilchrist, Tr. 319-320). Later, Daramic acquired Jungfer, an Austrian separator manufacturer which, in addition to selling PE separators to European battery manufacturers, sold polyethylene manufacturing lines to other separator manufacturers. (Gilchrist, Tr. 320-21).

Response to Finding No. 8:

Complaint Counsel's finding number 8 is misleading. Daramic, through its predecessor company W.R. Grace, has been manufacturing polyethylene separators since 1954. (Hauswald, Tr. 957-59; RFOF 231). {

} (RFOF 518-527). Exide selected Daramic's proposal as the best option based on its cash needs at that time. (RFOF 524; PX0726; PX0731; PX0908 (Amos Dep. at 21), *in camera*). {

(PX2237 at 002). {

} (Hauswald, Tr. 772, 875, *in camera*).

2. Microporous

9. Microporous Products L.P., ("Microporous" or "MPLP") was a leading developer, manufacturer, and marketer of highly specialized rubber and polyethylene battery separators for use in lead-acid batteries. (PX0131 at 008). Michael Gilchrist was President and CEO of Microporous. (PX0131 at 009). Prior to the acquisition of Microporous by Daramic, Microporous's management team had more than 170 years of aggregate industry experience with an average of more than 10 years service with Microporous. (PX0131 at 009).

Response to Finding No. 9:

Complaint Counsel's finding number 9 is incorrect. Microporous is more accurately characterized as a "niche" player in the battery separator industry, not a "leading developer, manufacturer, and marketer of highly specialized rubber and polyethylene battery separators." (RFOF 314-318). Microporous' expertise was in the development and manufacture of rubber and rubber-based battery separators for the lead-acid battery industry. (RX00741 at 003;

RX01452 at 005; RX00741 at 003). In fact, it was not until 1999 that Microporous expanded its product line beyond traditional pure rubber technology by introducing the CellForce® product, a polyethylene (“PE”) separator with a rubber additive. (RX01452 at 005). Moreover, at the time of the acquisition, Microporous sold no pure PE separators. (Gilchrist, Tr. 557) (RFOF 314-318).

10. Microporous is a subsidiary of Microporous Holding Corporation, a Delaware corporation. (PX0162 at 005, *in camera*). Microporous Products, GmbH, an Austrian registered company, is a solely owned subsidiary of Microporous. (PX0611 at 003).

Response to Finding No. 10:

Respondent has no specific response.

11. Microporous was the successor of a company called American Hard Rubber, which produced rubber separators and other products in New Jersey beginning in the early 1930’s. In the early 1950’s, Amerace Corporation acquired American Hard Rubber. Microporous was formed in the mid-1980’s as a result of a leveraged buy-out by a management group occurring around the time that another firm bought Amerace’s other product lines. (Gilchrist, Tr. 313-315).

Response to Finding No. 11:

Respondent has no specific response.

12. Microporous sold three brands of battery separators: i) Flex-Sil which was predominantly used in deep-cycle batteries; ii) Ace-Sil which was used in high-end stationary applications (*i.e.*, industrial batteries); and iii) CellForce which, at the time of the acquisition, was predominantly used in deep-cycle and motive power batteries. (Gilchrist, Tr. 300-301).

Response to Finding No. 12:

Complaint Counsel’s finding number 12 is incorrect in that the end use applications of CellForce include motive power, stationary backup and standby power, uninterruptible power supply, deep cycle, and marine batteries. (RFOF 128).

13. Prior to the acquisition, Microporous owned plants at Piney Flats, Tennessee and Feistritz, Austria. The plant in Piney Flats includes a building for the manufacture of Flex-sil and Ace-Sil, and an adjoining building for the manufacture of CellForce. The two buildings have never operated “independently.” (Gaugl, Tr. 4641). At the Piney Flats plant facility, Microporous operated three production lines - one line for each of its

three products (*i.e.*, Flex-Sil, Ace-Sil and CellForce). (Gilchrist, Tr. 311; see PX0078, *in camera*).

Response to Finding No. 13:

Complaint Counsel's finding number 13 is inaccurate and misleading. Microporous Products L.P. did not own the Feistritz, Austria facility, nor was the Feistritz facility an operating facility, at the time of the acquisition. (Trevathan, Tr. at 3571-72; RX1227 at 2, 39, Exh. A, *in camera*; RX1228, *in camera*; RX1229 at 47, *in camera*; RX1572; RFOF 378). In March 2007, Microporous established a European entity Microporous Products GmbH which began taking strides to build a facility in Feistritz, Austria and in fact was the owner of the Feistritz facility at the time of the acquisition. (Trevathan, Tr. 3571-72; RFOF 378).

Prior to the Acquisition, Microporous supplied separators from only its manufacturing facility in Piney Flats, Tennessee. (Godber, Tr. 276-78; PX1788 at 004; Gaugl, Tr. 4601; McDonald, Tr. 3791; RFOF 332). While it is true that Microporous did operate three production lines from the Piney Flats facility - one line for each of its three products (*i.e.*, Flex-Sil, Ace-Sil and CellForce) - the facility itself actually consists of only two plants. (Gilchrist, Tr. 311; RFOF 332-335). The first plant (the "rubber plant") houses the ACE-SIL® and FLEX-SIL® lines. (Gilchrist, Tr. 311; Hauswald, Tr. 999-1000). The second plant (the "PE plant") houses a PE line on which CellForce is made. (Gilchrist, Tr. 311; Hauswald, Tr. 999-1000). The PE plant houses a single PE line purchased from Jungfer in 2000 for \$5.4 million and which became operational in 2001. (McDonald, Tr. 3790; Gilchrist, Tr. 549-50; Gaugl, Tr. 4533-34; RFOF 332-335). The rubber plant and PE plant in Piney Flats are distinct plants producing unique products - the production lines are not interchangeable and the products are not economic substitutes. (Gilchrist, Tr. 349; RFOF 332-335).

As of the time of the acquisition, the plant in Feistritz, Austria was not yet operational. (Gilchrist, Tr. 334-35; RFOF 337). Daramic first produced separators on one of those lines in

March of 2008. (Gaugl, Tr. 4601; RFOF 337). {

}

(Hauswald, Tr. 923-24, *in camera*; RFOF 337).

14. Microporous employed seven or eight employees in its lab and testing facility at its Piney Flats location. (Gilchrist, Tr. 326). Having a lab and testing facilities was imperative to MPLP's ability to compete in the marketplace. (Gilchrist, Tr. 327-328).

Response to Finding No. 14:

Respondent has no specific response.

15. Prior to the acquisition, Microporous had about 15 employees at its Feistritz facility. As the facility moved into full production mode, Microporous anticipated having up to 40 employees at the facility. (Gilchrist, Tr. 333-334).

Response to Finding No. 15:

Complaint Counsel's finding number 15 is, in part, speculative. At no point did Microporous ever employ more than 15 employees at its Feistritz facility. (Gilchrist, Tr. 333-34). As the Feistritz facility was never operational prior to the acquisition, these 15 employees were tasked with pre-operation mechanical work, clerical work, accounting, testing, and quality assurance. (Gilchrist, Tr. 333). Complaint Counsel speculates that Microporous anticipated having up to 40 employees at the facility, but fails to mention that these anticipated employees were to be tasked with the operation of the second Feistritz manufacturing line. (Gilchrist, Tr. 333). Given that Microporous had no supply contracts were in place for this line, it is speculative to suggest that the Feistritz facility would one day have 40 employees. (RFOF 407-08).

III. Product Markets

A. Flooded Lead Acid Battery Separators Generally

16. Battery separators prevent electrical shorts in flooded batteries by insulating the positive and negative plates. The rubber or polyethylene material in the separators is microporous (*i.e.*, contains very small holes) and facilitates the movement of electrical current between the battery's plates. (Gilchrist, Tr. 304-305; Benjamin, Tr. 3504; PX0078 at 003).

Response to Finding No. 16:

Respondent has no specific response.

17. A flooded lead acid battery is one that contains an electrolyte liquid in it. When the battery is charged or discharged, the liquid tends to evaporate because it creates H₂O in the gas bubbles, which evaporates and requires adding additional water. (Godber, Tr. 147). Flooded batteries lose water continuously through gassing. Proper battery maintenance requires the addition of water, so that the water level stays above the battery plates. (Brilmyer, Tr. 1854-1855).

Response to Finding No. 17:

Respondent has no specific response.

18. Flooded lead acid batteries are different from valve-regulated and AGM technology. (Douglas, Tr. 4052-53). Flooded batteries have electrolyte freely flowing while valve-regulated batteries use an absorbed glass mat that absorbs the acid like a thick toilet tissue so there is no free acid in the battery. (Douglas, Tr. 4053-54). AGM batteries, *i.e.*, absorbed glass mat, are not flooded acid batteries. (Wallace, Tr. 1978).

Response to Finding No. 18:

Respondent has no specific response.

19. AGM separators are more expensive than PE battery separators. (Gillespie, Tr. 2982).

Response to Finding No. 19:

Respondent has no specific response.

1. Physical Distinctions Affect Performance

20. Battery separators are differentiated by various characteristics including: ingredients (*e.g.*, rubber, polyethylene), rib spacing, backweb thickness, border areas, and finishing characteristics (*i.e.*, delivered in large rolls or cut into smaller flat sheets). (Gilchrist, Tr. 352, 364-366). Many types of batteries have performance specifications that require a unique function or feature for the separator. Hence, battery separator manufacturers make different separator products or brands, each of which is suitable for particular applications. (Gilchrist, Tr. 350-351; Brilmyer, Tr. 1829, 1831).

Response to Finding No. 20:

Complaint Counsel's finding number 20 is misleading. While it is true that battery separator products are differentiated by various characteristics, it is also true that battery separators, particularly PE based battery separators, perform the same function of keeping the

positive and negative electrodes from touching and to provide physical spacing for the electrode. (RFOF 97). Even though each specific product has been slightly modified to perform different functions for the end use applications where the separator is used, such as lower electrical resistance or water loss, interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of a battery, although it may impact the battery's overall performance. (RFOF 98).

i) Formulations

21. Battery separators are distinguished by additives that serve a variety of functions and are added to the PE base according to the requirements of specific battery applications. (Whear, Tr. 4667-4668).

Response to Finding No. 21:

Respondent has no specific response.

22. Daramic's PE separator types are all chemically and physically tailored to perform in specific applications based on the function of the battery in which the separators are contained. (Whear, Tr. 4681-4682).

Response to Finding No. 22:

Complaint Counsel's finding number 22 is misleading. Battery separators, particularly PE based battery separators, perform the same function of keeping the positive and negative electrodes from touching and to provide physical spacing for the electrode. (RFOF 97). Even though each specific product has been slightly modified to perform different functions for the end use applications where the separator is used, such as lower electrical resistance or water loss, interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of a battery, although it may impact the battery's overall performance. (RFOF 98).

23. There are certain chemical properties of the separator that will require greater or emphasis depending on the specific application. (Whear, Tr. 4782). The specific formula of separator is set according to the needs of the customer. (Whear, Tr. 4782).

Response to Finding No. 23:

Respondent has no specific response.

24. In industrial applications, both UPS and motive power, the PE separators are made using a special “clean” oil that reduces the presence of black scum, which can interfere with the proper maintenance and function of these types of batteries. (Whear, Tr. 4807; PX0582 at 050).

Response to Finding No. 24:

Complaint Counsel’s finding number 22 is incorrect. {

} (Whear, Tr. 4807, 4832, *in camera*). {

} (Whear, Tr. 4807, 4832, *in camera*).

Although black scum occurs in all batteries, in industrial type batteries, which typically use a clear casing, black scum is a purely cosmetic defect which does not interfere with the proper maintenance and function of these types of batteries. (Whear, Tr. 4712-13).

25. The Clean Oil that Daramic uses is patented by Daramic. (Whear, Tr. 4807).

Response to Finding No. 25:

Respondent has no specific response.

ii) Thickness

26. Separators with different backweb thicknesses perform differently. (Leister, Tr. 4041-4042). You cannot have a separator with a thinner backweb perform in the same manner as a separator with a thicker backweb. (Leister, Tr. 4042).

Response to Finding No. 26:

Complaint Counsel’s finding number 26 is an incomplete recitation of Mr. Leister’s testimony. Mr. Leister testified that when comparing two identical battery separators, save for one separator having a thicker backweb and one separator having a thinner backweb, that “you almost can’t have that happen, you can’t have a thinner backweb and a thicker backweb and have it perform exactly the same. It will have a difference of performance.” (Leister, Tr. 4042)(emphasis added). This testimony does not support Complaint Counsel’s purported finding

of fact number 26, which alleges that separators of different backweb thicknesses can never perform in the same manner. In fact, separators of different backweb thicknesses often perform in a similar manner. (RFOF 69-74).

27. For example, East Penn does not use separators with the same backweb thickness in both motive and deep-cycle applications. (Leister, Tr. 3982). For motive power, East Penn specifies a backweb thickness of 0.020 as the minimum thickness, while East Penn's deep-cycle batteries use 0.012-0.013 thicknesses. (Leister, Tr. 3996). There is also no overlap between the backweb thicknesses of separators that East Penn purchases for use in motive power batteries with those that it purchases for automotive batteries. (Leister, Tr. 4021, 3982).

Response to Finding No. 27:

Complaint Counsel's finding number 27 is an incomplete and misleading. First, while East Penn does not currently use separators of the same backweb thickness in both motive and deep-cycle applications, East Penn acknowledges both that a) it is possible to use a separator of the same backweb thickness in both motive and deep cycle batteries; and b) that it possible to use a separator with the same backweb thickness in all different types of batteries. (Leister, Tr. 3982-83). Moreover, East Penn admits that there may be overlap in the backweb thickness between separators used for its automotive SLI product and its deep-cycle product. (Leister, Tr. 4021-22). Finally, Complaint Counsel ignores the abundance of evidence that battery separators of the same size or thickness can be used in multiple end-use applications. (RFOF 70-78).

28. Swapping separators of the same backweb thickness would affect the life and performance of the battery because in addition to backweb thickness there are other properties within a separator that impact on the performance of the battery. (Leister, Tr. 4023). These variations in separator properties include electrical resistance, puncture resistance and oxidation resistance, all of which are important in determining which separator to use in any particular end use application. (Leister, Tr. 4023-4024).

Response to Finding No. 28:

Complaint Counsel's finding number 28 is misleading. Battery separators, particularly PE based battery separators, perform the same function of keeping the positive and negative electrodes from touching and to provide physical spacing for the electrode. (RFOF 97). Even

though each specific product has been slightly modified to perform different functions for the end use applications where the separator is used, such as lower electrical resistance or water loss, interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of a battery, although it may impact the battery's overall performance. (RFOF 98).

29. For example, East Penn might have a very limited overlap in the backweb thicknesses of certain large eighteen wheeler truck SLI separators and some of its deep-cycle separators. (Leister, Tr. 4022). However, if East Penn were to take the separators in the eighteen-wheeler and place them in a deep-cycle battery it would devalue the deep-cycle battery by shortening the life of the battery. (Leister, Tr. 4022-4023).

Response to Finding No. 29:

Complaint Counsel's finding number 28 is misleading. In fact, if East Penn were to take the separators in the eighteen-wheeler and place them in a deep-cycle battery it would actually make the battery more attractive to customers who emphasize price. (Leister, Tr. 4023). Irrespective of customer preferences however, there is no dispute that separators of the same thickness are used in different applications and in each application the separators serve the same function within the battery. (RFOF 78).

iii) Applications

30. The following flooded battery applications use different types of separators: deep-cycle, SLI or automotive, motive and UPS batteries. (Gilchrist, Tr. 351-352). Daramic categorizes its separator sales by general categories such as Automotive, Industrial, HDDC, and Specialty. (Hauswald, Tr. 676-677; *see also* PX0582 at 031).

Response to Finding No. 30:

Complaint Counsel's finding number 30 is incorrect and misleading. First, there is significant evidence that separators used in the categories advocated by the FTC (deep-cycle, SLI or automotive, motive and UPS batteries) overlap significantly. (RFOF 69-78). Further evidence shows that various products made by Daramic are used across the spectrum of the FTC's product categories. (RFOF 45-46, 64, 67, 69-78). For example, a so-called "UPS"

separator can be and is used in a “motive” application, and so-called “SLI” separators can be and are used in a “deep cycle” application. (RFOF 37, 72, 721, 1185-1188, 769, 885). Quite simply, it is impossible to classify separators into distinctive “buckets” advocated by Complaint Counsel. (RFOF 69-70, 74).

31. Trojan has never considered using motive power construction in its deep-cycle batteries because they are so much smaller and there is not enough space for all of the insulation. (Godber, Tr. 146). Moreover, the cost of the insulation does not make it cost-competitive as the applications in which deep-cycle batteries are used do not require that length of life. (Godber, Tr. 146).

Response to Finding No. 31:

Complaint Counsel’s finding number 30 is incomplete and misleading. Complaint Counsel has chosen to focus on Trojan to bolster its alleged product markets. Complaint Counsel ignores the evidence that Daramic CL is used in the “motive” and “UPS” categories, Daramic HD is used in “motive,” “UPS” and “deep-cycle” and CellForce is used in “deep-cycle” and “motive.” (RFOF 89, 95, 127-128). Moreover, in 2008, Daramic sold an individual PE profile called “FC” with a backweb thickness of 11 mils to { } for use in a UPS application, to { } for use in a deep-cycle application and to { } for use in an SLI application. (RFOF 72-74). Daramic also sold a profile with a 15 mil backweb thickness for use in deep cycle, UPS, and SLI applications to different customers in 2008. (RFOF 72-74).

2. Separators are not substitutable for different end use applications

32. Misapplying the battery separators would “change the way [the battery] works. . . [and] change the life of the battery. . .”. (Whear, Tr. 4683).

Response to Finding No. 32:

Complaint Counsel’s finding number 32 is an incomplete and inaccurate recitation of the testimony in this matter. In this instance, the evidence illustrates that interchanging one PE separator product for another would not impact the functionality of the battery. As Mr. Whear explained, “First of all, the battery would probably work, and it would just change -- it might just

change the way it works. It might change the life of the battery, for instance. It depends on what change you made.” (Whear, Tr. 4683). Mr. Whear’s statement supports the overwhelming evidence that a polyethylene based separator used for one end-use application can be substituted into other end-use applications. (RFOF 69-78).

3. Producers can price discriminate by end use applications

33. PE separator manufacturers know the end use applications of the separators they sell.
{
} (Weerts, Tr. 4504, *in camera*).

Response to Finding No. 33:

{

} (RFOF 62; Whear, Tr. 4687-88; Hauswald, Tr. 974-75, 978; Weerts, Tr. 4456, *in camera*).

34. Daramic keeps track of the sales of its products. (Hauswald, Tr. 676). Daramic keeps track of whether the separator is sold in the United States or elsewhere. (Hauswald, Tr. 677).

Response to Finding No. 34:

Respondent has no specific response.

35. Daramic has sufficient information regarding the applications for its products that it is able to provide information regarding the demand for each type of application, including deep-cycle, motive power, reserve power, and SLI. (PX0395 at 019, *in camera*; Burkert, Tr. 2336).

Response to Finding No. 35:

Complaint Counsel’s finding number 35 is misleading. Complaint Counsel’s only support for this “fact” is a document created by Michael Gilchrist and the testimony of one highly biased third party witness. (Hauswald, Tr. 793-94, *in camera*). PE separators are identified, and priced, according to their thickness. (RFOF 14, 29, 45-46, 58). Thicker product is more expensive than thinner product. (RFOF 244; Riney, Tr. 4497, *in camera*). Generally,

separators made for SLI type applications are thinner, while separators made for the various industrial applications are thicker. (RFOF 25, 65, 67-68). However, this is not always the case. (RFOF 69-78). While rough approximations of demand for particular applications can be made, a separator manufacturer does not know for certain which end-use application a particular separator will be used in. (RFOF 62-63).

36. { } (RX01120, *in camera*; McDonald, Tr. 3895-3896, *in camera*).

Response to Finding No. 36:

Complaint Counsel's finding number 36 is misleading. Prior to the acquisition, Microporous attempted to track revenue numbers based on application, but was unable to accurately do so because of instances when Microporous did not know the end-use application for the products it was selling. (McDonald, Tr. 3894, *in camera*).

37. Daramic is aware of the end use applications for the separators it sells. For example, Daramic has an agreement with {

} (Roe, Tr. 1355, *in camera*).

Response to Finding No. 37:

Complaint Counsel's finding number 37 is misleading. The end use application of a battery separator can be generally, but not precisely, determined by looking at the physical dimensions of the separator. (RFOF 64). Generally, separators made for SLI type applications are thinner, while separators made for the various industrial applications are thicker. (RFOF 25, 65, 67-68). East Penn is a unique customer in that East Penn has only specified a backweb thickness of 0.020 on separators used in motive power (industrial) batteries. (Leister, Tr. 3996). Because of this, on separators sold to East Penn, Daramic can determine if a separator will be used in an SLI battery or a motive battery by looking at the separator's backweb thickness. Other customers withhold this level of detail when purchasing separators. (RFOF 63).

38. {
} (Gillespie, Tr. 3013-3014, *in camera*).

Response to Finding No. 38:

Complaint Counsel's finding number 38 is inaccurate. Daramic was aware of the product codes and specifications contained in Exide's RFP, it was not aware of the end use application where the separators would be used. (Gillespie, Tr. 3014-3016, *in camera*).

39. Daramic is aware that certain backweb thicknesses are typically used in particular types of end use applications. (Roe, Tr. 1308). Customers often request a specific backweb thickness when ordering a separator from Daramic. (Roe, Tr. 1308-1309). Daramic tracks the backweb thickness of all separators that it sells in the AFS database. (Roe, Tr. 1309-1310).

Response to Finding No. 39:

Complaint Counsel's finding number 39 is misleading. It is true that PE separators can be identified, and priced, according to their thickness. (RFOF 14, 29, 45-46, 58). Generally, separators made for SLI type applications are thinner, while separators made for the various industrial applications are thicker. (RFOF 25, 65, 67-68). However, this does not mean that a separator of a particular backweb thickness is only used in a certain end-use application. (RFOF 69-78). For example, there is end-use overlap in separators with a backweb thickness in the 11-12 mil range. (RFOF 74). Within the 12 mil backweb range one would find separators used in automobiles (SLI), golf carts (deep cycle) and telecom batteries (stationary). (RFOF 74).

{

} (RFOF 74).

40. When EnerSys provides technical specifications to a separator manufacturer, those specifications convey the type of battery and even the nomenclature of the battery. For example, when EnerSys provided its specifications to { } the drawings noted that it was a request for a { } with certain attributes. (Gagge, Tr. 2523, *in camera*).

Response to Finding No. 40:

Respondent has no specific response.

41. {
} (Gagge, Tr. 2524, *in camera*). {
} (Gagge, Tr. 2524, *in camera*).

Response to Finding No. 41:

Complaint Counsel's finding number 41 is not accurate and is based entirely on the biased testimony of Mr. Gagge. Mr. Gagge's testimony is inconsistent with the overwhelming evidence that separator manufacturers do not know the end-use application for which a battery separator will be used. (RFOF 62-64; Whear, Tr. 4687-88; Hauswald, Tr. 974-75, 978; Weerts, Tr. 4456, *in camera*). Mr. Gagge's testimony is not trustworthy as he has been instructed by his superiors at EnerSys to cooperate fully with the FTC lawyers. (RFOF 726). EnerSys' witnesses' testimony in this matter has been inconsistent with each other, certain exhibits and prior deposition testimony. (RFOF 725-733). Finding number 41 is just another example.

42. Daramic can discriminate by end use to EnerSys because EnerSys manufactures specific batteries at specific facilities. In Richmond, Kentucky, it manufactures a tubular-plate motive power battery. (Axt, Tr. 2099-2100). In Ooltewah, Tennessee, it manufactures a flat-plate motive power battery. (Axt, Tr. 2099-2100). In Monterrey, Mexico, it manufactures a flat-plate motive power battery and Mexican telecom batteries, and in Hays, Kansas it produces flooded batteries for the telecom and UPS industry in addition to battery backup for utilities. (Axt, Tr. 2099-2100).

Response to Finding No. 42:

Complaint Counsel's finding number 42 is misleading. It is true that EnerSys manufactures specific batteries at specific facilities. However, it is entirely speculative to then presume that based on this fact Daramic can, or does, discriminate by end use to EnerSys. In fact, finding number 42 cites no evidence to support this speculative conclusion.

43. Separator suppliers work with battery manufacturers to design and make sure that the separators it is using work well with all of the components of the battery in order to meet the customer's end use application. (Gillespie, Tr. 2932).

Response to Finding No. 43:

Complaint Counsel's finding number 43 is misleading. Some separator profiles have become standardized or widely accepted by customers. (RFOF 59). For non-standard separators, Daramic works with its customers to develop separator profiles which are suitable for the customer's batteries, regardless of the ultimate end use of that battery. (RFOF 57-62).

44. In developing a new separator product for battery manufacturers, it is necessary to know for what application the battery is intended. In Dr. Brilmyer's position as Director of R&D, he insisted upon knowing the application that his separators would serve before a developmental separator project could be green-lighted. From his perspective such knowledge is essential. (Brilmyer, Tr. 1828-1829).

Response to Finding No. 44:

Complaint Counsel's finding number 44 confuses the evidence as it fails to distinguish between the development of a new separator product and the sale of an existing separator product. The development of new separator products is typically conducted with one or multiple applications in mind. For example, the Project Leno separator was developed primarily for UPS batteries and stationary batteries. (RFOF 355-65). Once a new separator product is developed, however, it's sales are not limited to a specific application. For example, although not necessarily developed for multiple applications, Daramic CL is now used in the "motive" and "UPS" categories, Daramic HD is now used in "motive," "UPS" and "deep-cycle" and CellForce is now used in "deep-cycle" and "motive." (RFOF 89, 95, 127-128). Thus, even though a separator product was developed for certain applications it does not prevent the separator's ultimate use in other applications and consequently a separator manufacturer does not know for certain which end-use application a particular separator will be used in when it is sold. (RFOF 62).

45. Daramic actually suggests specific separators for specific applications. {

camera)). } (PX0913 (Whear, Dep. at 6, in

Response to Finding No. 45:

Complaint Counsel's finding number 45 is misleading. Daramic may suggest specific separators for specific applications, but doing so does not mean that such a separator can only be used exclusively in that application. (Whear, Tr. 4775-76)(Daramic HD used in both motive and deep-cycle applications).

46. Daramic tries to find out what the customer wants and then provide the customer with the appropriate separator for the specified application. (Whear, Tr. 4779). If asked which separator is appropriate for a golf cart battery for instance Mr. Whear would tell the customer that Daramic's HD is designed for that application. (Whear, Tr. 4776).

Response to Finding No. 46:

Complaint Counsel's finding number 46 is also misleading. The Daramic HD product used in Complaint Counsel's example was originally designed for motive power applications. (Whear, Tr. 4775-76). It has found limited use in low-end golf cart batteries. (Whear, Tr. 4775-76; RFOF 871-878). Thus, when Daramic sells a Daramic HD separator it does not know the end use application intended for that particular separator. (RFOF 62-64).

47. Most of Daramic's product is order based, which means that when Daramic produces a product it knows the customer for who it is producing that product. (Gaugl, Tr. 4623-4624). Daramic rarely builds any inventory without having the name of a customer. (Gaugl, Tr. 4624).

Response to Finding No. 47:

Complaint Counsel's finding number 47 is incomplete. Specifically, even if a battery separator manufacturer, such as Daramic, knows that a particular separator is going to a specific customer, it does not know for certain which end use application a particular separator will be used in as customers often withhold this level of detail when purchasing separators (RFOF 62-64; Whear, Tr. 4688; Hauswald, Tr. 978; Douglas, Tr. 4057-59).

48. Daramic prices its separators such that separators for different end use applications return different gross margins for Daramic. For example, in 2006 Daramic was selling both motive power and stationary separators to C&D. (PX0806 at 002-003; Roe, Tr. 1325-1326). At that time, Daramic was aware of the breakdown in sales to C&D of motive power versus stationary separators, and was getting a 60% gross margin on the stationary separators and a 40% gross margin on the motive power separators. (PX0806 at 003).

Response to Finding No. 48:

Respondent has no specific response.

49. The average price of an SLI separator in North America is \$0.70 per square meter. (Roe, Tr. 1313). Most of the UPS and stationary separators that Daramic sells are sold for more than \$2.00, and Daramic does not sell any UPS or stationary separators for less than \$1.00 per square meter. (Roe, Tr. 1315-1316). Daramic's HD separators being sold into deep-cycle applications range in price from \$1.50 - \$2.90. (Roe, Tr. 1314-1315). Daramic's motive power separators range in price from \$1.90 - \$3.00. (Roe, Tr. 1315).

Response to Finding No. 49:

Respondent has no specific response.

50. {
} (McDonald, Tr. 3877-3878, *in camera*).

Response to Finding No. 50:

Complaint Counsel's finding number 50 is incomplete. While Mike Gilchrist did head Microporous' negotiations with Trojan Battery related to the 2007 price increase, Mr. Gilchrist and Mr. McDonald had several conversations about the negotiations whereby Mr. Gilchrist informed Mr. McDonald about the negotiations and the ultimate agreement reached by Microporous and Trojan. (McDonald, Tr. 3814-16). Moreover, as Microporous' Director of Sales, Mr. McDonald reviewed communications from Trojan related to the negotiations. (RX00560).

51. After the acquisition of Microporous, Daramic examined and compared the average selling price of {
(PX0395 at 040-041, *in camera*). In the {

} (PX0395 at 040-041, *in camera*; Hauswald, Tr. 794-795, *in camera*).

Response to Finding No. 51:

Complaint Counsel's finding number 51 is inaccurate. While Complaint Counsel accurately recites the information shown on the slides found in PX0395 at 040-041, it fails to point out that the direct manufacturing costs detailed in those slides in not correct as it fails to

account for the glass mat which is typically added to separators used in golf cart applications and which justifies the increased selling price. (Hauswald, Tr. 794-796, *in camera*; PX0395 at 040-041, *in camera*).

52. A PowerPoint presentation for a April 22-23, 2008 meeting, shows that the 2008 {
(PX0395 at 040, *in camera*). {
(PX0395 at 040, *in camera*). Likewise, the {
(PX0395 at 041, *in camera*). The {
(PX0395 at 041, *in camera*).

Response to Finding No. 52:

Complaint Counsel’s finding number 52 is inaccurate. Again, while Complaint Counsel accurately recites the information shown on the slides found in PX0395 at 040-041, it fails to point out that the direct manufacturing costs detailed in those slides in not correct as it fails to account for the glass mat which is typically added to separators used in golf cart applications and which justifies the increased selling price. (Hauswald, Tr. 794-796, *in camera*; PX0395 at 040-041, *in camera*).

- i) Arbitrage will not defeat price discrimination by end use application

53. Arbitrage will not occur because separators are manufactured for customer specific designs. EnerSys cannot resell UPS separators to other manufacturers because they are made for EnerSys design and “there is no other market for them.” (*Burkert*, Tr. 2326; 2399). At one time EnerSys asked its sales person, Randy Hanschu, if Daramic could take back some separators and resell them. (*Burkert*, Tr. 2328). Mr. Hanschu informed EnerSys that no other customer used the same material and he could not resell it. (PX1257 at 001; *Burkert*, Tr. 2330).

Response to Finding No. 53:

Complaint Counsel’s finding number 53 is inaccurate. Not all battery separators are manufactured for specific customer designs. Many separator profiles, particularly separators that are used in SLI end use applications, have become standardized and widely accepted by multiple

customers. (RFOF 59). For example, Exide is working to standardize the specifications for its separators used around the world. (RFOF 214).

54. When EnerSys sought to return motive separators to Daramic, Daramic responded that “[e]very industrial motive power customer wants their specific size. For one reason or another company X believes they need a separator ½” aller than EnerSys.” (PX1275 at 001).

Response to Finding No. 54:

Complaint Counsel’s finding number 54 is misleading. Even though no other Daramic customers purchased the same size motive separators Daramic sold to EnerSys in 2004, it does not mean that Daramic customers are not doing so today or that in general there are not standardized separator profiles.

55. During the Ownsboro strike, EnerSys was only able to find one common separator in the Feistritz plant that could be used for one of its batteries in Mexico. (*Burkert*, Tr. 2333). The cost of the separator was approximately 20 percent more because EnerSys had to pay in euros, stock, carry, and freight the material to Mexico. The duties that EnerSys had to pay from Austria were approximately 6.5 percent. (*Burkert*, Tr. 2402).

Response to Finding No. 55:

Respondent has no specific response.

B. Product Markets Generally

56. Dr. Simpson opined that deep-cycle, motive, UPS and SLI are all product markets. (Simpson, Tr. 3170-3171). “[T]he starting point for defining the product market would be to look at the particular separators that are sold and ask what are the substitutes for these.” (Simpson, Tr. 3173-3174). Because battery manufacturers design a battery for a particular application, and the separator plays a significant role in the performance characteristics of the battery, battery manufacturers have little discretion to shift among different battery separators. Thus, according to Dr. Simpson, {

(Simpson, Tr. 3414, *in camera*).

Response to Finding No. 56:

Complaint Counsel’s finding number 56 is entirely false. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and shall be disregarded. Complaint Counsel and its expert Dr. Simpson have ignored the smallest market principle and

use of the hypothetical monopolist test and SSNIP system. This is an economic substitution test, not a functional substitution test. Dr. Simpson did not commence his analysis by looking first at individual products and applying a hypothetical monopolist test. Rather, he skipped that step and looked at the end use markets referred to in the complaint. That creates problems for his analysis. (RFOF 1334). Dr. Simpson has wholly ignored the Merger Guidelines system of economic substitutes and has offered proof only of functional substitution. (RFOF 133, 139, 1201, 1352). Additionally, even as to the approach followed by Simpson, that of defining the product market by end use application, Simpson admitted that battery separators can be used for different end use applications. (Simpson, Tr. at 3308, *in camera*; RFOF 1190-1192). Yet, Simpson did not account for this “dual usage” of separators in analyzing his product markets. (RFOF 1190-92).

In this matter, the correct relevant product market is an all PE separator market. (RX1572 at 2; RFOF 76, 77, 116, 126). PE separators are highly differentiated products but, because of the easy supply-side substitution, a manufacturer of one of these products can make any of the others. As a result, even though they are highly differentiated, they may sometimes be referred to as commodities. (Kahwaty, Tr. 5132-34). In addition this court cannot credit

{ }

(Simpson, Tr. 3354, 3376-77, *in camera*).

57. {

} (Simpson, Tr. 3414, *in camera*). { }

(Kahwaty, Tr. 5317, *in camera*).

Response to Finding No. 57:

Complaint Counsel’s finding number 58 is incorrect and misleading. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and

shall be disregarded. Further, Dr. Simpson has not conducted any empirical analysis on price elasticities or elasticities of demand. (Simpson, Tr. 3481-82, *in camera*; see also Simpson, Tr. 3474, *in camera*; RFOF 1178, 1321). Second, Dr. Kahwaty did not concede that the demand for separators used in deep-cycle batteries is inelastic, but instead was asked by Complaint Counsel to assume for the purposes of a hypothetical that the demand for separators used in deep-cycle batteries is inelastic. (Kahwaty, Tr. 5318, *in camera*). In fact, {
} (Kahwaty, Tr. 5319-20, *in camera*).

58. When Guidelines market analysis leads to many very small product markets - in some cases specific to a particular buyer - it makes sense to aggregate these very narrow product markets into broader ones where the market conditions (*e.g.*, entry conditions, market participants) are the same. (Simpson, Tr. 3174; Kahwaty, Tr. 5294-5295, *in camera*).

Response to Finding No. 58:

Complaint Counsel's finding number 58 is not correct. Dr. Simpson's market analysis erred in the concept of aggregating small markets to create a larger one. Such aggregation can be properly done only when the smaller markets all share the same competitive circumstances. Dr. Simpson failed to describe the competitive circumstances in each of the smaller markets and, therefore, his argument that they could be aggregated so as to form the four product markets he supports is defective. (Kahwaty, Tr. 5144-55, *in camera*). It is apparent from his testimony that Simpson did not define his markets by starting with the products, narrowly defined, of the merging firms. (RFOF 1183-88). Instead, Simpson just accepting the product market definitions in the Complaint. (RFOF 1187). Moreover, Simpson did not even consider an all PE market. (RFOF 1197).

59. Such aggregation leads to the following four markets described in the FTC's complaint: deep-cycle, motive, UPS, and SLI. (Simpson, Tr. 3170-3171). Aggregating beyond the markets identified in the FTC's complaint would lead to a loss of detail because one would combine markets where market participants differ and entry conditions differ. (Simpson, Tr. 3175).

Response to Finding No. 59:

Complaint Counsel's finding number 59 is entirely false. Dr. Simpson's product categories support the four end-use categories for his "markets" that are described in the complaint. These can be considered to be "four buckets," but Dr. Simpson's analysis fails to describe which separators are in which bucket. (RFOF 1343). For example, Dr. Simpson's description of his deep cycle market is flawed because he did not include straight PE separators in his market. Battery manufacturers, such as East Penn and Crown, use straight PE separators in deep cycle batteries. However, Dr. Simpson does not include any PE separators in the deep cycle category. Crown uses straight PE separators and batteries for floor scrubbers but separators for golf carts and floor scrubbers were included by Simpson in his deep cycle market. (Kahwaty, Tr. 5577-79, *in camera*)(RFOF 1344). Further evidence shows that various products made by Daramic are used across the spectrum of the FTC's product categories. (RFOF 45-46, 64, 67, 69-78). This is a fatal flaw to Dr. Simpson's approach. Also, because Dr. Simpson by his own admission did not start by looking at the individual products (indeed he did not even know what they were) he is unable to say what detail is supposedly lost by aggregating above the four markets pled in the complaint and readily accepted by Dr. Simpson here. (Simpson, Tr. 3292, 3295, 3302, 3470-71 *in camera*.) Furthermore, the FTC concedes that AGM and PVC separators are not part of their separator markets, but there is ample evidence that when looking at the "end-use" of separators (*i.e.*, whether they are going into a "deep-cycle" golf cart battery, or an "SLI" car battery) both AGM and PVC separators are found in all these end-use applications. (RFOF 105, 134-139). This alone is enough to show that the FTC has failed in the fundamental proof of identifying a product market in which to analyze the effects of the transaction at issue.

The all PE separator market is the correct relevant market here. (RX1572 at 2; RFOF 76, 77, 116, 126). The high degree of supply-side substitution that exists in the production of PE separators supports their designation as the relevant product market in this matter. First, it is easy to shift between production of different kinds of PE separators. (RFOF 155, 156, 969). Second, all PE separators material is identical until it passes through the calendar rolls fitted with specific profile patterns and adjusted to specific widths. It is the calendar roll patterns, along with the thickness of the material, not end-use application, that differentiates PE separators from each other. (RFOF 151-154, 939-940).

60. Daramic recognizes separate product markets for SLI, motive power, Deep-cycle and reserve power. {

} (Gilchrist, Tr. 458-459, *in camera*; PX0395, *in camera*).

At that meeting, attendees agreed that {

} (Gilchrist Tr. 461-463; PX395,

in camera).

Response to Finding No. 60:

Complaint Counsel's finding number 60 is inaccurate. Complaint Counsel attempts to equate a statement made by an unreliable witness and a document he drafted with the position of Daramic. The contradicting evidence is clear, however, that Daramic does not focus on separate product markets for SLI, motive power, deep-cycle and reserve power. For example, in analyzing the merger, Daramic focused on PE vs. Non-PE separators. (PX0055 at 82, *in camera*; PX0174 at 009, *in camera*; PX0275 at 011, *in camera*). Significantly, when conducting competitive market analysis, Daramic did not focus on separate product markets for SLI, motive power, deep-cycle and reserve power, but on the entire PE market. (PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*). Daramic also creates budgets based on the PE, Non-PE distinction. (PX1688 at 001, *in camera*).

61. {

} (PX0265 at 004, *in camera*).

Response to Finding No. 61:

Respondent has no specific response.

C. Deep-cycle Battery Separators are a Product Market

62. The market for deep-cycle battery separators is a product market. (Simpson, Tr. 3170-3171).

Response to Finding No. 62:

Complaint Counsel's finding number 62 is false. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Applying a correct "hypothetical monopolist test" to the markets alleged by the FTC shows that the alleged "deep cycle" market is not a valid, relevant market in which to analyze the acquisition. Instead, the "all PE separator market is the correct relevant market here. (RX1572 at 2; RFOF 76, 77, 116, 126). There is overwhelming evidence which shows that various separators are used across the spectrum of the FTC's product categories. (RFOF 45-46, 64, 67, 69-78). For example, "SLI" separators may be used in a "deep cycle" application. (RFOF 37, 72, 1185-1188, 769, 885). Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." (RFOF 89, 95, 127-128).

63. Company documents analyze competition in the context of a market for deep-cycle battery separators. (PX0131 at 028-029; PX0506 at 001-003, *in camera*).

Response to Finding No. 63:

Complaint Counsel's finding number 63 is inaccurate and misleading. The only evidence cited by Complaint Counsel in support of this "fact" are two Microporous documents created prior to the acquisition. Microporous was a "niche" player in the battery separator industry focusing on rubber and rubber-based battery separators used in deep cycle applications. (RFOF 314-18). Thus it would be logical for Microporous to analyze its competition for deep-cycle battery separators. At the time of the acquisition, Microporous did not even sell a pure PE separator. (RFOF 317). Daramic, on the other hand, did not analyze competition in the context

of a market for deep-cycle battery separators or any other separate product markets; instead Daramic's competitive market analysis was focused on the entire PE market. (PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*).

1. Product Characteristics

64. A deep-cycle battery is one that is built for long durations of discharge at a lower amperage. (Godber, Tr. 137-138). The construction of a deep-cycle is much different from other types of batteries. (Godber, Tr. 138). Deep-cycle batteries are made with thicker plates so that they can better withstand deep discharges and corrosion of the grid (lead plates pasted with lead oxide) that occurs in a golf cart battery. (Godber, Tr. 138). Further, the active material that is put into the positive plate is a different material than what is used in automotive batteries. (Godber, Tr. 138). The important measurers of a deep-cycle battery are capacity and life. (Godber, Tr. 138).

Response to Finding No. 64:

Respondent has no specific response.

65. Daramic uses the term "deep-cycle" in its business operations to denote batteries that deeply discharge such as those intended for golf cars and floor scrubbers. (Whear, Tr. 4764).

Response to Finding No. 65:

Complaint Counsel's finding number 65 is false. While Daramic is familiar with the phrase "deep cycle," it considers the term to be an artificial distinction. (Whear, Tr. 4694). Batteries which are deeply discharged in application are not necessarily "deep-cycle" batteries. (RFOF 78). For example, separators can be found in both the alleged "motive power" market (for example separators used forklift batteries) and the alleged "deep cycle" market (for example separators used golf cart batteries) that serve the same deep discharging function within the battery. (RFOF 78). The battery in each alleged market is used to move something (a golf cart, a forklift, or a mining vehicle) and is deeply discharged and then recharged. (Whear, Tr. 4694).

66. Deep-cycle batteries are distinct from SLI batteries. SLI batteries are used to start an engine, whereas "deep-cycle batteries are designed to run at relatively lower current draw for a long period of time, such as driving a golf cart, scissor lifts, floor-sweeping machines." (Qureshi, Tr. 1994).

Response to Finding No. 66:

Complaint Counsel's finding number 66 is incomplete and misleading in that it fails to include the fact that an "SLI" type separator may be effectively used in a "deep cycle" application. (RFOF 37, 72, 1185-1188, 769, 885). In fact, the evidence not only shows that this "could" happen, but that it does happen every day in the reality of the PE battery separator market. (RFOF 37, 721, 1185-1188, 769, 885). This is true in all of the FTC's alleged product categories. (RFOF 69-78).

67. Both deep-cycle and motive batteries are cycling batteries. (Roe, Tr. 1197). However, deep-cycle batteries are differentiated from motive power batteries in that deep-cycle batteries are more deeply discharged. (Roe, Tr. 1197).

Response to Finding No. 67:

Complaint Counsel's finding number 67 is false. Both deep-cycle and motive power batteries are deeply discharged in certain end use applications. (RFOF 78). For example, forklift batteries (the alleged "motive" market) and golf cart batteries (the alleged "deep cycle" market) serve the same deep discharging function. Each battery is used to move something (a golf cart, a forklift) and is deeply discharged and then recharged. (Whear, Tr. 4694)(RFOF 78).

68. The components of deep-cycle batteries differ from an SLI battery. Deep-cycle batteries use a high-antimony lead alloy grid and use high-density active material that takes longer to fall apart. (Qureshi, Tr. 1995). The positive lead alloy grid at U.S. Battery has an antimony content of 5% and the negative grid has an antimony content of 2.75%. (Qureshi, Tr. 1998). SLI grids have much lower antimony content or none at all. (Qureshi, Tr. 1996). Also the grid for a deep-cycle battery is generally thicker than that of an SLI battery. (Qureshi, Tr. 1997).

Response to Finding No. 68:

Complaint Counsel's finding number 68 is incomplete. While it is true that generally the components of deep-cycle batteries differ from the component of an SLI battery, this is not necessarily true of battery separators. Separators used "SLI" applications are also used in "deep cycle" applications. (RFOF 37, 72, 69-78, 1185-1188, 769, 885). For example, in 2008, Daramic sold an individual PE profile called "FC" with a backweb thickness of 11 mils to { } for use in a UPS application, to { } for use in a deep-cycle application and to { }

for use in an SLI application. (RFOF 72). {

} (PX1450, *in camera*).

69. A key component to deep-cycle batteries is the separator. The separator reduces antimony transfer which can cause antimony poison. (Godber, Tr. 139). The reduction of antimony transfer is important property for separators used in deep-cycle batteries. (Leister, Tr. 4039). The separator plays an important role in scavenging or tying up the antimony in the electrolyte, preventing it from going to the negative plate. (Qureshi, Tr. 2004).

Response to Finding No. 69:

Respondent has no specific response.

70. U.S. Battery uses leaf separators for all its deep-cycle batteries and assembles the plates and separators by hand. (Qureshi, Tr. 2035-36). While it has an enveloping machine that it could use to automate the deep-cycle battery manufacturing process when using HD separators, U.S. Battery has determined that through testing and experimentation that enveloped separators do not work well in deep-cycle batteries “[b]ecause the shed material falls to the bottom and creates punctures and the shed material rises to the top and prematurely creates internal shorts against the strap.” (Qureshi, Tr. 2035).

Response to Finding No. 70:

Respondent has no specific response.

71. In a deep-cycle battery, the lead and lead oxide are the most expensive components. (Qureshi, Tr. 1993). The separator is the next most expensive component. (Qureshi, Tr. 1993).

Response to Finding No. 71:

Complaint Counsel’s finding number 71 is misleading. {

} (PX2110 at 010;

Douglas, Tr. 4072, *in camera*; Craig, Tr. 2553, *in camera*). { }

i) Role of Antimony

72. Antimony plays two functions in the deep-cycle batteries. (Qureshi, Tr. 2001). The first one is that antimony hardens the lead to make it easier to handle and assemble. (Qureshi, Tr. 2001). In deep-cycle batteries the positive plate has an antimony alloy. The antimony helps cast the plate by increasing the flow of the molten lead that is poured into the grid mold. Antimony also prevents corrosion in a cycling application as well as creating better adhesion on the grid for active material flow. (Godber, Tr. 139).

Response to Finding No. 72:

Respondent has no specific response.

73. Antimony also is what makes the battery a deep-cycle; if you do not have enough antimony the cycle loses capacity. (Qureshi, Tr. 2001-2002). During the operation of a deep-cycle battery, traces of antimony comes out from the corrosion of particles on the metal grid, which if allowed to migrate to the negative plate will cause the battery to gas more. (Qureshi, Tr. 2002).

Response to Finding No. 73:

Respondent has no specific response.

74. The deposition of antimony onto the negative plate, sometimes called “antimony poisoning” drastically reduces the cycle life of the battery. (PX1791 at 001; PX1124 at 001).

Response to Finding No. 74:

Respondent has no specific response.

- ii) Need to suppress antimony transfer

75. Antimony poison occurs when the antimony migrates from the positive to the negative plate. (Godber, Tr. 139; *see also* Qureshi, Tr. 2002). Antimony poisoning causes the voltage of the battery to drop, and that causes the charger to charge longer, which creates more gas and more heat leading to increased water loss and corrosion. (Godber, Tr. 139-140).

Response to Finding No. 75:

Respondent has no specific response.

76. Excessive gassing weakens the battery causing the battery to have a shorter life. (Qureshi, Tr. 2002-2003). Excessive gassing also results in water loss, which requires the battery owner to water the battery more frequently. (Qureshi, Tr. 2002-2003). Daramic’s technical bulletin on golf cart separators has an entire section that explains this antimony effect. (Hauswald, Tr. 663; PX1791 (Technical Bulletin Topic: Golf Car Battery Separators)).

Response to Finding No. 76:

Respondent has no specific response.

77. Rubber based separators work best at preventing antimony transfer. (Godber, Tr. 140, 150). Rubber based separators reduce the antimony effect. Daramic offers multiple separator products that are designed for golf cart applications and have the “Rubber Effect” to combat antimony. (PX1791 at 001; Hauswald, Tr. 663-664). For the deep-

cycle applications the separators are enhanced with latex and rubber additives in order to aid in the suppression of antimony migration and stymie water loss that deep discharging batteries tends to produce. (Whear, Tr. 4682; PX0913 (Whear, Dep. at 052, *in camera*)).

Response to Finding No. 77:

Complaint Counsel's finding number 77 is inaccurate and misleading. As Complaint Counsel correctly points out in finding number 77, rubber based separators work best at preventing antimony transfer. (RFOF 121). The only rubber-based separator used in the FTC's so-called "deep-cycle" market is Flex-Sil. Flex-Sil has very different technical capabilities compared to other separators because it is made of pure rubber. (RFOF 117-127, 1200; PX2301, (Heglie Dep. at 98-99); Whear, Tr. 4684-4685). Daramic offers other separators designed to combat antimony (CellForce, Daramic HD), but these separators products are PE-based, not rubber-based, and therefore are inferior to Flex-Sil. (RFOF 122). For this reason, Flex-Sil is the industry gold-standard separator in motive, deep-cycle battery applications. (RFOF 121). For example, Flex-Sil delivers 2-3 times more cycles than PE based separators. (PX1124 at 001)

78. East Penn uses Daramic HD separators in its golf cart and floor scrubber batteries in order to reduce antimony transfer in those batteries. (Leister, Tr. 4038-39). {

} (PX1514, *in camera*).

Response to Finding No. 78:

Complaint Counsel's finding number 78 is misleading. East Penn uses "straight PE" separators (i.e., containing no other additives) in the batteries it manufactures for golf carts, floor scrubbers, and other deep cycle batteries. (Leister, Tr. 3978-79).

a. Pure Rubber (Flex-Sil)

79. In Daramic products like Flex-Sil, the separator is made of natural rubber. (Hauswald, Tr. 664; PX1791 at 001). Flex-Sil includes rubber in a solid form, the rubber makes up about 40% of the separator's content. (Hauswald, Tr. 673).

Response to Finding No. 79:

Respondent has no specific response.

b. Rubber/PE Hybrid (CellForce and HD)

80. In other Daramic products, such as Daramic HD or CellForce, the separator is made from PE for its increased strength and incorporates a rubber additive. (Hauswald, Tr. 664; PX1791 at 001, *in camera*). Daramic HD includes rubber in the form of latex, which is added in a liquid form. (Hauswald, Tr. 671-672).

Response to Finding No. 80:

Respondent has no specific response.

81. The HD latex additive allows HD to perform similarly to rubber separator in a way that straight PE separators cannot. (Whear, Tr. 4806; PX0582 at 046). Daramic HD contains uncrosslinked rubber material in order to retard antimony poisoning affects. (PX0675 at 013).

Response to Finding No. 81:

Complaint Counsel's finding number 81 is inaccurate – Daramic HD in an inferior product compared to Flex-Sil. (PX1124). The rubber-based separator Flex-Sil is unique in that no other battery separator product can offer the same degree of antimony suppression as Flex-Sil. (Whear, Tr. 4684-85; RFOF 121). Polyethylene is a completely inert material - it has no effect on inhibiting that antimony transfer process. (Gilchrist, Tr. 365). Consequently, rubber-based products, such as Flex-Sil, inhibit antimony transfer quite well. (Gilchrist, Tr. 365). For this reason, when it comes to preventing antimony transfer, batteries made with a polyethylene based separator are ultimately inferior in performance to batteries made with a rubber-based separator. (Gilchrist, Tr. 365)(RFOF 121). Not surprisingly, FlexSil test results consistently exceed those of Daramic HD. (RX01089; Godber Tr. 172, 271; RX01093 at 2 (“Nawaz said the batteries had failed and that we didn’t have anything to worry about as far as Daramic was concerned”); RX835; RX1334; RX1329; RFOF 121).

82. CellForce includes rubber in the form of ground-up Ace-Sil, which is added in a powder form. (Gilchrist, Tr. 312; Hauswald, Tr. 672; PX0798). CellForce is used in deep-cycle batteries. (Gilchrist, Tr. 360-361).

Response to Finding No. 82:

Respondent has no specific response.

83. Daramic HD is typically available in backweb thicknesses of between 13 to 15 mils. (Whear, Tr. 4806; PX0582 at 046).

Response to Finding No. 83:

Respondent has no specific response.

84. Deep-cycle batteries require separators containing rubber or latex to suppress antimony poisoning. (PX1791 at 001; PX0072 at 020; PX0798).

Response to Finding No. 84:

Complaint Counsel's finding number 84 is inaccurate. Battery manufacturers can and do use PE separators without a rubber additive ("straight PE") in deep-cycle applications. For example, East Penn's Lesiter testified that East Penn uses straight PE separators in some of its "deep cycle" batteries. (Leister Tr. at 3978-80). Additionally, Crown uses a straight PE separator in a portion of its "deep-cycle" batteries. (Balcerzak, Tr. 4093-94; RFOF 1344).

2. PE Separators do not work in Deep-cycle

85. Pure PE separators do not work for deep cycling applications. (Hauswald, Tr. 666; PX1124). Separators made of pure polyethylene are not able to suppress antimony. (Qureshi, Tr. 2005).

Response to Finding No. 85:

Complaint Counsel's finding number 85 is inaccurate. While a pure PE separator may not provide as many cycles as other separators in deep cycling applications, it is clear that battery manufacturers can and do use pure PE separators without a rubber additive ("straight PE") in deep-cycle applications. (Response to Finding No. 84).

86. Polyethylene separators and other inert materials are not suitable for deep-cycle batteries, which expand and contract the grid of a separator when the battery cycles through charges and discharges. Because antimony is used for the grid in deep-cycle batteries, the separator material must inhibit the antimony from leaching and collecting on the negative battery plate. Rubber based separators inhibit the leaching of antimony well. (Gilchrist, Tr. 365).

Response to Finding No. 86:

Complaint Counsel's finding number 86 is inaccurate and misleading. It is true that polyethylene is a completely inert material and as a result has a limited effect on inhibiting the antimony transfer process. (Gilchrist, Tr. 365; RFOF 122). For this reason, when it comes to preventing antimony transfer, batteries made with a polyethylene based separator are ultimately inferior in performance to batteries made with a rubber-based separator. (Gilchrist, Tr. 365; RFOF 121). However, preventing antimony transfer is not the exclusive criteria a battery manufacturer uses when selecting a separator which is evidenced by the fact that multiple battery manufacturers use polyethylene separators in "deep cycle" applications. (RFOF 768, 1344).

87. While it is physically possible to put a typical car battery into a deep-cycle application, the battery life would be extremely short. (Godber, Tr. 150-151). Trojan has tested straight PE separators in its deep-cycle products "off and on, and they just don't last." A PE separator in a deep-cycle product would drastically reduce the life of the battery to about 20 percent of what it would be if rubber was used. (Godber, Tr. 151). Polyethylene separators give substantially less number of cycles, less than half of what U.S. Battery expects from its separators. (Qureshi, Tr. 2005).

Response to Finding No. 87:

Complaint Counsel's finding number 87 is inaccurate and misleading. Again, while pure PE separators may not work as well in some deep-cycling applications when it comes to antimony suppression, this does not mean that pure PE separators cannot and are not used by battery manufacturers in deep cycle applications – indeed, they very much are. (RFOF 768, 1344)(see Response to Finding No. 84).

88. U.S. Battery expects a deep-cycle battery in a golf cart use to go at least 600 or more cycles, which is defined as a charge/discharge. (Qureshi, Tr. 2005-2006). A pure polyethylene separator gives substantially less number of cycles, less than half of what U.S. Battery expects. (Qureshi, Tr. 2005). A pure polyethylene separator "would last perhaps 150 to 300 cycles." (Qureshi, Tr. 2005).

Response to Finding No. 88:

Complaint Counsel's finding number 88 is incomplete and misleading. Clearly, East Penn and Crown Battery disagree with U.S. Battery's cycling criteria for separators used in deep-cycle batteries. (RFOF 768, 1344).

89. Exide does not use a straight PE separator in deep-cycle batteries because straight PE separators do not meet the performance criteria for those batteries. (Gillespie, Tr. 2933). In negotiations with Daramic and MPLP, Exide never threatened to switch to a straight PE separator. Doing so would not make sense as a straight PE separator in a deep-cycle battery would negatively impact the quality and reliability of the battery and would negatively impact on Exide's reputation. (Gillespie, Tr. 2933-2934).

Response to Finding No. 89:

Complaint Counsel's finding number 89 is incomplete and misleading. Clearly, East Penn and Crown Battery disagree with Exide's performance criteria for separators used in deep-cycle batteries. (RFOF 768, 1344).

90. Trojan has never threatened to move business to a straight polyethylene separator to constrain the prices it pays for deep-cycle separators. (Godber, Tr. 154). Mr. Godber cannot recall any instances where Trojan successfully used PE as leverage in negotiations with Microporous. (Godber, Tr. 223).

Response to Finding No. 90:

Complaint Counsel's finding number 90 is incomplete and misleading. Until the acquisition of Microporous by Polypore in 2008, Microporous was Trojan's exclusive battery separator supplier. (RFOF 742). Moreover, prior to the acquisition, Microporous did not even sell a straight polyethylene separator. (RFOF 318). Thus, it is not surprising that Trojan never moved its business to a straight polyethylene separator considering that Trojan believes Flex-Sil to be the industry gold-standard separator in motive, deep-cycle battery applications and markets Flex-Sil as such. (RFOF 120, 740). In fact, Trojan only uses a PE-based separator in less than 8% of its batteries. (RFOF 744).

91. All of Daramic's deep-cycle separator products function in a similar way, and differently from how pure PE performs, in terms of their performance for golf car applications, as shown in Daramic's technical bulletin on golf car battery separators. (Hauswald, Tr. 664, 666; PX1791 at 001).

Response to Finding No. 91:

Complaint Counsel's finding number 91 is incorrect. Pure PE separators, as well as Flex-Sil separators, CellForce separators and Daramic HD separators all function in a similar way in

golf cart applications in that each prevents the positive and negative electrodes from having contact and fixes the physical spacing between the electrodes. (RFOF 43-44). In terms of reducing water loss, antimony suppression and extending the life of a battery, none of these products function in a similar way in term of their performance. Flex-Sil is the premium battery separator in deep-cycle applications. (RX01643; Gilchrist, Tr. 535; Godber Tr. 271, 277; Wallace, Tr. 1964-1965; Quereshi Tr. 2072; McDonald, Tr. 3818; RFOF 121). Flex-Sil performs at least 15% better than Cellforce, which in turn, performs at least 15% better than Daramic HD. (RFOF 747, 875). Pure PE separators perform about 80% worse than Flex-Sil. (Godber, Tr. 151).

3. Other Technologies do not work in deep-cycle

92. 92. A PVC/silica separator is not a competitor in the deep-cycle market because it does not provide antimony suppression. (PX0319 at 007; *see also* Gagge, Tr. 2520, *in camera*).

Response to Finding No. 92:

Complaint Counsel's finding number 92 is not accurate. There is ample evidence that when looking at the "end-use" of separators (*i.e.*, whether they are going into a "deep-cycle" golf cart battery, or an "SLI" car battery) PVC separators are found in all these end-use applications. (RFOF 105, 134-139). PVC separators compete with polyethylene separators in several battery applications. (RFOF 839). In fact, EnerSys is looking at PVC separators as substitutes for polyethylene separators. (RFOF 139, 700-702).

93. Exide will not use PVC in deep-cycle batteries. PVC separators do not work well in deep-cycle batteries because PVC is {
} (Gillespie, Tr. 3042, *in camera*).

Response to Finding No. 93:

Complaint Counsel's finding number 93 is not accurate and incomplete. PVC separators compete with polyethylene separators in several battery applications. In fact, Exide is looking at PVC separators as substitutes for polyethylene separators. (RFOF 139, 514).

94. Sealed batteries using AGM separators do not perform well in golf cart and floor scrubber applications. (Roe, Tr. 1208; Gilchrist, Tr. 366). AGM does not work well in deep-cycle batteries because use of AGM can result in the shedding of lead particles in a deep-cycle battery which could penetrate the AGM separators, according to a former VP of worldwide technology at { } (PX0433 at 002; PX0911 (Roe, Dep. at 118-120, *in camera*)). Bob Cullen of H&V does not foresee wide-scale use of AGM in deep-cycle batteries in his lifetime. (PX0433 at 002).

Response to Finding No. 94:

Complaint Counsel's finding number 94 is not accurate. First, { } (PX0925 (Porter Dep. at 29, 138, 145), *in camera*). Second, there is ample evidence that when looking at the "end-use" of separators (*i.e.*, whether they are going into a "deep-cycle" golf cart battery, or an "SLI" car battery) AGM separators are found in all these end-use applications. (RFOF 105, 130-139, 514, 608, 695, 767). For example, Trojan uses AGM separators in its deep-cycle marine applications. (RFOF 220). Additionally, U.S. Battery will soon be manufacturing a deep cycle battery that uses an AGM separator. (Wallace, Tr. 1975). For these batteries, U.S. Battery intends to purchase AGM separators from a supplier in China and import the separators to its North American manufacturing facilities. (RFOF 859).

95. Sealed batteries last about 50% to 75% of what a good deep-cycle battery would last. (Godber, Tr. 147-148). In other words, flooded deep-cycle batteries have a 25 to 50 percent longer life than a sealed battery. (Godber, Tr. 149). Sealed batteries are more expensive than flooded deep-cycle batteries. AGM batteries cost approximately 30% more than a flooded battery, and a gel battery costs around 50% more than a flooded battery. (Godber, Tr. 149).

Response to Finding No. 95:

Respondent has no specific response.

96. Sealed batteries go into deep-cycle applications where there may be a regulation that prohibits a flooded battery such as in an airport or a hospital. (Godber, Tr. 148). Trojan does not produce sealed batteries, but buys some for resale. (Godber, Tr. 148). About one percent of the batteries Trojan sells are sealed. (Godber, Tr. 148).

Response to Finding No. 96:

Complaint Counsel's finding number 96 is not accurate. {

} (PX0925

(Porter Dep. at 29, 138, 145), *in camera*). Further, Trojan is introducing a line of sealed batteries which will be used in floor scrubbers and aerial work platforms and will increase the percentage of sealed batteries sold by Trojan. (Godber, Tr. 148-49).

4. End Use Applications

97. The primary end-use application for deep-cycle batteries is golf carts, but deep-cycle batteries also are used in other applications. (Godber, Tr. 143; *see also* Gilchrist, Tr. 305; Wallace, Tr. 1955-1956; Gillespie, Tr. 2931). The biggest markets for Trojan are golf, floor scrubbers, scissor lifts, and boom lifts. (Godber, Tr. 143).

Response to Finding No. 97:

Complaint Counsel's finding number 97 is incomplete. Example applications of deep-cycle batteries include golf carts, floor scrubbers, scissor lifts, boom lifts, utilities, and marine boat applications. (RFOF 20; Godber, Tr. 137-38; Gillespie, Tr. 2931; Whear, Tr. 4682, 4694; PX0319 at 007-008).

98. { } head of sales and marketing, defines deep-cycle {
 } batteries. (PX0922 (Roe, IHT at 54)). Similarly, Daramic documents refer to a
 {
 } (PX0263 at 004, *in camera*).

Response to Finding No. 98:

Complaint Counsel's finding number 98 is inaccurate in that {

} (PX0922 (Roe, IHT at 54), *in camera*). {

}

(PX0922 (Roe, IHT at 54), *in camera*).

99. Daramic's marketing Flex-Sil, CellForce and HD for golf cart batteries. (PX1791 at 001).

Response to Finding No. 99:

Respondent has no specific response.

i) Original Equipment

100. Exide expects to qualify HD for use in all of its deep-cycle batteries, including those going into OE applications. (Gillespie, Tr. 3091).

Response to Finding No. 100:

Complaint Counsel's finding number 100 is inaccurate and misleading. Exide does not currently use Daramic HD in any of its OE deep cycle batteries. (Gillespie, Tr. 3091; RX01094). Moreover, Exide has not qualified Daramic HD for use in its OE deep cycle batteries and, in fact, has not even taken any steps to begin the qualification process. (Gillespie, Tr. 3091). This is true even though Daramic HD is significantly less expensive than Flex-Sil. (RFOF 546, 548; Gillespie, Tr. 3092).

In fact, HD has not been qualified for use in OE batteries by any battery manufacturer because HD does not have the superior characteristics demanded by the customers for high-end batteries. (RFOF 18, 121-125, 548-549, 745, 747, 872; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762; McDonald, Tr. 3822; RX1094).

ii) After Market

101. Typically, 14-15% of deep-cycle batteries are sold by original equipment manufacturers while the remaining portion of deep-cycle batteries are sold in the aftermarket. (Gilchrist, Tr. 357-358, 608-609).

Response to Finding No. 101:

Complaint Counsel's finding number 101 is unreliable – it is based solely on Microporous' understanding of the end-use applications in which battery manufacturers sell their batteries. (Gilchrist, Tr. 357-358). Gilchrist's unreliability is exemplified by the testimony of battery manufacturers such as Trojan, the largest manufacturer for OEM golf cart batteries, which sells 40% of its batteries for OEM applications, and U.S. Battery which sells slightly less than 20% of its batteries for OEM applications. (Godber, Tr. 274, 278; RFOF 866).

102. Exide sells golf cart batteries into both OE and aftermarket markets. (Gillespie, Tr. 2932). Approximately 90% of the golf cart batteries that Exide sells are sold into the aftermarket, with the remainder going to OE applications. (Gillespie, Tr. 2932).

Response to Finding No. 102:

Respondent has no specific response.

5. Demand for Deep-cycle Separators is inelastic
- i) Post Acquisition Price Increases on Deep-cycle Separators have not Induced Switching to non-rubber based separators

103. Since the acquisition, U.S. Battery must single source the separators for its deep-cycle flooded batteries from Daramic. (Wallace, Tr. 1951).

Response to Finding No. 103:

Complaint Counsel's finding number 103 is misleading and inaccurate. Post-acquisition, U.S. Battery is not single sourced for separators used in its deep-cycle batteries as U.S. Battery is procuring AGM separators for use in its deep cycle batteries. (RFOF 859). Additionally, prior to the acquisition U.S. Battery was purchasing over 90% of the separators for its deep-cycle flooded batteries from Microporous. (RFOF 852, 864). In fact, prior to the acquisition, Microporous was the single source of separators used in U.S. Battery's premium deep cycle batteries. (RFOF 854-57).

104. Following the acquisition, Daramic increased prices on Flex-Sil, CellForce, and HD. (Roe, Tr. 1218). Despite these price increases, Daramic has not lost any deep-cycle business to any competitor anywhere in the world. (Roe, Tr. 1217-1218). Nor have Daramic's post-acquisition price increases on deep-cycle separators caused any customer to switch from a rubber or hybrid rubber/PE separator to a straight PE separator for use in a deep-cycle battery. (Roe, Tr. 1218).

Response to Finding No. 104:

Respondent has no specific response.

105. East Penn purchases HD from Daramic for use in its golf cart batteries under a contract that Daramic and East Penn entered into in 2008. (Roe, Tr. 1220-1221; RX01519). East Penn continued to purchase HD for their golf cart batteries despite the 5% price increase that Daramic passed through to East Penn on the HD separators in 2009. (Roe, Tr. 1222-1223).

Response to Finding No. 105:

Complaint Counsel's finding number 105 is misleading and inaccurate - Daramic did not pass through a price increase to East Penn; it was mutually agreed to by the parties. It is true that East Penn and Daramic entered into a {

} (RX01519, *in camera*). Under the Purchase Agreement, in the event of circumstances that caused extraordinary increases to Daramic in the price of raw materials or overhead, the terms of the Purchase Agreement required East Penn and Daramic to negotiate in good faith regarding a commercially reasonable adjustment to the agreed prices under the agreement. Daramic is to provide East Penn verifiable documentation evidencing such changes in circumstances. (RFOF 774). And in fact, Daramic did provide East Penn verifiable documentation to support the 2009 increase. (RFOF 774; PX 1550).

106. U.S. Battery sought additional suppliers for its deep-cycle separator needs over the years, but was unsuccessful in finding anyone willing or able to do so. (Wallace, Tr. 1943-1944). At one point in the last few years, U.S. Battery sought to persuade Entek to supply these separators, but Entek said it was not interested in entering the deep-cycle separator market. (Wallace, Tr. 1943-1944; 1950-1951).

Response to Finding No. 106:

Complaint Counsel's finding number 106 is false. U.S. Battery intends to purchase AGM separators for its deep-cycle batteries from a supplier in China and import the separators to its North American manufacturing facilities. (RFOF 859). {

}
(Wallace, Tr. 1943-1944). Complaint Counsel provides no other evidence to support this incorrect assertion and it should be disregarded in its entirety.

107. In the last year, U.S. Battery designed two new battery product lines called US 27DC and US 31DC which contained Daramic's HD separators. (Wallace, Tr. 1947-1948). During the design phase, U.S. Battery informed Daramic of these new applications for HD separators. At that time, Daramic did not indicate it would not be able to supply the

specified HD separators. After the acquisition and close in time to the production phase, Daramic informed U.S. Battery that it would only supply the Flex-Sil separator, which cost twice as much as the HD separator, for the two new battery lines. (Wallace, Tr. 1948-1950). Dr. Simpson evaluated the critical loss and determined that {

} (PX0033 at 006,

012, *in camera*; Simpson Tr. 3169-3172)

Response to Finding No. 107:

Complaint Counsel's finding number 107 is incorrect. In regards to U.S. Battery products US 27DC and US 31DC, U.S. Battery contacted Daramic and requested a quote for Daramic HD separators. Daramic's Steve McDonald handled U.S. Battery's quote and determined that Daramic did not have the tooling specifications necessary to manufacture Daramic HD separators with the overall thickness U.S. Battery requested for its US 27DC and US31DC products. (McDonald, Tr. 3824). Mr. McDonald communicated this determination to U.S. Battery. (McDonald, Tr. 3824).

Moreover, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Nevertheless, one would not expect a customer to switch from Flex-Sil to Daramic HD or CellForce, as Flex-Sil is a relevant product market on its own. (RFOF 1336-1341). Indeed, Dr. Simpson's critical loss analysis is inaccurate in that Simpson's analysis did not begin by determining narrowly defined product markets as required by the Merger Guidelines. (RFOF 1180-1184).

- ii) Limited Supply of Deep-cycle separators due to Owensboro strike did not cause substitution to non-deep-cycle separators

108. HD supply was limited during the 2008 strike at Daramic's Owensboro manufacturing plant. (Roe, Tr. 1219). Despite the limited availability of HD during the strike, no customers switched from HD to a straight PE product for use in deep-cycle applications. (Roe, Tr. 1219).

Response to Finding No. 108:

Respondent has no specific response.

109. The Owensboro strike limited the availability of HD for use at Exide. (Roe, Tr. 1223). Because of the HD shortage, Exide was forced to purchase Flex-Sil, which was the only available alternate product for their deep-cycle batteries. (Roe, Tr. 1223). Only by purchasing Flex-Sil was Exide able to avoid a supply interruption during the strike. (RX01260). In purchasing Flex-Sil in place of HD during the strike, Exide paid a premium for the Flex-Sil separators rather than switch to any alternate type of separator for use in their golf cart batteries. (Roe, Tr. 1223). Additionally, by switching from HD to Flex-Sil during the strike, Exide had to forego the credit towards its shortfall payments to Daramic that it was otherwise due under its contract with Daramic. (RX01260).

Response to Finding No. 109:

Respondent has no specific response.

D. Motive Separators are a Product Market

110. The market for motive power battery separators is a product market. (Simpson, Tr. 3170-3171).

Response to Finding No. 110:

Complaint Counsel's finding number 110 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Further, applying a correct "hypothetical monopolist test" to the markets alleged by the FTC shows that the alleged "motive power" market is not a valid, relevant market in which to analyze the acquisition. Instead, the "all PE separator market is the correct relevant market by which to analyze the acquisition. (RX1572 at 2; RFOF 76, 77, 116, 126). There is overwhelming evidence which shows that various separators are used across the spectrum of the FTC's product categories. (RFOF 45-46, 64, 67, 69-78). For example, a so-called "UPS" separator might well be effectively used in a "motive" application. (RFOF 37, 72, 1185-1188, 769, 885). Indeed, various products made by Daramic are used across the spectrum of the FTC's product categories. Daramic CL is used in the "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." (RFOF 89, 95, 127-128).

1. Product Characteristics

i) Thicker than other separators

111. Motive batteries are extremely large and serve as counterweights in the design of industrial vehicles and are among the largest batteries made. (PX2110 at 35). Motive batteries are much larger than deep-cycle batteries and their construction is much more robust. Instead of plastic, motive batteries use a steel tray and glass mat is wrapped around the plate. (Godber, Tr. 142).

Response to Finding No. 111:

Complaint Counsel's finding number 111 is partially inaccurate. While motive batteries are typically among the largest batteries made, the separators used in motive batteries can be the same or similar size as separators used in other types of batteries. For example, battery separators used in motive applications have overall thicknesses ranging from 60 mils to 140 mils, and backweb thicknesses ranging from 13 mils to 25 mils. (RFOF 68). Similarly sized separators can be found in batteries used in deep-cycle applications (overall thicknesses ranging from 35 mils to 100 mils, and backweb thicknesses ranging from 8 mils to 15 mils), batteries used in SLI applications (overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils), and batteries used in stationary applications (overall thicknesses ranging from 11 mils to 200+ mils, and backweb thicknesses ranging from 11 mils to 32 mils). (RFOF 65-68).

112. Motive batteries must be able to withstand at least five years of use as that is the typical warranty on a fork lift battery. (Godber, Tr. 142). Motive batteries tend to corrode like the deep-cycle, but the grids are a lot thicker and it takes longer to corrode. (Godber, Tr. 142). In addition, the positive plate is surrounded with a lot of insulation and glass mat, so that none of the material can get out and short. (Godber Tr. 142). The glass mat and insulation used in motive batteries is very expensive and is not a cost-effective option for deep-cycle batteries. (Godber, Tr. 142-143).

Response to Finding No. 112:

Respondent has no specific response.

113. Motive battery separators are so much thicker than other separators that Daramic has to allocate a particular part of its plant capacity for it. (Hauswald, Tr. 708-709).

Response to Finding No. 113:

Complaint Counsel's finding number 113 is inaccurate and misleading. As previously explained in Respondent's Response to Finding No. 111, the separators used in motive batteries can be the same or similar size as separators used in other types of batteries. (RFOF 65-68; Hauswald, Tr. 708). Similarly sized separators can be found in batteries used in deep-cycle applications, SLI applications, and stationary applications. (RFOF 65-68).

ii) Unique Formulations

114. For traction batteries, Daramic sells a product called Daramic Industrial CL. (Hauswald, Tr. 681). Daramic CL is specifically designed for use in motive power applications. (Roe, Tr. 1327). Daramic CL is a standard PE separator that utilizes clean oil as an ingredient. (Roe, Tr. 1327).

Response to Finding No. 114:

Complaint Counsel's finding number 114 is not accurate. Daramic CL is used in products in a multitude of end-use applications including traction and stationary battery applications. (RFOF 89; Whear, Tr. 4784-85; Hauswald, Tr. 988). Moreover, although {
}. (Whear, Tr. 4807, 4832, *in camera*; Hauswald, Tr. 988)(see also Respondent's Response to Finding No. 24).

115. CellForce, a PE-based separator with a rubber additive (*i.e.*, Ace-Sil dust) is used in motive batteries. (Gilchrist, Tr. 385).

Response to Finding No. 115:

Respondent has no specific response.

2. End use applications

116. Motive power batteries are batteries used primarily in fork trucks. (Gilchrist, Tr. 306-307; Axt, Tr. 2097; Hauswald, Tr. 708; Godber Tr. 142). Motive power batteries must provide a low, steady power source over a much longer period of time than light duty deep-cycle batteries. (PX0319 at 008). The vast majority of demand for motive power is limited to two geographies: North America and Europe. (Gilchrist, Tr. 399).

Response to Finding No. 116:

Complaint Counsel's finding number 116 is not entirely accurate. There is no distinction in the functionality of a separator used in a so-called motive power battery and a separator used in any other type of deep cycling battery. The separators in each of these applications both serve the same function within the battery. Each battery is used to move something (a golf cart, a forklift, or a mining vehicle) and both are deeply discharged and then recharged. (RFOF 78). In fact, the evidence cited by Complaint Counsel for finding number 116 clearly illustrates this overlap: *i.e.*, deep cycling batteries include both fork trucks (allegedly "motive" batteries) and golf carts (allegedly "deep cycle" batteries). (PX0319 at 007-008).

3. Respondent recognizes motive separators as a distinct market in documents

117. Respondent's documents analyze competition in the context of a market for motive battery separators. (PX0080 at 021, *in camera*; PX0131 at 030-031, 035, 062-065; PX0395 at 025, *in camera*; PX0506 at 001-002, 004-005, *in camera*).

Response to Finding No. 117:

Complaint Counsel's finding number 117 is misleading and inaccurate. Complaint Counsel's only support for this "fact" are a handful of documents created by Microporous prior to the acquisition and one post-acquisition document created by a former Microporous CEO, Gilchrist. Complaint Counsel once again attempts to equate one single document drafted by an unreliable witness with the position of Daramic. The evidence is clear, however, that {

} For example, in analyzing the merger, {

} (PX0055 at 82, *in camera*; PX0174 at 009, *in camera*; PX0275 at 011, *in camera*).

Significantly, when conducting competitive market analysis, Daramic did not focus on separate product markets for SLI, motive power, deep-cycle and reserve power, but on the entire PE market. (PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*). Daramic also creates budgets based on the PE, Non-PE distinction. (PX1688 at 001, *in camera*). Finally, Complaint

Counsel ignores the significant evidence that separators used in the categories advocated by the FTC (deep-cycle, SLI or automotive, motive and UPS batteries) overlap significantly. (RFOF 69-78).

118. { } (PX0042 at 012, *in camera*).

Response to Finding No. 118:

Complaint Counsel's finding number 118 is totally false and misleading. Microporous, not Polypore, conducted a Board of Director's Meeting on January 11, 2006. (PX0402, *in camera*, incorrectly cited as PX0042 by Complaint Counsel). This Microporous Board presentation, drafted years prior to the acquisition, in no way rebuts the overwhelming evidence that Polypore and Daramic viewed the separator market as a PE, non-PE market. (*See* Response to Finding No. 117).

119. Microporous's former owners wrote that { } (PX1124 at 2; *See also*, *e.g.*, (PX0072 at 020; PX0185 at 006).

Response to Finding No. 119:

Complaint Counsel's finding number 119 is misleading. Complaint Counsel relies only on pre-merger documents created by Microporous to support its "fact." Complaint Counsel again chooses to ignore the abundance of evidence illustrating that Polypore and Daramic did not segment the market by application. (*See* Response to Finding No. 117).

120. A Daramic marketing flyer describes the motive market as follows:

the requirements for traction batteries in respect of mechanical properties and chemical stability are considerably higher than for starter separators. [A] forklift battery is typically operated for about 40,000~50,000 hours in charge – discharge service whereas a starter battery only for 2000 hours. The requirements as to electrical resistance are lower because of the typically low current densities for traction batteries. *These differences are reflected in the design of the modern traction battery separator material.* (PX1790 at 001 (emphasis added)).

Response to Finding No. 120:

Respondent has no specific response.

4. PVC is not an alternative in North America

121. {

} (PX0916 (Dauwe, Dep. at 22)). {

125)).

} (PX0916 (Dauwe, Dep. at

Response to Finding No. 121:

Complaint Counsel's finding number 121 is misleading. Despite Complaint Counsel's mischaracterizations, it is clear that PVC separators are used in flooded lead acid batteries being used for motive applications in North America. (PX0916 (Dauwe, Dep. at 18, 25), *in camera*). Moreover, Complaint Counsel fails to point out the advantages of using a PVC separator over a PE separator, such as improved oxidation resistance (PX0916 (Dauwe, Dep. at 22), *in camera*).

122. Daramic's own documents detail the problems with PVC, stating that "In North America and Western Europe, sintered PVC separators are never used in motive power applications. Batteries with sintered PVC separators will not meet the demanding performance and cycle life applications (the battery is required to achieve a minimum life of 4 years under arduous deep-cycle duty." (PX1790 at 002).

Response to Finding No. 122:

Complaint Counsel's finding number 122 is incorrect. PVC separators are used in flooded lead acid batteries intended to be used in motive power applications in North America. (PX0916 (Dauwe, Dep. at 18, 25), *in camera*). {

} (RFOF 139). By way of example, {

} (Gagge,

Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280). EnerSys has considered using Amer-Sil PVC separators. (PX1283; RFOF 700).

123. { } where the application is more heavy-duty. (Axt, Tr. 2307, *in camera*).

Response to Finding No. 123:

Complaint Counsel’s finding number 123 is misleading in that PVC separators are used in North America. (PX0916 (Dauwe, Dep. at 18, 25), *in camera*). Douglas Battery, for example, is currently in discussions with AmerSil, a Luxembourg company and manufacturer of PVC separators. Amersil contacted Douglas Battery in 2008 expressing an interest in “establishing a foothold in North America.” (Douglas, Tr. 4063). Douglas Battery is currently waiting to test a new product technology that Amersil is developing. (RFOF 839).

124. Amer-Sil has taken certain steps to improve the stability of the PVC separators { } (PX0916 (Dauwe, Dep. at 122, *in camera*)) { } (PX0916 (Dauwe, Dep. at 88), *in camera*) { } (PX0916 (Dauwe, Dep. at 158, *in camera*)).

Response to Finding No. 124:

Complaint Counsel’s finding number 124 is incomplete. Complaint Counsel simply ignores evidence and testimony it does not find favorable, such as Douglas Battery’s use of PVC separators in North America or the testimony of Amer-Sil’s own witness indicating that PVC separators are used in flooded lead acid batteries in North America for motive power applications. (RFOF 839)(PX0916 (Dauwe, Dep. at 18, 25), *in camera*).

125. { } (PX0916 (Dauwe, Dep. at 22-23)).

Response to Finding No. 125:

Respondent has no specific response.

- 5. Demand for motive separators is inelastic

126. If Daramic threatened to cut { } off if it did not pay a { } increase in price for its separators, { } would have no choice but to pay because there are no alternatives available to Daramic. (Craig, Tr. 2567, *in camera*).

Response to Finding No. 126:

Complaint Counsel's finding number 126 is inaccurate and speculative. First, EnerSys has available to it potential suppliers of battery separators for its industrial batteries and, in fact, has been in discussion with three potential suppliers since the merger of Daramic and Microporous was announced. (RFOF 681-703). Moreover, Complaint Counsel's only support for finding number 126 is a speculative statement made by a non-credible and biased witness of EnerSys. (RFOF 726).

127. Daramic is currently seeking a price increase of approximately { } from EnerSys. (Craig, Tr. 2552, *in camera*). {

(Craig, Tr. 2552-2553, *in camera*). {

} (Craig, Tr. 2553, *in camera*).

Response to Finding No. 127:

Complaint Counsel's finding number 127 is inaccurate. First, {

}

(RFOF 634). Second, EnerSys makes "strong efforts . . . to pass through sales price increases in all regions" rather than eroding margins as Craig testified to in the hearing. (RX01185 at 044; Craig, Tr. 2553, *in camera*; RFOF 635). Indeed, the evidence shows that EnerSys attempts to "control [its] raw materials costs through strategic purchasing decisions" including hedging arrangements. (RFOF 635).

128. A { } increase in Daramic's battery separator prices would have very little impact on the price of a motive or UPS battery. (Craig, Tr. 2553-2554, *in camera*).

Response to Finding No. 128:

Complaint Counsel's finding number 128 is inaccurate. While it is true that a battery separator is only a small cost in the manufacture of a battery, (RFOF 41), it is equally true that EnerSys has a history of passing such cost increases onto its customers in order to prevent a decrease in its margin. (See Response to Finding No. 127)(RFOF 635).

129. There is no motive separator technology available to motive customers for a small but significant and non-transitory increase in price. Daramic is currently seeking price increases from EnerSys of {
} (Axt, Tr. 2212, *in camera*; RX00564 at 001).
Despite these price increases, EnerSys {
}
(Axt, Tr. 2220, *in camera*). Motive battery manufacturers {
} (Axt, Tr. 2220, *in camera*).

Response to Finding No. 129:

Complaint Counsel's finding number 129 is false. For example, {

} (RFOF 682-83). {

} (RFOF 685). {

} (RFOF 695). { } (RFOF

700). **In fact,** {

} (RFOF 700).

130. When EnerSys used Amer-Sil PVC separators in Europe during Daramic's declared force majeure in 2006, they were 20 percent more expensive than the PE that EnerSys was buying from Daramic. (Axt, Tr. 2102).

Response to Finding No. 130:

Complaint Counsel's finding number 130 is inaccurate. With no substantive evidence, Complaint Counsel is attempting to equate the cost of a limited shipment of PVC separators sold to EnerSys' plant in Poland on short-notice in 2006, to a general price comparison between PVC and PE. (Axt, Tr. 2102).

131. A UPS battery like PX3002 costs EnerSys approximately { } to make. (Craig, Tr. 2553, *in camera*). The cost of the separator is approximately { } percent of the cost of the battery. (Craig, Tr. 2553, *in camera*). EnerSys sells this battery for approximately { } (Craig, Tr. 2553, *in camera*). Using { } percent as a percent of cost for ease of calculation, the cost of the separators in the battery are approximately { } and a { } percent increase would be approximately { } (Craig, Tr. 2554, *in camera*). If EnerSys passed this price increase on, the price of the battery would increase by only { } percent. (Craig, Tr. 2554, *in camera*). The figures for motive batteries are slightly different, but the result is the same. (Craig, Tr. 2554, *in camera*).

Response to Finding No. 131:

Complaint Counsel's finding number 131 is a speculative hypothetical stemming exclusively from the testimony of a very biased witness. (RFOF 725-733). It is supported by no relevant evidence. As such, this "fact" is not credible and should be disregarded.

132. EnerSys would likely eat a { } percent price increase rather than destroying customer relations by giving them the impression that EnerSys was "nickel-and-diming" them. (Craig, Tr. 2554, *in camera*).

Response to Finding No. 132:

Complaint Counsel's finding number 132 is false. Complaint Counsel's only support for finding number 131 is a speculative statement made by a non-credible and biased witness of EnerSys. (RFOF 726). In contrast, EnerSys' own documents and the testimony from its own witness make it clear that EnerSys passes cost increases through to its customers in the form of sales price increases rather than allowing its margins to erode. (RX01185 at 044; Craig, Tr. 2553, *in camera*).

E. UPS Separators are a Product Market

133. The market for UPS battery separators is a product market. (Simpson, Tr. 3170-3171).

Response to Finding No. 133:

Complaint Counsel's finding number 133 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Second, Dr. Simpson has failed to explain what his UPS separator market is, what it is comprised of or even how large it is. (RFOF 1185-1188).

Also, Dr. Simpson admitted that does not even know the size of his alleged "UPS market." (Simpson, Tr. 3354, 3376-77, *in camera*). Nor does he know the sizes or dimensions of the products that make up the so-called "UPS market." (Simpson, Tr. 3329-30, *in camera*). Dr. Simpson's own admissions undercut the validity of his own "UPS market."

Further, applying a correct "hypothetical monopolist test" to the markets alleged by the FTC shows that the alleged "UPS" market is not a valid, relevant market in which to analyze the acquisition. Instead, the "all PE separator market is the correct relevant market by which to analyze the acquisition. (RX1572 at 2; RFOF 76, 77, 116, 126). There is overwhelming evidence which shows that various separators are used across the spectrum of the FTC's product categories. (RFOF 45-46, 64, 67, 69-78). For example, a so-called "UPS" separator might well be effectively used in a "motive" or "SLI" application. (RFOF 37, 70-73, 1185-1188, 769, 885). Indeed, various products made by Daramic are used across the spectrum of the FTC's product categories. Daramic CL is used in the "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." (RFOF 89, 95, 127-128).

134. Microporous documents analyze competition in the context of a market for UPS battery separators. (PX0078 at 028, *in camera*; PX0135 at 002, *in camera*; PX0140, *in camera*; PX0402 at 022, *in camera*).

Response to Finding No. 134:

Complaint Counsel's finding number 134 is misleading and inaccurate. Just like the support for its other alleged product markets, Complaint Counsel's only support for this "fact"

are a handful of documents created by Microporous prior to the acquisition. The contradicting evidence is clear, however, that Daramic does not focus on separate product markets for SLI, motive power, UPS, deep-cycle and reserve power. For example, in analyzing the merger, Daramic focused on PE vs. Non-PE separators. (PX0055 at 82, *in camera*; PX0174 at 009, *in camera*; PX0275 at 011, *in camera*). Significantly, when conducting competitive market analysis, Daramic did not focus on separate product markets for SLI, motive power, deep-cycle, UPS and reserve power, but on the entire PE market. (PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*). Daramic also creates budgets based on the PE, Non-PE distinction. (PX1688 at 001, *in camera*). Finally, Complaint Counsel ignores the significant evidence that separators used in the categories advocated by the FTC (deep-cycle, SLI or automotive, motive and UPS batteries) overlap significantly. (RFOF 69-78).

1. Product Characteristics

135. An uninterruptible power supply or source ("UPS") battery is designed to be used as a backup power source usually for computer systems. (Brilmyer, Tr. 1832; Roe, Tr. 1736-1737; *see also* Axt, Tr. 2099). In the event of a power failure, the UPS batteries are designed to provide a quick burst of energy between 5 to 30 minutes in duration. The batteries are typically built using clear cases that allow for the easy visual inspection and maintenance of electrolyte levels within the battery. These batteries need to be trustworthy and are generally rated at 15 to 20 year life span. (Brilmyer, Tr. 1833).

Response to Finding No. 135:

Complaint Counsel's finding number 135 is incomplete. So-called UPS batteries are reserve power batteries used in a variety of applications such as large back-up batteries for telecommunications, emergency lighting, computer systems, cell phone towers or other reserve power application. (Roe, Tr. 1736-37, 1816-17; Whear, Tr. 4692; Douglas Tr. 4052-53).

136. Classic reserve power batteries generate a low current over a relatively long period of time, while UPS batteries, a type of reserve power battery, generate a higher current over a shorter period of time. (Gilchrist, Tr. 305-306).

Response to Finding No. 136:

Respondent has no specific response.

137. UPS batteries are very dependable batteries lasting 15-20 years and provide short bursts of power for five minutes to 30 minutes when used. They have thick plates and typically a clear case that facilitates the inspection of the battery's acid level. (Brilmyer, Tr. 1833).

Response to Finding No. 137:

Respondent has no specific response.

2. Special Formulations

138. UPS battery separators are typically made of PE, *i.e.*, microporous polyethylene. (Brilmyer, Tr. 1833). Specifically, for the stationary UPS applications the separators have lower overall oil content than separators built for other applications in order to further reduce the presence of black scum. (Whear, Tr. 4713-4714).

Response to Finding No. 138:

Complaint Counsel's finding number 138 is inaccurate. Separators found in UPS batteries can be, and are, made of PE, AGM, PVC, or phenolic resin (DARAK). (RFOF 100, 130, 135).

139. Black scum interferes with the efficient maintenance of a flooded UPS battery where the case of the battery is clear by obscuring the line indicators used to visually inspect and maintain the acid levels within the battery. (Brilmyer, Tr. 1852-1855).

Response to Finding No. 139:

Complaint Counsel's finding number 139 is inaccurate. In most cases, black scum is a purely cosmetic defect which does not interfere with the proper maintenance and function of UPS type batteries. (Whear, Tr. 4712-13; Brilmyer, Tr. 1852).

140. The black scum problem also presents itself in battery applications where an automatic watering system is employed. Here the scum can clog the float bob mechanism used to trigger the watering system thus preventing the proper maintenance of water level within the battery. (Brilmyer, Tr. 1852-1853).

Response to Finding No. 140:

Complaint Counsel's finding number 140 is inaccurate. As stated previously, black scum is a typically a cosmetic defect which does not interfere with the proper maintenance and function of the battery itself, although in some circumstances the automatic watering system

which is found in a small portion of batteries may be impacted. (Whear, Tr. 4712-13; Brilmyer, Tr. 1852; Gilchrist, Tr. 353).

141. Daramic starting working on the black scum problem in the early 1990's. (Whear, Tr. 4710). During the early test work Daramic discovered a type of oil that would reduce the scum formation. (Whear, Tr. 4710-4711). Later Daramic began to adjust the amount of residual oil left in the separator in further effort to address the black scum issue but neither the new oil nor the reduced overall oil content initiatives completely eliminated the presence of black scum. (Whear, Tr. 4713-4714).

Response to Finding No. 141:

Complaint Counsel's finding number 141 is incomplete. Since that time, Daramic has continued to study the issue extensively and determined that cutting fluids used by EnerSys played a significant role in the creation of black scum problem. (RFOF 724). Daramic met with representatives of EnerSys and recommended that EnerSys change its cutting fluid to reduce the frequency of the black scum incidents. (RFOF 724).

142. Not all PE separator products are appropriate for UPS battery application. Daramic has different separators designed for different uses. For instance, "Daramic HP is a PE product made by Daramic, not for UPS products. It's a high puncture resistance product made for the automotive industry." (Brilmyer, Tr. 1915).

Response to Finding No. 142:

Complaint Counsel's finding number 142 is false. Daramic HP is the current standard Daramic polyethylene product and is used in most applications including UPS/Stationary batteries. (RFOF 87). Moreover, all of the polyethylene based separators (including Daramic HP) perform the same function of keeping the positive and negative electrodes from touching and providing physical spacing for the electrode. Interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of a battery, but may impact the battery's overall performance. (RFOF 97-98).

143. Daramic CL was made for industrial applications where scum formation was a potential problem. (Brilmyer, Tr. 1834).

Response to Finding No. 143:

Complaint Counsel's finding number 143 is not accurate. Daramic CL is used in products in a multitude of end-use applications including traction and stationary battery applications. (RFOF 89). Moreover, although {

}.
(Whear, Tr. 4807, 4832, *in camera*; Hauswald, Tr. 988)(see also Respondent's Response to Finding No. 24).

144. Using the HP PE separator in a UPS application would lead to a much greater scum issue than using Daramic CL. (Brilmyer, Tr. 1922).

Response to Finding No. 144:

Complaint Counsel's finding number 144 is not accurate. {

} (Whear, Tr. 4807, 4832, *in camera*; Hauswald, Tr. 988)(see also Respondent's Response to Finding No. 24)

145. Daramic's DARAK separator, which is used in industrial batteries largely in Europe is a unique separator that is stiff, very chemically stable, and contains no oil. It is not a PE separator product. (Brilmyer, Tr. 1864, 1911).

Response to Finding No. 145:

Respondent has no specific response.

146. CellForce, a PE-based separator with a rubber additive (*i.e.*, Ace-Sil dust) can be used in UPS batteries. (Gilchrist, Tr. 397-398).

Response to Finding No. 146:

Respondent has no specific response.

F. SLI Separators are a Product Market

147. The market for SLI battery separators is a product market. (Simpson, Tr. 3170-3171).

Response to Finding No. 147:

Complaint Counsel's finding number 147 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. Further,

applying a correct “hypothetical monopolist test” to the markets alleged by the FTC shows that the alleged “SLI” market is not a valid, relevant market in which to analyze the acquisition. Instead, the “all PE separator market is the correct relevant market by which to analyze the acquisition. (RX1572 at 2; RFOF 76, 77, 116, 126). There is overwhelming evidence which shows that various separators are used across the spectrum of the FTC’s product categories. (RFOF 45-46, 64, 67, 69-78). For example, in 2008, Daramic sold an individual PE profile called “FC” with a backweb thickness of 11 mils to { } for use in a UPS application, to { } for use in a deep-cycle application and to { } for use in an SLI application. (RFOF 72-73). Another example, Daramic's AU profile, is used by one customer in a stationary application and by a different customer in an SLI application. (RFOF 70).

148. Respondent’s documents analyze competition in the context of a market for SLI battery separators. (PX0080 at 060, *in camera*; PX0088 at 001; PX0131 at 031-032; PX0402 at 012, *in camera*; PX0506 at 001-002, *in camera*; 006-007, *in camera*).

Response to Finding No. 148:

Complaint Counsel’s finding number 148 is misleading and inaccurate. Just like the support for its other alleged product markets, Complaint Counsel’s only support for this “fact” are a handful of documents created by Microporous prior to the acquisition. The evidence is clear, however, that Daramic does not focus on separate product markets for SLI, motive power, UPS, deep-cycle and reserve power. For example, in analyzing the merger, Daramic focused on PE vs. Non-PE separators. (PX0055 at 82, *in camera*; PX0174 at 009, *in camera*; PX0275 at 011, *in camera*). Significantly, when conducting competitive market analysis, Daramic did not focus on separate product markets for SLI, motive power, deep-cycle, UPS and reserve power, but on the entire PE market. (PX0207 at 64-72, *in camera*; RX01558 at 025, *in camera*). Daramic also creates budgets based on the PE, Non-PE distinction. (PX1688 at 001, *in camera*). Finally, Complaint Counsel ignores the significant evidence that separators used in the categories

advocated by the FTC (deep-cycle, SLI or automotive, motive and UPS batteries) overlap significantly. (RFOF 69-78).

1. Product Characteristics

149. SLI batteries are batteries used in automobiles. (Gilchrist, Tr. 307). SLI is an acronym for starting, lighting and ignition. (Brilmyer, Tr. 1831).

Response to Finding No. 149:

Complaint Counsel's finding number 149 is not complete. SLI batteries include those placed in automobiles, trucks, buses, boats, snowmobiles, jet skis and recreational vehicles. (Brilmyer, Tr. 1831-32; Gillespie, Tr. 2390, *in camera*; Leister, Tr. 3976-77).

150. For the SLI application, the PE separator is enhanced to provide superior (lower) electrical resistance and puncture resistance. (Whear, Tr. 4682, PX0913 (Whear, Dep. at 14, *in camera*)).

Response to Finding No. 150:

Complaint Counsel's finding number 150 is not accurate. Lower electrical resistance and higher puncture resistance are both optional enhancements that can be made to the standard Daramic PE separator through a slight formula or process change to meet the needs of a niche application or a specific customer. (RFOF 85). For example, Daramic Standard, Daramic HP, Daramic HPR, Daramic V, Daramic HPO, Daramic W and Daramic Duralife are all Daramic PE products used in SLI application which have varying degrees of electrical and puncture resistance. (PX0582 at 042; RFOF 82-97). Interchanging one PE-based battery separator product for another PE-based battery separator product would not impact the functionality of the SLI battery, but may impact the battery's overall performance. (RFOF 98).

151. SLI separators must also have {
} (PX0913 (Whear, Dep. at 16, *in camera*); PX0669 at 004, *in camera*, 019, *in camera*).

Response to Finding No. 151:

Complaint Counsel's finding number 151 is not accurate. Lower electrical resistance is an optional enhancement that can be made to the standard Daramic PE separator. (See Response to Finding No. 150).

152. Daramic uses the term "SLI" to differentiate between other types of separators in its business. (Whear, Tr. 4761). Within the SLI category 90 percent of sales in North America are of separators between six and ten mils in thickness. (Whear, Tr. 4762).

Response to Finding No. 152:

Complaint Counsel's finding number 152 is inaccurate, misleading, and takes testimony out of its proper context to serve the specific needs of Complaint Counsel. First, Mr. Whear testified that he was aware of the types of separators Complaint Counsel was referring to within Daramic's business when Complaint Counsel asked a question related to SLI applications. (Whear, Tr. 4761). It is a mischaracterization of Mr. Whear's testimony to equate his response to Complaint Counsel's purported "fact" that "Daramic uses the term "SLI" to differentiate between other types of separators in its business." Equally egregious, Complaint Counsel cites to Mr. Whear's testimony as evidence for the "fact" that 90 percent of Daramic's SLI sales in North America are of separators between six and ten mils in thickness. This also mischaracterizes Mr. Whear's testimony which was as follows:

Q. And isn't it true that in North America, what you actually sell -- make and sell, that over 99 percent of those separators fall within 6 to 10 mils?

A. That's information I wouldn't know.

Q. Do you have any idea what the typical range actually is for automotive separators anywhere in the world?

A. Not by the way you're breaking it down, no.

Q. Can you tell us at all, anywhere in the world, in the category of what you just described as auto for SLI, any percentage at all of what you make?

A. No.

Q. Okay. Now, are you telling us that you don't know where the industry is in terms of what a backweb thickness is for automotive SLI?

A. What I'm telling you is I don't know the percentages that you're asking me to quote.

Q. Can you tell me if it's over 90 percent that you make at any of the factories in North America for automotive SLI, that over 90 percent of them are between 6 and 10 mils?

A. I can only take a guess, and if speculation is appropriate, then I can do that.

Q. Give us the best that you can, based on your experience.

A. I would say that, yeah, 90 percent, in North America, would be between 6 and 10 mils. (Whear, Tr. 4761-62)(*emphasis added*).

Although Complaint Counsel would like to rely on information it asked Mr. Wheat to speculate to, the actual evidence is clear that battery separators used in SLI applications have overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils. (RFOF 65).

2. Physical Distinctions Affect Performance

153. Daramic HP represents the majority of Daramic's sales of SLI separators. (Whear, Tr. 4805). The typical backweb thickness for this separator ranges from .150mm to .200mm. (Whear, Tr. 4805, PX0582 at 044).

Response to Finding No. 153:

Complaint Counsel's finding number 153 is inaccurate in that .150mm and .200mm are typical backweb thickness used in Daramic HP separators, not the exclusive range of typical thickness. (Whear, Tr. 4805, PX0582 at 044). In fact, SLI separators are sold with overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils. (RFOF 65).

154. Daramic Standard is not advertised to the SLI market due to the fact that at the typical overall thicknesses prevailing in the SLI market Standard PE would not have sufficient

puncture resistance necessary to prevent damage to the separator during battery production. (Whear, Tr. 4804-4805; PX0582 at 041-042).

Response to Finding No. 154:

Complaint Counsel's finding number 154 is false and misleading. Daramic Standard is advertised in the SLI market. Daramic Standard with an atypical .150 micron backweb is sold, but not advertised, as it is not a typical product offering. (Whear, Tr. 4803-04). Daramic Standard's typical product offerings have backweb thicknesses of .200 and .250 microns. (PX0582 at 043). Moreover, it is clear from the very evidence cited by Complaint Counsel that Daramic Standard had "good puncture and oxidation resistance." (PX0582 at 043).

155. {

} (PX0913 (Whear, Dep. at 26, *in camera*)).

Response to Finding No. 155:

Respondent has no specific response.

156. CellForce can be used in SLI batteries and has some advantages because {
} (Gilchrist, Tr. 440-441, *in camera*).

Response to Finding No. 156:

Complaint Counsel's finding number 156 is false. Prior to the acquisition, Microporous had partnered with JCI to do some testing on CellForce for use in a unique and specialized SLI application called a "start-stop" battery. (RFOF 366). Neither JCI nor any other battery manufacturer ever approved CellForce for these specialized start-stop SLI applications. (RFOF 366). Results from the testing of the start-stop battery varied and Microporous "was getting some positive results out of the tests, and then at different points, they weren't as positive." (RFOF 367). In fact, although {

} (RFOF 367).

157. The backweb thicknesses of SLI separators have been reduced in recent years. (Leister, Tr. 4024). This reduction in thickness is meant to reduce the overall cost of the separators. (Leister, Tr. 4024). SLI battery separators are very thin and very strong so as to resist punctures and have mechanical strength. (Brilmyer, Tr. 1829, 1831).

Response to Finding No. 157:

Respondent has no specific response.

158. { } is the standard backweb thickness in use in SLI batteries sold in the US. (PX0907 (Kung, Dep. at 75-76, 80), *in camera*).

Response to Finding No. 158:

Complaint Counsel's finding number 158 is false. There is no standard backweb thickness used in SLI batteries, there are, however, typical backweb thicknesses. Daramic Standard's typical product offerings, for example, have backweb thicknesses of .200 and .250 microns, while Daramic HP's has typical product offerings at .150 and .200 microns. (PX0582 at 043-44). Nevertheless, there is a wide range in the backweb thickness of separators used in SLI applications in the United States. (RFOF 65).

159. Over 99% of the separators that Daramic tracks that are sold in the automotive market have a backweb thickness between 6 and 10 mils (150-250 microns). (Hauswald, Tr. 677-678).

Response to Finding No. 159:

Complaint Counsel's finding number 159 is false. Mr. Hauswald clearly testified that he did not know what percentage of Daramic's sales fell between a particular backweb thickness range. (Hauswald, Tr. 680-81). Moreover, SLI separators are sold with overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils. (RFOF 65).

160. It is very difficult for a separator manufacturer to change the thickness of their PE separator from { } (PX0907 (Kung, Dep. at 79), *in camera*).

Response to Finding No. 160:

Complaint Counsel's finding number 160 is incorrect. In the manufacturing process, as the product passes through the calendar roll it receives a defined thickness and rib pattern. (RFOF 152). The spacing between the top and bottom calendar rolls determines the backweb thickness of a battery separator. (RFOF 152). The grooves of a calendar roll determine the height of the ribs and the overall thickness of a battery separator. (RFOF 152). By changing the calendar roll, the same PE manufacturing line can produce separators of different sizes, such as .2 or .150 mils, or for different end-use applications, such as SLI or industrial. (RFOF 154). Significantly, a calendar roll can be substituted into the manufacturing line in place of another calendar roll in approximately twenty minutes. (RFOF 156)(For illustrative purposes see RX01641). Moreover, {

} (RFOF 156).

IV. Geographic Market is North America

A. Manufacturers in North America can price discriminate to customers based on geography.

161. Dr. Simpson explained that North America is the relevant geographic market with which to analyze this transaction. (Simpson, Tr. 3183). Because manufacturers of deep-cycle, motive, UPS, and SLI battery separators can set different prices for different geographic regions they can price discriminate based on geography. (Simpson, Tr. 3183).

Response to Finding No. 161:

Complaint Counsel's finding number 161 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. Further, Complaint Counsel has also failed to adduce sufficient evidence to show their claimed North American geographic market. (RFOF 186-223). In fact, before Complaint Counsel had even put on its first witness at trial, they could not avoid describing the PE battery separator business as "worldwide." (Robertson, Tr. 17, 19-20). Significantly, the FTC's geographic market case requires it to show that a hypothetical monopolist could engage in price discrimination on a worldwide basis. Making that case

depends, in turn, on a showing that such discrimination would not be defeated by arbitrage. But Complaint Counsel's economic expert, Dr. Simpson, acknowledged that he had not adequately considered whether arbitrage could be used by worldwide customers to defeat price discrimination by the hypothetical monopolist. (RFOF 1178, 1203-1204; Simpson, Tr., 3329-34, *in camera*). Quite simply, Simpson's opinion regarding the relevant geographic market is not supported by any appropriate, quantitative analysis and is contradicted by substantial evidence in this case, which Simpson never addressed. (RFOF 1202). Actual economic testimony and evidence establish that the geographic market for the product of all PE separators is global and that arbitrage is possible. (RFOF 1349; Kawhaty, Tr. 5164-65, *in camera*; Thuet, Tr. 4351, 4399-40, 4330).

162. Where sellers can price discriminate based on geographical location, the Merger Guidelines state: "The agency will consider additional geographic markets consisting of particular locations of buyers for which a hypothetical monopolist would profitably and separately impose at least a small but significant and nontransitory increase in price." (Merger Guidelines, Section 1.22). Dr. Simpson concluded from reviewing the testimony of buyers and the documents in this case that a hypothetical monopolist could impose such a price increase on buyers in North America. (Simpson, Tr. 3183).

Response to Finding No. 162:

Complaint Counsel's finding number 162 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. Further, in determining the geographic market, Simpson agrees that the relevant question is whether arbitrage can occur for products manufactured in North America. (RFOF 1203). Simpson admits, however, that he did not do any explicit arbitrage analysis. (RFOF 1204). Instead, Simpson relied solely on the testimony of battery separator customers as to whether they would arbitrage separators. (RFOF 1205). Significantly, {

}. (RFOF 1207). {

} (RFOF 1355). {

} (RFOF 1354; Thuet, Tr. 4351, 4339-40, 4330).

163. A hypothetical monopolist of all production facilities in North America can price discriminate to North American customers because suppliers ship directly to customers. (e.g., PX0920 (Gilchrist IHT 64-65); see PX0033 at 005 FN5 (Simpson Report); PX2251 at 004 (Simpson Rebuttal Report), *in camera*).

Response to Finding No. 163:

Complaint Counsel's finding number 163 is false. First, Dr. Simpson's reports are not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. Further, Dr. Simpson did not adequately consider shipping costs. (RFOF 1357). Had Dr. Simpson conducted an appropriate analysis he would have learned that representative figures indicate that {

} (RX00677, *in camera*; RFOF 1357). {

(RFOF 1356).

B. Daramic charges different prices in different geographic regions

164. { }.
(Riney, Tr. 4958, *in camera*; Roe, Tr. 1317). { }
(Roe, Tr. 1797, 1799, *in camera*).

Response to Finding No. 164:

Complaint Counsel's finding number 164 is incomplete and inaccurate. While it is accurate that at times Daramic's price for a particular separator in North America will be different than the price for the same separator in Europe or Asia, it is not accurate that there is no correlation between the two. All of Daramic's prices are based on the costs of producing the product in a particular location. (Riney, Tr. 4958-59, *in camera*). The labor costs associated with production are unique in different locations; *i.e.*, labor costs in Europe are higher than they are in Asia Pacific. (Riney, Tr. 4958-59, *in camera*). The cost of securing raw materials may also be different depending on location; *i.e.* whether you receive silica via rail in the U.S. versus truck in Potenza, Italy certainly has an impact on the cost. (Riney, Tr. 4958-59, *in camera*). Having to deal in different currencies also has an impact especially when Daramic must convert those local currencies to U.S. dollars based on an ever-changing foreign exchange rate. (RFOF 245; Riney, Tr. 4958-59, *in camera*). Finally, Complaint Counsel's "fact" is based on an incomplete hypothetical on which the witness was not able to come to terms with Complaint Counsel. (Roe, Tr. 1799-1800, *in camera*).

165. { } determines the market price in each geographic region based in part on the competitive landscape that exists in each region. (PX0922 (Roe, IHT at 27, *in camera*); Roe, Tr. 1317-1318).

Response to Finding No. 165:

Complaint Counsel's finding number 165 is incomplete and inaccurate. The competitive landscape is one factor among many factors used by Daramic in its negotiations with

sophisticated buyers on the proposed terms of a particular supply agreement. (Roe, Tr. 1318). In contrast, a “market” price is generally determined based on the costs of producing the product in a particular location, such as labor costs, raw material costs and exchange rates. (RFOF 245; Rincy, Tr. 4958-59, *in camera*)(see Response to Finding No. 164).

166. Even in global negotiations with Daramic, EnerSys received different prices depending on the geographic market. In November 2005, Daramic and EnerSys negotiated an energy surcharge that would {
} (Axt, Tr. 2137-2138, *in camera*; RX00582, *in camera*).

Response to Finding No. 166:

Complaint Counsel’s finding number 166 is inaccurate and misleading. Faced with escalating raw material costs, Daramic was forced to implement “a global surcharge, not a regional surcharge” in 2005. (RX00582 at 002, *in camera*; RFOF 245-246). The global surcharge implemented by Daramic was to increase prices 6% globally in order to offset a portion of its escalating costs. (RX00582 at 002, *in camera*). However, Daramic conceded a 3% reduction of the energy surcharge in Europe in response to EnerSys’ threats to reduce its volume with Daramic. (RX00582 at 001, *in camera*; RFOF 626-627). In fact, EnerSys later sought to use this concession to argue for a price concession for the US as well. (RX00584 at 001)(“Why do you continue to try for an additional 3% in the US, it is not validated and will never be confirmed.”).

167. Exide currently pays Daramic {
} (Gillespie, Tr. 2998, *in camera*, 3060-3062, *in camera*).

Response to Finding No. 167:

Complaint Counsel’s finding number 167 is inaccurate and misleading. As with many of its supplier contracts, Exide’s contract with Daramic specified regional prices. (Gillespie, Tr. 3060, *in camera*). This is not surprising as Daramic’s prices are determined based on the costs of producing the product in a particular location, such as labor costs, raw material costs and

exchange rates. (RFOF 245; Riney, Tr. 4958-59, *in camera*)(see Response to Finding No. 164).

Moreover, {

(RFOF 246).

168. The average price of an SLI separators sold in North America is \$0.70 per square meter. (Roe, Tr. 1313). Whereas in Europe the average price of an SLI separator is \$1.00 per square meter at today's exchange rates. (Roe, Tr. 1313-1314).

Response to Finding No. 168:

Complaint Counsel's finding number 168 is inaccurate and misleading. First, the average prices specified by Complaint Counsel do not relate to similarly sized separators. Separator purchasers in Europe typically seek a separator with a thicker backweb. (Roe, Tr. 1313-14). A thicker backweb requires more PE material and makes the separator more expensive as a result. (RFOF 244). Consequently, one would expect a typical European separator to cost more than a typical North American separator. Additionally, Daramic's prices are determined based on the costs of producing the product in a particular location, such as labor costs, raw material costs and exchange rates. (RFOF 245; Riney, Tr. 4958-59, *in camera*)(see Response to Finding No. 164).

169. Daramic continues to price separators differently depending on the geographic region. In an { } Daramic offered different prices for comparable material in different geographic zones. (PX2296 at 005-006, *in camera*; Roe, Tr. 1792, *in camera*).

Response to Finding No. 169:

Complaint Counsel's finding number 169 is inaccurate and misleading. As explained previously, { }

(RFOF 245). Pricing in Asia is lower than in North America. {

} (RFOF 245). {

}. (RFOF 245; Roe, Tr. 1797, *in*

camera; Riney, Tr. 4958-59, *in camera*)(see Response to Finding No. 164).

C. North American Customers Look to North American Suppliers for Separators

170. {

} (Gillespie, Tr. 3036-3037, *in camera*).

Response to Finding No. 170:

Complaint Counsel's finding number 170 is inaccurate and misleading. Exide is a "global participant in the global marketplace." (RFOF 210). Douglas Gillespie, Exide's Vice President of Global Procurement, is responsible for the procurement of materials around the world. (RFOF 211). Significantly, {

} (RFOF 212; Bregman, Tr. 2898-99, *in camera*; RX00144, *in camera*; RX00300, RX00301, *in camera*; RX00302; RX00303, *in camera*; RX00304; RX00305; RX00306, *in camera*). In fact, {

} (RFOF 212). It is also important to note that Exide conducted a global search for automotive battery separator manufacturers. (RFOF 213; Gillespie, Tr. 2962-63; RX00144, *in camera*; RX00300, RX00301, *in camera*; RX00302; RX00303, *in camera*; RX00304; RX00305; RX00306, *in camera*; RX00362). In conducting the search, Exide visited various separator manufacturers around the world, hired a third party to identify separator manufacturers in the Asia-Pacific region, and sent a Request for Proposal ("RFP") to "the top separator manufacturers around the globe." (RFOF 213; Gillespie, Tr. 2962-63). Through the RFP, Exide provided its global PE separator requirements to numerous separator manufacturers. (Gillespie, Tr. 2965, 2967; RX00144, *in camera*; RX00145, *in camera*; RX00339 at 17, *in camera*; RX00338). {

} (RX00147, *in camera*). And Exide is also

{

} (RFOF 201; RX00303, *in camera*, RX00304; RX00305;

RX00306; RX00307).

171. {

} (Gillespie, Tr. 3037, *in camera*).

Response to Finding No. 171:

Complaint Counsel's finding number 171 is inaccurate and misleading. {

} (Gillespie, Tr. 3037, *in camera*). It

should be noted, however, that such discussions are ongoing and a final determination has not occurred. (RFOF 963, 971). In fact, {

} (RFOF 965). Moreover, {

} (RFOF 589). For

example, {

} (RFOF 970). {

} (Gillespie,

Tr. 3123-24, *in camera*; Weerts, Tr. 4486, *in camera*; Weerts, Tr. 4521-23, *in camera*). Such discussions are on-going and there has been no determination as to which { } facility would supply which { } facility for either { }. (RFOF 971-972).

172. North American suppliers export separators to customers overseas at a higher cost to both the supplier and the customers. For example, Microporous exported 75% of the CellForce separators that it produced at Piney Flats to Hawker/EnerSys facilities in Europe. (Gilchrist, Tr. 345). It shipped these separators to Hawker/EnerSys in containers at a freight cost of several thousand dollars per container. (Gilchrist, Tr. 599). It also took typically between 18-21 days to ship from North America to Europe. (Gilchrist, Tr. 595). MPLP also had to pay Hawker/EnerSys for warehouse space for consignment stock, so as to avoid supply shortages. (Gilchrist, Tr. 599).

Response to Finding No. 172:

Complaint Counsel's finding number 172 is inaccurate and misleading. First, Complaint Counsel's "fact" is supported by only one example – Microporous exporting CellForce to Hawker EnerSys. Even in Complaint Counsel's example, Microporous found it profitable to sell product from its North American facility to customers in Europe. (Gilchrist, Tr. 541). In fact, raw material and labor costs are similar in North American and in Europe. (Gilchrist, Tr. 600). Additionally, Complaint Counsel overlooks the evidence that {

} (RFOF 188; RX0119, *in camera*;

RX01407, *in camera*). And that in 2008, { }

its North American facility, while in 2007 {

} (RFOF 195). **Importantly,** {

} (RFOF 1351).

1. Large North American customers expect worldclass suppliers

173. Exide believes that there are very few world-class separator manufacturers that are capable of providing separators to a large battery manufacturer such as Exide. (Gillespie, Tr. 2955-2958). In order for a separator supplier to be a viable option for supply of separators to Exide in North America, it must have: (i) the ability to provide quality separators that meet Exide's requirements on a consistent, reliable basis; (ii) technology to be able to provide for Exide's current and future needs; (iii) the infrastructure and wherewithal to supply a company of the size of Exide; (iv) sufficient capital to be able to make investments in R&D and equipment; (v) the logistical wherewithal to supply Exide's facilities on a global basis; (vi) pricing to meet Exide's commercial needs; (vii)

the ability to provide year-over-year improvements in Exide's total costs; (viii) the ability to improve their own processes and methodologies to provide mutual gains to Exide and the supplier; and (ix) the ability from an engineering prospective to understand and develop separators capable of improving the performance of the batteries. (Gillespie, Tr. 2956-2958).

Response to Finding No. 173:

Complaint Counsel's finding number 173 is incomplete. In addition to Daramic, there are several separator manufacturers that are able to satisfy Exide's supplier requirements. For example, {

} (RFOF 928). {

} (RFOF

928).

{

} (RFOF 977). In fact, {

}

(RFOF 978-979). BFR operates four production lines, with {

} (RFOF 980, 985).

Another example is {

} (RFOF 1007). {

} (RFOF 1006).

Other examples include Anpei – {

} FOF (1017-1030); Separindo – which is the same size as the former Microporous, and produces separators comparable to Daramic's separators with no significant difference between the products, (RFOF 1031-33); Sebang, (RFOF 1034-1040); and Baotou, (RFOF 1041-45).

2. Local Supply a benefit to customers

174. It is a market advantage to be able to supply separators locally to battery manufacturers. (PX0582 at 018; RX01498 at 001, *in camera*). Daramic supplies customers locally in order to reduce the risk of supply chain disruption to the customer. (Hauswald, Tr. 724-725).

Response to Finding No. 174:

Complaint Counsel's finding number 174 is inaccurate and misleading. Complaint Counsel has repeatedly focused on the "need" for local supply, yet attempted to "gloss over" the fact that {

} (RFOF 194-95, 443, 926, 932, 933, 936, 937, 1353; RX01530 at 003, *in camera*.)

{

} (RFOF 933). { } cannot offer "local" supply to

Austria any more than it can offer such supply to any country in Asia. Yet it ships and sells its products on every continent without disruption or impact on its ability to compete for sales of PE separators. (RFOF 932, 933, 936, 937, 963, Hauswald, Tr. 1044-45; Simpson, Tr. 3335, *in camera*; Weerts, Tr. 4462, *in camera*). Likewise, Microporous, prior to the acquisition, had been operating from one small facility in Piney Flats, TN for many years, but sold its separators to customers all over the world, { }

(RFOF 192, 1146). Daramic, is, in fact, the only separator supplier of any type (including AGM

and PVC) that operates numerous manufacturing facilities located throughout the world. (RFOF 936; Gilchrist, Tr. 307; Hauswald, Tr. 859, 862, *in camera*; RX00677, *in camera*; RX01084, *in camera*). Asian PE separator manufacturers like { } supply separators to South America and Italy, while the { } sells to customers in Korea – neither have more than one manufacturing facility. (RFOF 1049, 1109). Also, U.S. Battery admitted that it to sells batteries around the world from its plants located in the United States and has won, year after year, awards regarding its services and supply. (RFOF 222; Wallace, Tr. 1936-37, 1955, 1957-60). Obviously, as demonstrated by this numerous battery manufacturers and separator suppliers, local supply is not an impediment nor is it necessary.

175. All PE SLI battery manufacturers in North America who buy separators from Daramic receive those separators from Daramic plants in the United States. (Hauswald, Tr. 716-717).

Response to Finding No. 175:

Respondent has no specific response.

176. { }.
(PX0919 (Riney, IHT at 429, *in camera*)).

Response to Finding No. 176:

Complaint Counsel’s finding number 176 is inaccurate and misleading. Mr. Riney’s testimony as it relates to Complaint Counsel’s “fact” is that in the past a closer proximity between a separator manufacturing plant and a battery manufacturing plant allowed for a Daramic employee to travel to the battery manufacturing plant quicker. However, with the speed and volume of air travel today, this is no longer a consideration. (PX0919 (Riney, IHT at 429), *in camera*).

177. { } (PX0918 (Riney, IHT 36, *in camera*)). For

example, instead of ordering separators a month ahead of time, they could order the separators several days before they would be used on the battery production line. (Gilchrist, Tr. 594-596).

Response to Finding No. 177:

Complaint Counsel's finding number 177 is inaccurate, misleading and an egregious attempt to mischaracterize the testimony. In response to a question that in no way related to supply chains, but instead related to a comparison between the start-up Microporous to the established Daramic, Mr. Riney stated: "because people like Daramic, because people say what else are you going to give me besides price? How do I know I'm going to have a consistent supply, how do I know I'm going to have the technical service, how do I know you're going to be around for, you know, five years from now. There's less confidence that Daramic brings to the table." (PX0918 (Riney, IHT 36), *in camera*). Moreover, Mr. Gilchrist himself testified that if a European customer has an agreed upon a price and delivery time from a separator manufacturer, the customer does not care whether the separator comes from a plant in Austria, Italy, China or Piney Flats, Tennessee. (Gilchrist, Tr. 594). Once again, Complaint Counsel has attempted to focus on the "need" for local supply, by attempting to "gloss over," or in this case mischaracterize, the facts. (*See* Response to Finding No. 174).

178. A local separator supplier was more likely to respond quickly to any technical and quality issues relating to delivered separators. (Gilchrist, Tr. 594-96). {
}. (PX0918
(Riney, IHT at 196, *in camera*)).

Response to Finding No. 178:

Complaint Counsel's finding number 178 is inaccurate, misleading and another mischaracterization of the testimony. Mr. Riney testified generally that Daramic's technical assistance capability is something that gives Daramic a heads-up versus other competitors. Neither his response, nor the question he was responding to, was related in the least to the effects of a local or global supply on the ability of a manufacturer to supply technical assistance.

(PX0918 (Riney, IHT at 196), *in camera*). Complaint Counsel once again mischaracterizes the actual evidence in order to formulate its “facts.” (See Response to Finding No. 174, No. 177).

179. Ocean transport is the most economic mode for transporting battery separators from Asia to the United States. (Hauswald, Tr. 723). In order to ship separators from China to the United States, they would have to travel six to eight weeks via ship. (Hauswald, Tr. 722-723).

Response to Finding No. 179:

Complaint Counsel’s finding number 179 is incomplete in that Daramic also transports battery separators from Asia to the United States by air. (Hauswald, Tr. 723). In fact, {

} (RFOF 188).

180. Local supply is also an important factor that Daramic emphasizes in sales pitches to customers. (Roe, Tr. 1318-1319). For example, in a 2003 sales pitch to JCI, Daramic discussed the possibility of building a new plant in Brazil to supply JCI’s Brazilian battery manufacturing plant on a local basis. (Roe, Tr. 1321; RX01188). Daramic believed that building a plant to supply JCI on a local basis would provide many advantages to JCI’s business. (Roe, Tr. 1321). Those advantages included the avoidance of import duties and the need to carry less inventory, both of which would lower JCI’s overall costs for separator purchases. (Roe, Tr. 1321-1322; RX01188 at 003).

Response to Finding No. 180:

Complaint Counsel’s finding number 180 is inaccurate and incomplete. Daramic emphasizes both local supply and global supply in sales pitches to customers. (Roe, Tr. 1318). The 2003 sales pitch referenced by Complaint Counsel was unique in that Brazil imposed significant import duties in 2003, which have since been rescinded. (Roe, Tr. 1322). Nevertheless, the 2003 negotiations between JCI and Daramic focused on the benefits of Daramic on a global basis to JCI, itself a global company. (Roe, Tr. 1323).

181. In addition to the tangible price benefits of local supply, Daramic understood that local supply would be beneficial to JCI as it would facilitate Daramic’s local sales managers and technical support personnel working with the customer on a weekly basis, along with Daramic support personnel fluent in the local language, all of which would provide added value to the customer as opposed to supply from a distant manufacturing location. (Roe, Tr. 1322-1324; RX01188 at 003).

Response to Finding No. 181:

Complaint Counsel's finding number 181 is inaccurate and incomplete. In the hope of improving its sales pitch, Daramic offered JCI weekly access to Daramic's sales manager and support personnel fluent in the local language. Daramic was unsure if this was something JCI would be interested in. (Roe, Tr. 1322-1324). While these facts may have been considered as favorable by JCI, it does not take away from the fact that JCI and Daramic negotiated from a global perspective. (Roe, Tr. 1323). Nor do these factors diminish the undisputed fact that producers of PE separators sell globally. (RFOF 186-202, 203-223, 493, 985).

182. JCI understood the value of local supply very well. {
} (PX0652;
PX0924 (Jensen, Dep. at 94-95, *in camera*)). The offer was for \$10 per square foot while the land had a commercial value of "at least \$30 per SQM." (PX0652 at 001; PX0924 (Jensen, Dep. at 99, *in camera*)). This deep discount came from Entetec's strong interest in enticing Daramic to build a production line close to its facility. (PX0652 at 001 ("Enertec is not selling us land for the money; they are looking for a Brazil supplier.")). "Enertec is willing to sell us part of their land for two reasons, first they have a large site with no plans to use it for expansion and secondly they understand the advantage of a lower landed cost by having a battery separator plant near." (PX0653 at 001; PX0924 (Jensen, Dep. at 110, *in camera*)).

Response to Finding No. 182:

Complaint Counsel's finding number 182 is misleading. Complaint Counsel attempts to paint JCI's 2003 dealings (which involved only one of JCI's 20+ manufacturing facilities, (RFOF 438)) as the final stroke in its "local supply" picture. JCI's more recent history illustrates that local supply is not a predominant consideration for JCI. {

} (RFOF 443). JCI clearly understands, and is a participant in, the global separator market.

183. Similarly, in 2006, JCI worked to develop a new supplier in Asia to introduce new competition to that geographic region. (Hall, Tr. 2702). JCI looked at Anpei and BFR as possible new suppliers in Asia. (Hall, Tr. 2702-2703; PX1509 at 003, *in camera*). JCI believed that the addition of one or more new Asian suppliers would {
} (PX1519 at 009, *in camera*). JCI's strategy with regard to BFR was {
{
Tr. 2856, *in camera*, 2878, *in camera*}. (Hall,

Response to Finding No. 183:

Complaint Counsel's finding number 183 is misleading. {

} (RFOF 443, 446). Moreover, it is clear that during this time period, JCI understood the benefit of a global supply. From January 1, 2004 to December 31, 2008, {
} (RFOF 459).

{
} (RFOF 459).

{
} (RFOF 459). JCI purchased on average 50 million square meters annually from Daramic during the period of 2004 through the end of 2007. (RFOF 459). In fact, {

} (RFOF 462). {

} (RFOF 475, 194-95, 443, 926, 932, 933, 936, 937, 1353; RX01530 at 003, *in camera*).

184. {
} (PX1522 at 004, *in camera*).

Response to Finding No. 184:

Complaint Counsel's finding number 183 is inaccurate and misleading. While Complaint Counsel selectively quotes from JCI's "Global Separator" strategy, {
} (PX1522 at 003,
in camera)(emphasis added). Two key points of this strategy are {
} (PX1522 at 003, *in camera*).

185. EnerSys prefers to have its separator suppliers to be located close to its plants, not necessarily next door, but "within a 50-mile radius." (Axt, Tr. 2108). EnerSys prefers to have local suppliers to reduce shipping costs, inventory carrying costs, freight forward fees, logistics, lead times, timeliness of supply, and duties. (Axt Tr. 2109, 2130). This is particularly true in Europe and North America where EnerSys does a lot of business. (Axt Tr. 2108). Even for its low-volume motive business in China, EnerSys is concerned about logistics. (Axt Tr. 2240-2241). However there is {
} (Axt, Tr. 2220, *in camera*).

Response to Finding No. 185:

Complaint Counsel's finding number 185 is inaccurate and misleading. There is substantial evidence which contradicts Complaint Counsel's "fact" that EnerSys prefers to have its separator suppliers to be located close to its plants. First, EnerSys is the largest manufacturer of industrial batteries in the world, and it procures separators on a global basis. (Axt, Tr. 2228; RX00236; RX01203, *in camera*). Further, {

} (RFOF 201). {

} (RFOF

201). Moreover, {

}

(RX00239, *in camera*; RX00193; RX00203, *in camera*). {

} (RX01203, *in camera*). EnerSys also gave

consideration to PT Separindo located in India (RX00194) and Epoch located in China. (RX00195; RFOF 685).

186. Prior to the opening of Microporous's Feistritz facility, EnerSys purchased CellForce separators from Microporous for its plants in Europe. (Axt, Tr. 2141-2142, *in camera*). However, this raised concerns for EnerSys because {
} (Axt, Tr. 2142, *in camera*; PX1200 at 002, *in camera*). {
} (Axt, Tr. 2142, *in camera*).

Response to Finding No. 186:

Complaint Counsel's finding number 186 is misleading. Whether or not purchasing separators from Microporous' Tennessee facility actually raised concerns at EnerSys, there is no dispute that from 1996 up until the merger, EnerSys purchased separators from Microporous' Piney Flats, Tennessee facility and shipped those separators to EnerSys' plants located in Europe and China. (RFOF 661, 666). In fact, prior to the merger of Microporous and Daramic, less than 10% of the separators purchased by EnerSys from Microporous remained in the United States. (RFOF 662). Clearly, any "concern" of EnerSys was minimal.

187. MPLP and EnerSys { } (PX1200 at 001, *in camera*). {
} (Axt, Tr. 2141, *in camera*). {

}

(PX1200 at 002-003, *in camera*).

Response to Finding No. 187:

Complaint Counsel's finding number 187 is inaccurate. EnerSys' own witness testified that EnerSys does not believe it is necessary for its business for its separator suppliers to be

physically located in both North America and Europe. (Burkert, Tr. 2385; RX00224; RFOF 665).

188. Logistic considerations including shipping costs to the customer, reductions in lead times as well as pure customer preference framed the basis of MPLP decision to expand into Europe. (Trevathan, Tr. 3709).

Response to Finding No. 188:

Complaint Counsel's finding number 188 is false. Microporous' expansion plans were capacity driven. When the expansion discussions began, the FLEX-SIL® line was running at nearly full capacity and the CellForce line began to approach full capacity. (RFOF 369).

189. Battery manufacturers who purchase separators from local suppliers save on ocean freight costs. For example, after Microporous opened its Feistritz plant, Hawker/EnerSys no longer had to pay ocean freight costs of several thousand dollars per container to import CellForce separators from Piney Flats. (Gilchrist, Tr. 599). {

}

(PX0905 (Gaugl, Dep. at 34-35, *in camera*)).

Response to Finding No. 189:

Complaint Counsel's finding number 189 is misleading. Regardless of freight costs, prior to the acquisition Microporous sold and shipped separators from its facility in Piney Flats, Tennessee to customers around the world, including locations in the U.S., Mexico, South America, Europe, Asia and Africa, and found it profitable to do so. (RFOF 191; Gilchrist, Tr. 541).

190. In the summer of 2007, East Penn was interested in getting a new battery separator competitor for local supply of PE SLI separators. (Leister, Tr. 4007). East Penn was looking for an alternate source due to the long lead times and added freight costs that East Penn faces when ordering PE SLI separators from Entek on the west coast. (Leister, Tr. 4008). The long lead times are an important issue for East Penn because shipments from Entek on the West Coast exceed East Penn's manufacturing time and necessitate East Penn's carrying additional supplies of PE separators at an added cost to East Penn. (Leister, Tr. 4008). The freight costs are an issue as well as East Penn incurs larger freight costs when obtaining supply from Entek. (Leister, Tr. 4008-4009). Freight and lead times are important components of East Penn's evaluation of separator suppliers as East Penn evaluates suppliers based on the total cost of doing business with a supplier, rather than on the list price of the separators. (Leister, Tr. 3986).

Response to Finding No. 190:

Complaint Counsel's finding number 190 is misleading. While East Penn did seek an East Coast based supplier as an alternative to its West Coast based supplier, such issues did not prevent East Penn from obtaining a quote for the sale of PE separators and samples from Anpei, an Asian separator manufacturer. (RFOF 201).

191. East Penn considers the ability to meet with separator sales representatives and engineers on a regular basis as an important component of its separator supplier considerations. (Leister, Tr. 4026).

Response to Finding No. 191:

Complaint Counsel's finding number 191 is misleading. East Penn considers the ability to talk with separator sales representatives and engineers on a regular basis as an important component of its separator supplier considerations. (Leister, Tr. 4026) ("And the ability to talk to the separator supplier's engineers on a regular basis, that's also important?"). There is no testimony that a face-to-face meeting is more beneficial than a simple phone call.

192. East Penn is not currently seeking to obtain PE separators supplies from any Asian PE separator manufacturers. (Leister, Tr. 4035-4036). East Penn believes that obtaining PE separator supplier from Asia would be problematic as this would pose an even greater challenge to East Penn than does its current supply situation with Entek. (Leister, Tr. 4035).

Response to Finding No. 192:

Complaint Counsel's finding number 192 is incorrect. {

} (RFOF 789). Additionally, sourcing from an Asian supplier would not be problematic for East Penn as evidenced by the fact that East Penn is currently looking for an Asian supplier to provide East Penn with AGM separators. (Leister, Tr. 4044-4045).

193. East Penn approached Entek on multiple occasions about the possibility of Entek setting up an East Coast facility so that Entek could provide local supply to East Penn. (Leister, Tr. 4020-4021). Entek informed East Penn that Entek would take it under advisement, which East Penn understood to mean that Entek was not going to move forward with establishing an East Coast manufacturing facility. (Leister, Tr. 4021).

Response to Finding No. 193:

Complaint Counsel's finding number 193 is incomplete. {

} (RFOF 933). As a result, {

} (RFOF 194-95, 443, 926, 932, 933, 936, 937, 1353;

RX01530 at 003, *in camera*.) {

}

(RFOF 932, 933, 936, 937, 963, Hauswald, Tr. 1044-45; Simpson, Tr. 3335, *in camera*; Weerts, Tr. 4462, *in camera*).

194. With Entek out of the picture for local supply, East Penn turned towards MPLP. (Leister, Tr. 4021). East Penn initiated conversations with MPLP about the possibility of MPLP supplying East Penn with PE SLI separators. (Leister, Tr. 4006-4007; PX0141). East Penn did so because it was seeking a new local supplier of PE SLI separators. (Leister, Tr. 4008).

Response to Finding No. 194:

Complaint Counsel's finding number 194 is not accurate and pure speculation. In 2007, East Penn discussed the possibility of Microporous supplying PE separators to East Penn for use in SLI batteries. (Leister, Tr. 3990). East Penn provided Microporous part numbers and volumes that East Penn might be interested in purchasing from Microporous, but Microporous did not have the machinery or the tooling to supply the volumes that East Penn requested. (RFOF 780; Leister, Tr. 3991). Microporous never committed to East Penn that it could supply East Penn with the sizes and volumes of PE separators discussed in 2007. (RFOF 781; Leister, Tr. 3991). East Penn did not want to enter into a memorandum of understanding ("MOU") with Microporous, and therefore, the discussions between the two companies "fizzled out" prior to

Daramic's acquisition of Microporous. (RFOF 781; Leister, Tr. 4019). Microporous has never been qualified by East Penn as an alternative supplier of PE separators. (RFOF 782).

195. {

} (Balcerzak, Tr. 4097, 4108, *in camera*).

Response to Finding No. 195:

Complaint Counsel's finding number 195 is false and misleading. {

} (Balcerzak, Tr.

4097). {

}

(RFOF 807-808; Balcerzak, Tr. 4128-29).

196. Crown tries to maintain just-in-time delivery of its separator supply. (Balcerzak, Tr. 4130). Having to ship material from overseas would interfere with Crown's just-in-time methods. (Balcerzak, Tr. 4130).

Response to Finding No. 196:

Complaint Counsel's finding number 196 is misleading. The logistics of obtaining separators from overseas would not create an impediment to Crown. (RFOF 808).

197. Douglas Battery has a preference for local supply because it reduces distance, time, travel, just-in-time opportunities, and enables the supplier to quickly respond if Douglas has problems with their separators. (Douglas, Tr. 4080).

Response to Finding No. 197:

Complaint Counsel's finding number 197 is misleading. Douglas Battery does not limit its suppliers to local suppliers, as evidenced by its current discussions with Amer-Sil, a Luxembourg company, concerning Douglas Battery's use of PVC separators. (RFOF 839).

198. Planning for the Rama III project began in 2006. (PX0640). One of the explicit rationales for the Prachinburi expansion was the { } (PX0640 at 001; PX0924 (Jensen, Dep. at 56, *in camera*)). {

} (PX0924 (Jensen, Dep. at 72, *in camera*)).

Response to Finding No. 198:

Respondent has no specific response.

3. Cost of exporting separators to North America is prohibitively expensive

199. Daramic has not shipped separators from either of its Asian manufacturing plants to customers in North America. (Roe, Tr. 1233-1234).

Response to Finding No. 199:

Complaint Counsel's finding number 199 is misleading. While Daramic has multiple facilities such that it does not need to ship separators from its Asian manufacturing plants into North America, there is no basis to suggest that separator producers in Asia cannot do so. Indeed, there are several suitable Asian separator producers that could easily begin exporting materials to North America. (RFOF 152-55, 977-1049.). They are already exporting their products to South America and Europe, and Complaint Counsel presents no evidence to show that they could not export to North America. (RFOF 493, 1049).

200. EnerSys would prefer to have a supplier with plants both in North America and in Europe. (*Burkert*, Tr. 2385). If EnerSys had to have a supplier with two plants in North America and none in Europe, it would be a negative cost to EnerSys. (*Burkert*, Tr. 2386). EnerSys does not want to stock, pay freight, or worry about supply interruptions. (*Burkert*, Tr. 2467).

Response to Finding No. 200:

Complaint Counsel's finding number 200 is false. EnerSys' own witness testified that EnerSys does not believe it is necessary for its business for its separator suppliers to be physically located in both North America and Europe. (*Burkert*, Tr. 2385; RX00224; RFOF 665).

201. {

} (*Burkert*, Tr. 2349, *in camera*).

Response to Finding No. 201:

Complaint Counsel's finding number 201 is false. From 1996 up until the merger, EnerSys purchased separators from Microporous' Piney Flats, Tennessee facility and shipped those separators to EnerSys' plants located in Europe and China. (RFOF 661, 666). In fact, prior to the merger of Microporous and Daramic, less than 10% of the separators purchased by EnerSys from Microporous remained in the United States. (RFOF 662). Moreover, {

} (RFOF 685:

RX00239, *in camera*; RX00193; RX00203, *in camera*). {

} (RFOF 685; RX01203, *in camera*).

202. EnerSys was forced to ship a container of separators to its Monterrey plant from Daramic's Feistritz facility during the Ownsboro strike at a high freight and time cost. (PX1285).

Response to Finding No. 202:

Complaint Counsel's finding number 202 is incomplete and misleading. The evidence cited by Complaint Counsel shows only that the cost of shipping 100,000 square meters of material from Daramic's Feistritz facility to EnerSys' Monterrey facility would have cost approximately \$2,000 by ship or approximately \$25,000 by air. Significantly, Complaint Counsel has not presented any evidence as to how these costs compare with typical freight costs between EnerSys and Daramic. Consequently, there is no way to determine whether such costs are or are not "high".

203. {

} (PX0782 at 002; PX0912 (Riney, Dep at 240, *in camera*)).

Response to Finding No. 203:

Complaint Counsel's finding number 203 is incomplete and misleading. The costs quoted by Complaint Counsel refer to { } (PX0782 at 002 { } (emphasis added), *in camera*).

204. If the price of motive separators in North America increased by five percent, Douglas Battery would not look for separator suppliers abroad. (Douglas, Tr. 4082).

Response to Finding No. 204:

Complaint Counsel's finding number 204 fails to consider the testimony of Douglas and other witnesses regarding the { }. (Douglas, Tr. 4066-67, *in camera*; Simpson, Tr. 3336, *in camera*; Hauswald, Tr. 1084-85). Douglas' consignment program with Daramic is very important to Douglas' bottom line and its financial benefits have not been considered in Complaint Counsel's hypothetical 5% price increase. (Douglas, Tr. 4067, *in camera*). In any event, the relevant question here is not what Douglas Battery would do if there were a 5% increase under some unknown conditions and scenarios, but rather what would happen with a SSNIP which is a hypothetical situation.

205. PE separators that are manufactured in China are subject to added taxes by the Chinese government resulting in higher manufacturing costs for Chinese separator manufacturers. (PX0871 at 002, *in camera*). PE separators exported from China are subject to a value-added tax. (Thuet, Tr. 4404-4405). The value-added tax includes a 12% charge on the sale price of the separators that is non-recoverable for the separator manufacturer. (Thuet, Tr. 4405). This value-added tax has a negative impact on the direct manufacturing costs of battery separator manufacturers in China, including on Daramic's Tianjin joint venture facility. (Thuet, Tr. 4405).

Response to Finding No. 205:

Complaint Counsel's finding number 205 is incomplete and not accurate. First, { } (Thuet Tr. at 4353, *in camera*; RFOF 192). { } (Hall, Tr. 2846-47, 2880, *in camera*; RFOF 192). { } (Hall, Tr.

2894, *in camera*). Finally, when comparing products apple to apple, {

}

(RFOF 192; Thuet, Tr. 4434; RX00677, *in camera*).

206. {

camera). {

} (Simpson, Tr. 3237-3238, *in*

} (Simpson, Tr. 3238, *in camera*). {

} (Simpson, Tr. 3238, *in camera*). Finally, {

} (Simpson, Tr. 3238, *in camera*).

Response to Finding No. 206:

Complaint Counsel's finding number 206 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Further, in disputing Dr. Kahwaty's analysis, {

} (RFOF 1208).

Nor did {

} (RFOF 1357).

{

} (RFOF 1356).

i) { }

207. { } (Roe, Tr. 1807; PX0907 (Kung, Dep. at 186-187, *in camera*)).

Response to Finding No. 207:

Complaint Counsel’s finding number 207 is inaccurate. Daramic has lost business to BFR and the competition for that business "goes back and forth." (RFOF 986-87). { } (RFOF 986).

208. BFR faces a number of barriers to export of separators outside of China. Separators manufactured by BFR and exported out of China are subject to a non-refundable value-added tax (“VAT”) of 12% which serves as a barrier to export. (Hall, Tr. 2717). The VAT is a “cost adder to product produced inside of China whose destination was outside of China.” (Hall, Tr. 2717). { } (PX1522 at 005, *in camera*; Hall, Tr. 2723-2725, *in camera*).

Response to Finding No. 208:

Complaint Counsel’s finding number 208 is inaccurate and exaggerated. First, { } (Thuet Tr. at 4353, *in camera*; RFOF 192). Further, { } (RFOF 1110). { } (RFOF 192, 995).

{ } (Hall, Tr. 2894, *in camera*). Finally, when comparing products apple to apple, {

} even when accounting for the

VAT. (RFOF 192; Thuet, Tr. 4434; RX00677, *in camera*).

209. { } (Hall, Tr. 2846-2847, *in camera*). Mr. Hall testified that he is aware that there are Chinese guidelines that allow a manufacturer to {

} (Hall, Tr. 2846-2847, *in camera*). {

} (Hall, Tr. 2846-2847, 2879, *in camera*).

Response to Finding No. 209:

Complaint Counsel's finding number 209 is incomplete in that {

} (Thuet Tr. at 4353, *in camera*; RFOF 192).

And that { }. (RFOF 1110).

210. Another barrier to export is the relative value of Chinese currency. (Hall, Tr. 2717-2718). The Chinese currency has strengthened since China unpegged its currency from the US dollar. (Hall, Tr. 2718). This strengthening of the Chinese currency has made BFR products more expensive to export because inputs such as labor are now more expensive relative to other currencies. (Hall, Tr. 2718-2719; *see also* PX1522 at 005, *in camera* {

}).

Response to Finding No. 210:

Complaint Counsel's finding number 210 is inaccurate and exaggerated. Complaint Counsel attempts to create an "export barrier" based on the alleged rising costs of labor. Yet the evidence is clear that {

}

(RFOF 995). Moreover, despite Complaint Counsel's alleged barriers, {

} (RX01203, *in*

camera; RX00195; RX00194; Gillespie Tr. 3022-24, 3041, *in camera*; RFOF 493). In fact, {

} (Hall Tr. 2849-50, *in camera*; Axt, Tr. 2267-69, *in camera*; RX00023 at 002, *in camera*).

211. Yet another barrier to BFR's export of product from China are the freight costs associated with transporting separators from BFR's Chinese manufacturing facility to other countries. (Hall, Tr. 2721-2722).

Response to Finding No. 211:

Complaint Counsel's finding number 211 is inaccurate, speculative and not supported by evidence. Mr. Hall testified only that there may be freight expenses involved in transporting separators from BFR's Chinese manufacturing facility to other countries. (Hall, Tr. 2721-2722). There is no evidence of the cost of these freight expenses, how these freight expenses compare to other freight expenses (such as the freight expense incurred in transporting separators from Piney Flats, Tennessee to one of JCI's North American manufacturing plants), or most importantly, how these freight expenses create an export barrier. There is simply no basis for Complaint Counsel's "fact".

212. Duties also serve as barriers to BFR export to certain countries. (Hall, Tr. 2721-22). For example, Mexico imposes duties on separators coming from China. (Hall, Tr. 2722). This is particularly significant for JCI who manufactures its golf cart batteries in a plant in Mexico. (Hall, Tr. 2665).

Response to Finding No. 212:

Complaint Counsel's finding number 212 is incomplete and misleading. {

} (RX00050 at 011, *in camera*). {

} (RX01203, *in camera*;

RX00195; RX00194; Gillespie Tr. 3022-24, 3041, *in camera*; RFOF 493). One sentence of testimony, from one witness, that one country, may impose a duty on goods coming from China is hardly sufficient evidence to support Complaint Counsel's export barrier theory. In fact, JCI, the company Complaint Counsel cites to as an example of the effects of the purported export barrier, has formed a joint venture with BFR. (RFOF 1116). Clearly, JCI would not have

formed a joint venture for the supply of separators if an export barrier would have made that supply disadvantageous.

a. {
}

213. {
(Hall, Tr. 2735, *in camera*; PX1522 at 005, *in camera*). {

} (PX0907 (Kung, Dep. at 189, *in camera*)). Because Daramic operates large production lines, {
(PX0907 (Kung, Dep. at 189, *in camera*)).

Response to Finding No. 213:

Complaint Counsel’s finding number 213 is inaccurate. {

}. (RFOF 1116). When JCI signed a supply agreement with BFR, JCI intended to “make [BFR] a world class separator supplier to JCI and other battery manufacturers.” (RFOF 1117). Further, it was James Kung, an expert in the construction of PE manufacturing lines, who built the PE lines that are currently in operation at BFR. (RFOF 977, 1069). In fact, {

} (RFOF 977). Significantly, {

} (Hall, Tr. 2844-45, *in camera*). {

} (RFOF 983-984).

Finally, James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung {
} (PX0184 at 002; PX0273 at 009, *in camera*;
PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155),
in camera).

- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/Microporous] acquisition." (sic) (RX00022).
- Kung { } (PX1521 at 002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- { } (PX1510 at 002, *in camera*). { } (PX1510 at 002, *in camera*).
- Kung { } (PX1521 at 002, *in camera*).

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* ("We have no chance to make this material. So we don't need to discuss that.")). In direct contradiction of Kung's testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

214. Mr. Hall performed a benchmarking analysis of BFR's cost structure to determine the viability of BFR's opportunity to export to JCI's Asian joint ventures. (Hall, Tr. 2716). The benchmark analysis performed by Mr. Hall is a comparison of costs for production of a separator between { } (Hall, Tr. 2724, 2729, *in camera*).

{
} (Hall, Tr. 2724, *in camera*).

Response to Finding No. 214:

Respondent has no specific response.

215. {
} (Hall, Tr. 2728, *in camera*). {
} (Hall, Tr. 2728, *in camera*). {
} (Hall, Tr. 2729, *in camera*).

Response to Finding No. 215:

Respondent has no specific response.

216. In order to do an efficient benchmarking analysis, Mr. Hall {
} (Hall, Tr. 2725, *in camera*). Mr. Hall used 2007 cost data in his
benchmarking analysis {
} (Hall, Tr. 2725-2726, *in camera*).

Response to Finding No. 216:

Complaint Counsel's finding number 216 is inaccurate and incomplete. {

} (Hall, Tr. 2847-48, *in camera*).

217. Mr. Hall utilized BFR data that he received from {
} (Hall, Tr. 2847, *in camera*).

Response to Finding No. 217:

Respondent has no specific response.

218. {
} (Hall, Tr. 2726, *in camera*);
PX1522 at 005, *in camera*). {
} (Hall, Tr. 2726, *in camera*). {
} (Hall, Tr.
2726, *in camera*).

Response to Finding No. 218:

Complaint Counsel's finding number 218 is inaccurate and incomplete. In conducting his benchmarking analysis, {

} (Hall, Tr. 2845-46, *in camera*). In fact,

{ } (Hall, Tr. 2845, *in camera*).

219. Labor is { } of manufacturing a PE separator. (Hall, Tr. 2727-2728, *in camera*). Much of the manufacturing process is { } (Hall, Tr. 2727-2728, *in camera*).

Response to Finding No. 219:

Complaint Counsel's finding number 219 is inaccurate and misleading. {

} (Hall, Tr. 2847, *in camera*).

220. { } (Hall, Tr. 2724-2725, *in camera*).

Response to Finding No. 220:

Complaint Counsel's finding number 220 is misleading in that {

} (Hall, Tr. 2845, *in camera*).

221. Mr. Hall had knowledge of { } (Hall, Tr. 2729-2730, *in camera*). Mr. Hall then cross-referenced the { } with his knowledge of BFR material costs. (Hall, Tr. 2730, *in camera*).

Response to Finding No. 221:

Complaint Counsel's finding number 221 is incorrect and misleading. Not only did {

}

(Hall, Tr. 2845-46, *in camera*).

222. {

} (Hall, Tr. 2729-2731, *in*

camera).

Response to Finding No. 222:

Complaint Counsel's finding number 222 is incorrect and misleading. As previously stated, Mr. Hall's understanding was without reference to the companies' raw material supply contracts or how the supply contracts compared. (*See* Response to Finding No. 221).

223. Mr. Hall was also able to determine { } conversion costs (manufacturing costs) for a typical PE separator. Mr. Hall utilized information from {

} (Hall, Tr. 2731, *in camera*).

Response to Finding No. 223:

Complaint Counsel's finding number 223 is inaccurate and misleading. {

} (Hall, Tr. 2847-48, *in*

camera).

224. Mr. Hall determined { } conversion costs for a typical PE separator by extrapolation from his understanding of how {

} (Hall, Tr. 2732, *in camera*).

Response to Finding No. 224:

Complaint Counsel's finding number 224 is inaccurate and misleading. {

} (See Response to Finding No. 223).

225. According to Mr. Halls' benchmarking analysis, in 2007, BFR's material costs were {
{ (Hall, Tr. 2725-2726, *in camera*; PX1522 at 005, *in camera*). According to Mr. Hall's analysis BFR's material costs were {

} (Hall, Tr. 2732-2733, *in camera*; PX1522 at 005, *in camera*).

Response to Finding No. 225:

Complaint Counsel's finding number 225 is inaccurate and misleading. As previously stated, Mr. Hall's understanding was without reference to the companies' raw material supply contracts or how the supply contracts compared. (See Response to Finding No. 221). Moreover, {

} (Hall, Tr. 2847, *in camera*).

226. Mr. Hall's benchmarking analysis showed that BFR's manufacturing costs in 2007 were {
{ per square meter of 6 mill backweb separator. (Hall, Tr. 2727, *in camera*; PX1522 at 005, *in camera*). Mr. Hall's benchmarking analysis indicated {
} as
to the conversion costs. (Hall, Tr. 2733, *in camera*). According to Mr. Hall's analysis, {
} (PX1522 at
005, *in camera*).

Response to Finding No. 226:

Complaint Counsel's finding number 226 is inaccurate and misleading. {

} (See Response to Finding No. 223). {

} (Hall, Tr. 2847, *in camera*).

227. Mr. Hall attributes {
}
(Hall, Tr. 2733-2734, *in camera*).

Response to Finding No. 227:

Complaint Counsel's finding number 227 is inaccurate and misleading. First, the flaws in Hall's benchmarking analysis have been discussed in detail above. (*See* Response to Finding Nos. 216, 218-226). Moving beyond Hall's analysis, however, it is clear that JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RFOF 1117). As BFR grows, {

} (Hall, Tr. 2844-45, *in camera*). {

} (RFOF 983-84). In fact, {

}

(RFOF 977). {

}

228. Mr. Hall understands that {
} (Hall, Tr. 2735, *in camera*). According to Mr. Hall, the total cost for BFR to produce a typical 6 mill backweb separator was {____} per square meter in 2007. (Hall, Tr. 2727, *in camera*; PX1522 at 005, *in camera*). According to Mr. Hall's analysis, {____} cost to produce an equivalent separator {____} per square meter, and {____} cost to produce that same separator was {____} per square meter in 2007. (PX1522 at 005, *in camera*; Hall, Tr. 2734-2735, *in camera*).

Response to Finding No. 228:

Complaint Counsel's finding number 228 is inaccurate and misleading. Due to fundamental flaws in Hall's benchmarking analysis, we do not know whether his cost figures are accurate, (*see* Response to Finding Nos. 216, 218-26), although the evidence indicates that it is not. (Thuet, Tr. 4434; RX00677, *in camera* ({

))). What we do know is that, regardless of whether BFR is currently cost disadvantaged or cost advantaged, {

} (RFOF 500). We also know

that {

} (RFOF 501, 991-94: Hall Tr.

2849-50, *in camera*; Axt, Tr. 2267-69, *in camera*; RX00023 at 002, *in camera*). {

} (RFOF 986).

229. At BFR's most recent board meeting in March 2009, Mr. Hall analyzed updated figures with regards to BFR's cost structure. Based on BFR's current cost structure, the same 6 mill backweb separator now costs BFR approximately {

} (Hall, Tr. 2735-2736, , *in camera*, 2764, *in camera*).

Response to Finding No. 229:

Complaint Counsel's finding number 229 is inaccurate and misleading. The same flaws that existed in Hall's original benchmarking analysis occurred in the March 2009 analysis and make such findings unreliable. (*See* Response to Finding No. 228).

230. EnerSys had looked to Asia for future potential suppliers. In his search for alternatives, Mr. Axt located two companies in China that currently make SLI separators, {
} (Axt, Tr. 2217, *in camera*). EnerSys is working with these companies {
}
(Axt, Tr. 2218-2219, *in camera*).

Response to Finding No. 230:

Complaint Counsel's finding number 230 is incomplete. { } are both considering commencing production of PE UPS and motive battery separators in the very near future. (RFOF 970, 991, 1024).

231. { } (Axt, Tr. 2220, *in camera*).
The prices quoted to EnerSys from { } (Axt, Tr. 2217, *in camera*; Burkert. Tr. 2360, *in camera*). { }
(Axt, Tr. 2217, *in camera*; Burkert, Tr. 2365, *in camera*). {

(Axt, Tr. 2218, *in camera*).

}

Response to Finding No. 231:

Complaint Counsel's finding number 231 is incomplete and misleading. As BFR grows,

{

} (Hall, Tr. 2844-45, *in camera*). As a

result, {

} (RFOF 686). In fact, {

} (RFOF 688).

232. {

} (PX1248 at 001, *in camera*).

Response to Finding No. 232:

Complaint Counsel's finding number 232 is inaccurate. {

} (RFOF

1020).

233. {

camera). EnerSys is working with {

} (Axt, Tr. 2219, *in*

} (Axt, Tr. 2219, *in camera*).

Response to Finding No. 233:

Complaint Counsel's finding number 233 is inaccurate and misleading. {

} (RFOF 680).

Complaint Counsel, however, misconstrues the reasons behind EnerSys' conduct. EnerSys has acquired over 23 companies and has entered into joint ventures, it generates over 2 billion dollars in revenue annually from its 20 manufacturing facilities. (RFOF 605-09). Quite simply, EnerSys sells a lot of batteries and requires a lot of battery separators. Moreover, EnerSys'

claim that it must have a second source is false. Prior to the acquisition, EnerSys intended to move 100% of its battery separator purchases to a sole supplier, Microporous. (RFOF 674-77). The “evidence” Complaint Counsel cites as support that EnerSys must have a second source comes only from a very biased witness whose past behavior illustrates his desire to harm Daramic. (RFOF 725-26, 732).

b. { }

234. BFR cannot compete on price terms with Daramic and Entek in selling PE separators to customers in the United States – {
} (PX0907 (Kung, Dep. at 172-173, *in camera*)). In the United States,{

(PX0907 (Kung, Dep. at 172-173, *in camera*)).

Response to Finding No. 234:

Complaint Counsel’s finding number 234 is false. First, as BFR grows, {

} (Hall, Tr. 2844-45, *in camera*). Further, {

(RX01203, *in camera*; RX00195; R00X194; Gillespie Tr. 3022-24, 3041, *in camera*; RFOF 493). For example, {

} (RFOF 991). In fact, {

} (Hall Tr. 2849-50, *in camera*; Axt, Tr. 2267-69, *in camera*; RX00023 at 002, *in camera*). {

} (*See Respondent’s Reply to Complaint Counsel’s Finding No. 213*).

235. When asked whether BFR can find customers in North America and sell its PE separators to them, Mr. Kung answered: { (PX0907 (Kung, Dep. at 176-177), *in camera*). {

} (PX0907 (Kung, Dep. at 176-177, *in camera*)).

Second, {

} (PX0907 (Kung, Dep. at 176-177, *in camera*)).

Response to Finding No. 235:

Complaint Counsel's finding number 235 is false. {

} (*See* Response to

Finding No. 234). Finally, Kung is not a credible witness. (*See* Respondent's Reply to Complaint Counsel's Finding No. 213).

236. When asked how much prices would have to increase in North America for BFR to supply a North American battery manufacturer with PE SLI separators Mr. Kung responded by saying {

}

(PX0907 (Kung, Dep. at 186-187, *in camera*)).

Response to Finding No. 236:

Complaint Counsel's finding number 236 is inaccurate. Asian separator manufacturers, including BFR, have sought to sell PE separators to customers located in North America. (RFOF 201). For example, East Penn obtained a quote for the sale of PE separators and sample from Anpei. (RFOF 201). {

} (RFOF 201). {

} (RFOF 201). {

} (RFOF

201). {

} (RFOF 201). These facts support the economic conclusion that the Asian price plus transportation cost to North America is less than the North American price plus the SSNIP that

would be imposed in North America. (RFOF 1356). In fact, Asian producers could profitably ship PE separators to North America and sell them there. (RFOF 1357). {

}

(RX00677, *in camera*; RFOF 1357). Finally, Kung is not a credible witness. (See Respondent's Reply to Complaint Counsel's Finding No. 213).

237. Using Mr. Hall's benchmarking analysis of 2007 costs, {

camera). {

} (PX1522 at 005, *in*

} (PX1522 at 005, *in camera*).

Response to Finding No. 237:

Complaint Counsel's finding number 237 is inaccurate. Mr. Hall's benchmarking analysis failed to consider several important variables and is not accurate or reliable as a result. (See Response to Finding Nos. 216, 218-226). Further, the evidence shows that {

} (Thuet, Tr. 4434, *in camera*; RX00677, *in*

camera). Thus, Asian producers could profitably ship PE separators to North America and sell them there. (See Response to Finding No. 236).

238. { } (Hall, Tr. 2746-2747, *in camera*). { } (Hall, Tr. 2745, *in camera*). { } (Hall, Tr. 2745, *in camera*).

Response to Finding No. 238:

Complaint Counsel's finding number 238 is inaccurate. Not only is BFR cost-competitive in North America, BFR could make a profit by shipping PE separators to North America and selling them there. (*See* Response to Finding No. 236-37).

239. As far as Mr. Hall knows, BFR { } (Hall, Tr. 2745, *in camera*; PX0907 (Kung, Dep at 298, *in camera*)).

Response to Finding No. 239:

Complaint Counsel's finding number 239 is inaccurate and misleading. { } (*See* Response to Finding No. 234).

240. JCI has no plans to { } (Hall, Tr. 2745, *in camera*). JCI never had a { } (Hall, Tr. 2745-2746, *in camera*). Nor did JCI ever { } (Hall, Tr. 2746, *in camera*).

Response to Finding No. 240:

Complaint Counsel's finding number 240 is inaccurate. First, { } (RFOF 493). Further, { } (RX00051; RX00055; Hall, Tr. 2860, *in camera*; RFOF 493). In fact, { } (RFOF 493).

241. JCI believes that {

} (Hall, Tr. 2746, *in camera*).

Response to Finding No. 241:

Complaint Counsel's finding number 241 is inaccurate. Notwithstanding the opinion of Mr. Hall, Asian separator manufacturers, including BFR, have a different opinion and have sought to sell PE separators to customers located in North America. (RFOF 201). For example, East Penn obtained a quote for the sale of PE separators and sample from Anpei. (RFOF 201).

{

} (RFOF 201). {

}

(RFOF 201). {

} (RFOF 201). {

} (RFOF

201).

Additionally, it is {

} (RFOF 493). As a result, {

} (RFOF 493).

Finally, {

} (RFOF 1013). Clearly, Asian

suppliers are not limited to supplying only Asia.

242. BFR is not considering building a manufacturing plant in North America. The BFR board has not approved any plans to { } (Hall, Tr. 2879, *in camera*).

Response to Finding No. 242:

Complaint Counsel's finding number 242 is incorrect. First, {

} (RFOF 493). Moreover, {

} (RFOF 493). Thus, it is not surprising that {

} (See Response to Finding No. 234).

c. { }

243. All of BFR's PE separator production is currently sold { }
(PX0907 (Kung, Dep. at 85, *in camera*)). JCI purchases separators from BFR, but these
separators are { } (PX0907 (Kung,
Dep. at 90, *in camera*)).

Response to Finding No. 243:

Complaint Counsel's finding number 243 is not accurate. {

} (RX00050 at 11, *in camera*). (RFOF

- 493). Kung is not a credible witness. (See Respondent's Reply to Complaint Counsel's Finding
No. 213).

244. JCI has investigated the possibility of BFR sourcing separators to { } (Hall,
Tr. 2738-2740, *in camera*). { }
Tr. 2736-2738, *in camera*). { } (Hall,

Response to Finding No. 244:

Respondent has no specific response.

245. JCI's ownership interest in BFR does not allow it to { }
{ } (Hall, Tr. 2741, *in camera*). Neither does JCI's
ownership interest in BFR allow JCI to dictate { }
{ } (Hall, Tr. 2742-2743, *in camera*).

Response to Finding No. 245:

Respondent has no specific response.

246. In 2008, { } (RX01532
at 007, *in camera*). { }
{ } (Hall, Tr. 2738-2740, *in camera*).

Response to Finding No. 246:

Respondent has no specific response.

4. Separator manufacturers outside of North America do not sell separators for flooded lead acid batteries into North America.

247. Other flooded lead acid battery suppliers, including Amer-Sil and firms in India and China, did not have a global reach and only supplied the local market near their plants. (Gilchrist, Tr. 307-08).

Response to Finding No. 247:

Complaint Counsel's finding number 247 is not accurate. {

} (RFOF 930-33). Complaint Counsel also ignores the fact that:

a) {

} (RX00050 at 11, *in camera*; RFOF 493);

b) Anpei sells and ships its product throughout the world. (RFOF 1019);

c) {

} (RFOF

1013, 1008);

d) {

} (Axt, Tr. 2272, *in camera*; Burkert, Tr. 2449-51, *in camera*; RX00239, *in camera*; RX00193; RX00203, *in camera*; RX00199 *in camera*; Axt, Tr. 2277, *in camera*; Burkert, Tr. 2456, *in camera*; RX00223, *in camera*; Burkert, Tr. 2450, *in camera*);

e) {

} (RFOF

199); and

f) Anpei, Separindo, Baotou, Sebang, Epoch are all PE separator companies in Asia competing with Daramic for business including business in South America. (RFOF 200).

248. As worldwide VP of sales and marketing, Mr. Roe was the person at Daramic who was responsible for competitive intelligence. (Roe, Tr. 1193-1194). Mr. Roe testified that he is not aware of any instance prior to Daramic's acquisition of MPLP where Asian manufacturers of PE separators supplied North American battery manufacturers with PE separators for use in any type of flooded lead acid batteries. (Roe, Tr. 1236). Mr. Roe further testified that he does not know of any instances where an Asian PE separator manufacturer had supplied North American battery manufacturers with separators for any type of flooded applications since the acquisition of MPLP. (Roe, Tr. 1236-1237).

Response to Finding No. 248:

Complaint Counsel's finding number 248 is incomplete and inaccurate. It ignores relevant evidence from the current market, such as the fact that:

a) East Penn obtained a quote for the sale of PE separators and sample from Anpei.

(RFOF 201);

b) {
} (RFOF 201);

c) {
} (RFOF 201);

d) {
} (RFOF 201);

e) {
} (RFOF 201); and

f) {
} (See Response to Finding No. 234).

249. Daramic has not faced competition in North America from Asian PE battery separator manufacturers. (Thuet, Tr. 4381-4382; Seibert, Tr. 4266-4267, *in camera*). Nor has Daramic ever seen any instances of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America. (Thuet, Tr. 4379-4380). {

} (Seibert, Tr. 4165, *in camera*; RX01084, *in camera*).

According to Polypore's CEO, the Asian separator manufacturers are not selling separators in North America because the margins are not high enough. (Toth, Tr. 1404).

Response to Finding No. 249:

Complaint Counsel's finding number 249 is inaccurate and misleading. The evidence is clear that {

} (*See* Response to Finding No. 234), and that Asian separator manufacturers have also sought to sell PE separators to customers located in North America. Thus, regardless of whether Daramic has first-hand knowledge of Asian PE battery separator manufacturers selling PE separators for flooded lead acid batteries to customers in North America, Daramic certainly perceives competition in North America from Asian PE battery separator manufacturers. (RFOF 201, 985-87, 996, 1000, 1007, 1008, 1013, 1019, 1022, 1024-30). {

} (RFOF 193, 196, 941, 942). In fact, {

} (RFOF 197).

250. Microporous did not consider the regional Asian suppliers as potential competitors for its separator business in North America. (Gilchrist, Tr. 308).

Response to Finding No. 250:

Complaint Counsel's finding number 250 is inaccurate and misleading. Microporous was a "niche" player in the battery separator industry until it was acquired by Polypore on February 29, 2008. (RFOF 314). Microporous developed and manufactured rubber and rubber-based battery separators for the lead-acid battery industry. (RFOF 314). Since Microporous was the only manufacturer of rubber separators, there was no competition anywhere across the globe, Asia or otherwise, for these products. (RFOF 316).

251. {
} (Weerts, Tr. 4500-4502, *in camera*).
{
} (Weerts, Tr. 4502, *in camera*).

Response to Finding No. 251:

Complaint Counsel's finding number 251 is misleading and inaccurate. {

}

(RFOF 193, 196, 941-42). In fact, {

} (RFOF 197).

252. {

camera). {

} (Weerts, Tr. 4502-4503, *in*

camera). {

} (Weerts, Tr. 4501, *in*

} (Weerts, Tr. 4512, *in camera*).

Response to Finding No. 252:

Complaint Counsel's finding number 252 is not accurate. {

} (RFOF 941). {

} (RFOF 941). {

} (RFOF 942). {

} (RFOF 942). {

} (RFOF 942).

253. {

} (PX0916 (Dauwe, Dep. at 35, 40, *in camera*)). {

} (PX0916

(Dauwe, Dep. at 29-33, *in camera*)). {

} (PX0916 (Dauwe, Dep.

at 152-153, *in camera*)).

Response to Finding No. 253:

Complaint Counsel's finding number 253 is not accurate. {

} (Axt, Tr. 2272, *in*

camera; Burkert, Tr. 2449-51, *in camera*; RX00239, *in camera*; RX00193; RX00203, *in camera*; RX00199 *in camera*; Axt, Tr. 2277, *in camera*; Burkert, Tr. 2456, *in camera*; RX223, *in camera*; Burkert, Tr. 2450, *in camera*). Documentary evidence shows that {
}. (RFOF 685;

RX01203, *in camera*; RX00195; RX00194). Moreover, {
} (RFOF 593).

254. {
camera). {
} (Gagge, Tr. 2512, *in camera*). {
} (Gagge, Tr. 2520, *in camera*). {
} (Gagge, Tr. 2520, *in camera*). Because some EnerSys batteries are likely to be subjected to {
} {
} (Gagge, Tr. 2521, *in camera*).

Response to Finding No. 254:

Complaint Counsel's finding number 254 is not accurate. First, as previously stated, {
}. (See Response to Finding No. 253). Further, evidence adduced at trial also showed that {
} (Burkert, Tr. 2451, *in camera*; PX1262; RX00199, *in camera*; RX00239, *in camera*; Berkert, Tr. 2456, *in camera*). In fact, {
}
(RFOF 139). {
} (Gagge, Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280; RX00215, *in camera*). Moreover, {
} (RFOF 702).

Five Percent Price Increases in Battery Separators Will Not Cause an Increase in Imports of Batteries

255. With the exception of an extremely low volume tank battery called OPz, EnerSys does not import flooded lead batteries into North America. (Craig, Tr. 2548-49). It is not cost-effective to ship large flooded lead acid batteries like EnerSys's motive and UPS batteries. (Craig, Tr. 2549-50). EnerSys must drain flooded lead acid batteries in order to ship them and then refill them when they arrive. (Craig, Tr. 2550).

Response to Finding No. 255:

Complaint Counsel's finding number 255 is inaccurate and misleading. EnerSys manufactures a majority of its batteries outside of the United States for importing into the United States. (RFOF 608). EnerSys has 20 plants worldwide, but only four plants located in the United States. (RFOF 605). In 2007, EnerSys' annual spend for separators in North America was only { } (RFOF 607). By way of example, EnerSys manufactures batteries for fork lifts in Mexico which it ships to the United States. (RFOF 608). EnerSys also manufactures AGM batteries in China which it imports into the United States. (RFOF 608).

5. Respondents documents analyzed North American market separate from other geographic regions

256. { } (Seibert, Tr. 4252, *in camera*). { } (RX01073 at 006, 010, 014, *in camera*; RX01074 at 006, 010, 014, *in camera*).

Response to Finding No. 256:

Complaint Counsel's finding number 256 is false. { } (See RX01073 at 004, 005, 008, 009, 012, 013, 015-018, *in camera*; RX01074 at 004, 005, 008, 009, 012, 013, 015-018, *in camera*) (Hauswald, Tr. 858-59, *in camera*; PX0522 at 11-18, *in camera*; RX01073,

in camera; RX01409, *in camera*; RX00620, *in camera*; RX01001, *in camera*; RX01002; RX01004, *in camera*; RX01074, *in camera*; RX01075, *in camera*; RX01084, *in camera*; RX01085, *in camera*; RX01086, *in camera*; RX01087; RX01088; RX01179, *in camera*; RX01409, *in camera*).

257. Daramic is currently seeking a price increase of approximately { } from EnerSys. (Craig, Tr. 2552, *in camera*). { } (Craig, Tr. 2552-53, *in camera*).

Response to Finding No. 257:

Complaint Counsel’s finding number 257 is inaccurate. The only evidence Complaint Counsel cites to support this “fact” is the testimony of EnerSys’ CEO who has been a vocal opponent to the Daramic-Microporous merger, and is in fact on the “warpath” to see that the merger is dissolved. (RFOF 727-26). In actuality, {

{ } (RX00062, *in camera*). As a result,

{

{ } (RFOF 501, 686). {

{ } (RFOF 682). Finally, {

{ } (RFOF 685, 691-93, 695-700).

V. Market Participants

A. Daramic and MPLP Were Only Suppliers of Deep-cycle Separators in North America

258. Prior to the acquisition, Microporous participated in the North American deep-cycle market with its CellForce and Flex-Sil products. (Gilchrist, Tr. 300-301).

Response to Finding No. 258:

Respondent has no specific response.

259. Prior to the acquisition, Daramic participated in the North American deep-cycle market with its HD product. (Gilchrist, Tr. 343).

Response to Finding No. 259:

Complaint Counsel's finding number 259 is inaccurate and misleading. Daramic HD was not competitive in the alleged deep-cycle market with Microporous. For deep cycling applications, the industry standard is FLEX-SIL®. (RFOF 120-21). FLEX-SIL® is unique in that no other battery separator product can offer the same degree of antimony suppression as FLEX-SIL®. (RFOF 120-21). Flex-Sil is a niche product used in very specific applications. (RFOF 119, 120-21, 123, 126, 239, 314, 569; Gilchrist, Tr. 299; Hall, Tr. 2799). In fact,

{
} (RFOF 118). For example, Trojan, Microporous' largest customer, considers FLEX-SIL® to be unique. (RFOF 121). U.S. Battery uses only FLEX-SIL® in its premium battery line, offering a one year warranty. (RFOF 121). Both Trojan and U.S. Battery advertise the FLEX-SIL® separator on their websites, not Daramic HD. (RFOF 121). Moreover, FLEX-SIL® is priced substantially above Daramic HD. (RFOF 124). Despite this fact, U.S. Battery purchases of FLEX-SIL® separators comprised over 90% of its separator purchases. (RFOF 124). Trojan only purchased FLEX-SIL® separators, not Daramic HD, despite the substantial price differential. (RFOF 124).

Clearly, Complaint Counsel has chosen to ignore the fact that FLEX-SIL® is made of rubber and the overwhelming evidence in the case that FLEX-SIL® is considered the industry standard separator for deep cycle batteries (RX01643; Gilchrist, Tr. 535; Godber Tr. 271, 277; Wallace, Tr. 1964-1965; Quereshi Tr. 2072; McDonald, Tr. 3818), is demanded by battery customers due to its superior performance and product life (Gilchrist Tr. 536; McDonald Tr. 3787; Godber Tr. 271, 277; Wallace Tr. 1964-1965), and as such, bears a premium price

(Wallace, Tr. 1967-72; Quereshi, Tr. 2065 (FLEX-SIL® is sold in US Battery's premium line, FLEX-SIL® constituted approximately 95% of US Battery's purchase of separators in 2007 and is twice as expensive as Daramic HD); McDonald Tr. 3820). Moreover, from the evidence presented in this hearing, FLEX-SIL® is the only battery separator actually advertised by battery companies. (Godber, Tr. 277; Wallace, Tr. 1963-1965; RX01643).

260. Prior to the acquisition of Microporous by Daramic, the only competitors in the world for the sale of battery separators for deep-cycle applications were Daramic and Microporous. (Godber, Tr. 153-54; Gilchrist, Tr. 305, 343; Wallace, Tr. 1931, 1943; Hauswald, Tr. 674-675; McDonald, Tr. 3948).

Response to Finding No. 260:

Complaint Counsel's finding number 260 is inaccurate and misleading. Daramic HD did not compete with Flex-Sil in deep cycle applications. FLEX-SIL® is a niche product used in deep cycle applications and has very different, and superior, technical capabilities than polyethylene based separators. (RFOF 125). In fact, Complaint Counsel called Mike Gilchrist, Microporous' former CEO, as its witness, who testified that FLEX-SIL® had no real competition for its niche position in the battery separator market. (RFOF 126). Testimony that customers "could" substitute some of their Flex-Sil purchases with HD is not only suspect in light of their continued failure to do so, but does not advance the FTC's product market cause, as they also testified that HD definitely could not be substituted, regardless of the price of Flex-Sil, for a majority of the separators they use. (RFOF 1, 124, 745-47, 751, 868-70, 875, 877).

Moreover, Complaint Counsel fails to account for the fact that East Penn's witness Leister testified that East Penn uses straight PE separators in some of its deep cycle batteries. (Leister Tr. at 3978-80). Additionally, Crown uses a straight PE separator in a portion of its "deep-cycle" batteries. (Balcerzak, Tr. 4093-94; RFOF 1344). {

} (RFOF 927, 928, 977, 986,

1007-12, 1021). In fact, Anpei produces high quality PE separators which are used in OEM applications. (RFOF 1021).

261. Prior to the acquisition, U.S. Battery, which primarily manufactures deep-cycle batteries, only bought separators for its deep-cycle flooded batteries from Daramic and Microporous. (Wallace, Tr. 1942-1943). U.S. Battery is not aware of any other suppliers of battery separators for deep-cycle flooded batteries. (Wallace, Tr. 194; Qureshi, Tr. 2011).

Response to Finding No. 261:

Complaint Counsel's finding number 261 is inaccurate and misleading. Prior to the acquisition, Microporous was U.S. Battery's primary separator supplier. (RFOF 852). In 2007, over 90% { } of U.S. Battery's separator purchases were FLEX-SIL® separators even though a FLEX-SIL® separator costs twice as much as a Daramic HD separator. (RFOF 864-65). In fact, FLEX-SIL® is the only separator U.S. Battery uses in its premium deep cycle batteries.

262. The only separators that are available for flooded lead acid deep-cycle batteries are Flex-Sil, HD, and CellForce, which all come from Daramic. (Godber, Tr. 151-152; *see also* Qureshi, Tr. 2004).

Response to Finding No. 262:

Complaint Counsel's finding number 261 is false. Complaint Counsel fails to account for the fact that East Penn's witness testified that East Penn uses straight PE separators in some of its deep cycle batteries. (Leister Tr. at 3978-80). Additionally, Crown uses a straight PE separator in a portion of its "deep-cycle" batteries. (Balcerzak, Tr. 4093-94; RFOF 1344).

{

} (RFOF 927-28, 977, 986, 991, 1007-12, 1021). In fact, {

}. (RFOF 501, 810, 962, 991,

1118).

263. Prior to the acquisition, Daramic and Microporous competed for the sale of separators that went into golf cart batteries. (Hauswald, Tr. 653-654).

Response to Finding No. 263:

Complaint Counsel's finding number 263 is inaccurate and misleading. Flex-Sil has no competitive products and is its own relevant product market. (RFOF 126). For example, { } and does not have the superior characteristics demanded by the customers for high-end batteries. (RFOF 18, 121-25, 548-49, 745, 747; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762, McDonald, Tr. 3822; RX1094). Moreover, the evidence at trial makes it clear that a SSNIP increase to Flex-Sil would not lead to a substitution from Flex-Sil – the gold standard in deep-cycle separators – to HD. (RFOF 121-25, 271, 278, 545-49, 745, 747, 1338-39).

The behavior and testimony of {

} (RFOF 535-37).

Specifically, {

} (RFOF 535-39;

PX0442, *in camera*; RX00677, *in camera*). In 2008, the purchase of {

} (RX00677, *in camera*; PX1040 at 002,

in camera; PX1063, *in camera*). When the credit is included in the price comparison for 2008,

the adjusted selling price for {

} (RX00677, *in camera*; PX0489). Nevertheless, despite the fact that {

} (RFOF 537, 541, 545,

547; RX00677, *in camera*). Furthermore, the incentive to purchase {
} not purchase any meaningful
quantities of { } until 2006. (RX01119, *in camera*; RFOF 535-39, 541, 545, 546-47). These
facts preclude any argument that Flex-Sil and HD are economic substitutes. Simply because
both products can be used in ‘deep-cycle’ applications does not make them economically
substitutable products.

264. In the past ten years, Mr. Gilchrist has not seen any competition other than that between
MPLP and Daramic for deep-cycle applications. (Gilchrist, Tr. 366).

Response to Finding No. 264:

Complaint Counsel’s finding number 264 is inaccurate and misleading. Mr. Gilchrist
testified that has not seen any competition at all for Flex-Sil, including from Daramic HD.
(RFOF 126).

265. As a result of the acquisition, Daramic has “complete control” or 100% of the deep-cycle
separator markets world-wide. (PX0076 at 002, Gilchrist, Tr. 421).

Response to Finding No. 265:

Complaint Counsel’s finding number 265 is inaccurate and misleading. Prior to the
acquisition, Flex-Sil was manufactured in one location and had no competitors. (RFOF 119,
126). Today, Flex-Sil is manufactured in one location and has no competitors. (RFOF 119,
126). The acquisition had no effect on Complaint Counsel’s alleged deep-cycle market.
Moreover, as previously discussed, Complaint Counsel fails to account for the fact that straight
PE separators are used in deep cycle batteries. (*See* Response to Finding No. 262).
Additionally, {

} (RFOF 501, 810, 962, 991, 1118). In fact, at the BCI conference in May 2009, {

} (RFOF 810).

266. Today, Daramic is the only supply option in the world for deep-cycle battery separators. (Godber, Tr. 229; Qureshi, Tr. 2010-2011).

Response to Finding No. 266:

Complaint Counsel's finding number 266 is inaccurate and misleading. The evidence at trial and the evidence set forth herein shows that Microporous' Flex-Sil separator and Daramic's HD were not competitive and were not in the same relevant market. The only thing that happened with the acquisition is that Microporous' competitive share was shifted to Daramic and thus it has had no adverse impact. (See Response to Finding Nos. 259-65). Additionally, Complaint Counsel fails to account for the fact that straight PE separators are used in deep cycle batteries. (See Response to Finding No. 262). {

} (RFOF 501, 810,

962, 991, 1118).

267. JCI is not aware of any separator manufacturer other than Daramic that can supply a deep-cycle battery separator that will work in JCI's batteries. (Hall, Tr. 2705).

Response to Finding No. 267:

Complaint Counsel's finding number 267 is incomplete and misleading. First, JCI manufactures only a small amount of golf cart batteries, accounting for only 2 to 3 percent of its production. (RFOF 439). Further, straight PE separators can and are being used in deep cycle batteries. (Leister Tr. at 3978-80). {

} (RFOF 927, 928). {

} (RFOF 949). JCI entered into joint venture agreement with BFR in February 2007. (RFOF 491). Interestingly, {

} (RFOF 501, 810, 962, 991, 1118;

RX00150, *in camera*; RX00183, *in camera*).

268. { } (PX1515 at 002, *in camera*). Following the acquisition of MPLP, JCI scheduled what it called “red flag” meeting to discuss the impact of the acquisition on JCI’s purchases of deep-cycle separators. (Hall, Tr. 2705-2707). {

} (PX1514, *in camera*).

Response to Finding No. 268:

Complaint Counsel’s finding number 268 is incomplete and misleading. JCI admits that

{ } (Hall, Tr. 2834, *in camera*). In any event, {

(Hall, Tr. 2834, *in camera*). In any event, {

} (RFOF 501, 810, 962, 991, 1118; RX00150, *in camera*; RX00183, *in camera*).

269. { } (PX0023 at 003, *in camera*). { } (PX0023 at 003, *in camera*).

Response to Finding No. 269:

Complaint Counsel’s finding number 269 is not accurate. Asian deep-cycle batteries for use in floor-scrubbers and golf carts are already being imported into North America by at least two Chinese companies, Leoch and RPS, which is exporting deep-cycle batteries to Florida from China. (RFOF 1057). {

}. (See Response to Finding No. 267).

270. Respondent’s documents show that Microporous and Daramic are the only current sellers and the only market participants in the North American market for rubber and PE/rubber deep-cycle battery separators used in golf carts and scrubbers. (PX0131 at 035; PX1104 at 001; PX0395 at 027, *in camera*).

Response to Finding No. 270:

Complaint Counsel’s finding number 270 is incomplete and inaccurate. Complaint Counsel fails to account for the fact that straight PE separators are used in deep cycle batteries. (See Response to Finding No. 262). {

} (RFOF 501, 810, 962, 991, 1118).

271. Sales data from 2007 show that the change in HHI and the post-merger HHI for the deep-cycle market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-3185). {

} (Simpson, Tr. 3184-3185; PX0033 at 040, 042 (Simpson Report), *in camera*). {

} (Simpson, Tr. 3438, *in camera*).

Response to Finding No. 271:

Complaint Counsel's finding number 271 is inaccurate. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded.

Further, by {

} (PX0033 at 040, *in*

camera). Further, {

} (Simpson, Tr. 3308, *in camera*).

{

} (Simpson, Tr. 3309, *in camera*). Nevertheless,

{

}

(Simpson, Tr. 3310-11, *in camera*). Moreover, {

} (RFOF 1229, 962;

RX00150, *in camera*; RX00183, *in camera*). This is true even though {

} (RFOF 1229).

{

} (RFOF 1362). {

} - smaller than in the worldwide calculation because Microporous exported a significant amount of its production outside of North America, so its worldwide share was more than its North American share. (RFOF 192, 338-342). {

} (Simpson, Tr. 3358-59, 3391, *in camera*)

272. Microporous's separators have approximately 90% market share for golf-cart battery applications because its application specific separator prevents gassing and water loss in these deep-cycle batteries. (Brilmyer, Tr. 1831).

Response to Finding No. 272:

Complaint Counsel's finding number 272 is inaccurate and misleading. FLEX-SIL® is the industry gold-standard separator in deep-cycle battery applications. (RFOF 120). In fact,

{

} (RFOF 118). For example,

{

}

U.S. Battery uses only FLEX-SIL® in its premium battery line, offering a one year warranty. (RFOF 121). In fact, U.S. Battery's purchases of FLEX-SIL® separators comprised over 90% of its separator purchases, despite the fact that FLEX-SIL® is priced substantially above Daramic HD. (RFOF 124).

There is no doubt that FLEX-SIL® is considered the industry standard separator for deep cycle batteries (RX01643; Gilchrist, Tr. 535; Godber Tr. 271, 277; Wallace, Tr. 1964-65; Quereshi Tr. 2072; McDonald, Tr. 3818), is demanded by battery customers due to its superior performance and product life (Gilchrist Tr. 536; McDonald Tr. 3787; Godber Tr. 271, 277; Wallace Tr. 1964-65), and as such, bears a premium price (Wallace, Tr. 1967-72; Quereshi, Tr. 2065 (FLEX-SIL® is sold in US Battery's premium line, FLEX-SIL® constituted approximately 95% of US Battery's purchase of separators in 2007 and is twice as expensive as Daramic HD);

McDonald Tr. 3820). Moreover, from the evidence presented in this hearing, FLEX-SIL® is the only battery separator actually advertised by battery companies. (Godber, Tr. 277; Wallace, Tr. 1963-1965; RX01643).

273. 2005-2007 Market shares and HHI calculations for deep-cycle battery separators in North America are:

		Sales	Shares		
{					}
{					}
{					}

(PX0949 at 190-214, *in camera*; PX0949 at 224-233, *in camera*; PX0033 at 40, *in camera*).

Response to Finding No. 273:

Complaint Counsel’s finding number 273 is inaccurate. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and shall be disregarded. Further, Simpson’s HHI calculations are flawed as they do not take into account the use of PE only separators in his deep cycle separator market or {

} (*See Response to Finding No. 271*).

274. {
PX0033 at 40, *in camera*}. }

Response to Finding No. 274:

Complaint Counsel’s finding number 274 is misleading. By {

} (PX0033 at 040, *in camera*; RFOF1288).

1. Daramic produces HD

275. Daramic's HD separator is a separator with a rubber additive (*i.e.*, latex or liquid rubber) which is used in deep-cycle batteries. (Gilchrist, Tr. 338-339, 343). Daramic markets HD to deep-cycle battery manufacturers. (Gilchrist, Tr. 381).

Response to Finding No. 275:

Complaint Counsel's finding number 275 is inaccurate and misleading. While Daramic HD is used in low-end, no warranty batteries, {
 } and does not have the superior characteristics demanded by the customers for high-end batteries. (RFOF 18, 121-25, 548-49, 745, 747, 871-72; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762; McDonald, Tr. 3822; RX01094). Moreover, from the evidence presented in this hearing, FLEX-SIL® is the only battery separator actually advertised by battery companies. (Godber, Tr. 277; Wallace, Tr. 1963-1965; RX01643).

2. MPLP Produced Flex-Sil and CellForce

276. Microporous developed CellForce in the mid-1990's to address customer needs for a more flexible separator material that can fold around the battery plates and be sealed along one edge, while retaining the electrochemical attributes of a rubber-based separator. (Gilchrist, Tr. 316-317). Because there were cost advantages for customers to use CellForce that related to sealing and sleeving the separator, Microporous anticipated that its Flex-Sil customers would migrate to CellForce separators for many of its battery applications. (Gilchrist, Tr. 373-374).

Response to Finding No. 276:

Complaint Counsel's finding number 276 is inaccurate and misleading. Although Microporous anticipated that its Flex-Sil customers would migrate to CellForce separators for many of its battery applications that has not proven to be accurate. (*See* Response to Finding No. 272).

3. No Other Suppliers in the World

B. Daramic and MPLP were the only Suppliers of Motive Separators in North America

277. Prior to the acquisition, Microporous participated in the North American motive market with its CellForce product. (Gilchrist, Tr. 300-301).

Response to Finding No. 277:

Complaint Counsel's finding number 277 is inaccurate. First, the distinction between Complaint Counsel's "motive" market and "deep cycle" market is arbitrary. (See Response to Finding Nos. 65, 67, 116; RFOF 78; PX0319 at 007-08). Further, Microporous' presence in the alleged "motive" market did not have any competitive impact in that market. (RFOF 384, 777-79, 1273, 1366, 370-71, 395, 386, 562).

278. Prior to the acquisition, {
} (PX0211 at 001, *in camera*; Hauswald, Tr. 988).

Response to Finding No. 278:

Complaint Counsel's finding number 278 is incomplete and misleading. For example, Daramic CL is used in the "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle". (RFOF 89, 95, 127-28).

279. As a result of the acquisition, Daramic has "complete control" or more than 97% of the industrial markets for motive power separators world-wide. Amer-Sil in Luxembourg would be the remaining competitor. (PX0076 at 002, Gilchrist, Tr. 422).

Response to Finding No. 279:

Complaint Counsel's finding number 279 is false. Complaint Counsel is correct that {

} (RFOF 135). Indeed, EnerSys has purchased PVC separators for use in its industrial batteries. (RFOF 135). And both {

} (RFOF 139).

Complaint Counsel ignores, however, several other competitors in its alleged "motive power" market. For example, {

}.
}

(RFOF 991; RX00061, *in camera*). {

} (RFOF 1024). Significantly, {

} (RFOF 940, 968, 970). In fact,

{

} (Gillespie, Tr. 3037, *in camera*). Indeed, because its large amount of excess capacity,

{

} (RFOF 943-44). Finally,

testimony and documentary evidence at trial confirm that many Asian producers of industrial separators are also in a position to supply the alleged North American market and, in fact that they may already do so indirectly through the sale of Asian industrial batteries into North America. (Thuet, Tr. 1057).

Additional evidence shows that in the alleged “motive power” market, Daramic {

} (RX000927 at 005-16, *in camera*; RFOF 253).

280. Sales data from 2007 show that the change in HHI and the post-merger HHI for the motive market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-3185). Daramic’s acquisition of Microporous increased the {
} in the motive market. (Simpson, Tr. 3185; PX0033 at 040, 042 (Simpson Report), *in camera*).

Response to Finding No. 280:

Complaint Counsel’s finding number 280 is inaccurate. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and shall be disregarded. Further, Simpson’s HHI calculations are flawed as they do not take into account {

}

{

}. (RFOF 1218). This is true even though {

} (Simpson, Tr. 3343, *in camera*). {

} (Simpson, Tr. 3344, *in camera*). {

} (Simpson, Tr. 3344, *in camera*). {

} (Simpson, Tr. 3344, *in camera*). Moreover, {

} (RFOF 1229). {

} (Simpson, Tr. 3445, *in camera*), {

}. (Simpson, Tr. 3478, *in camera*; RFOF 1220). Dr. Simpson acknowledged at trial that the {

} (Simpson,

Tr. 3355-56, 3341, 3348-50, 3358-59, *in camera*)

281. In August 2007, Mr. Gilchrist informed the Microporous board that {

} (PX0080 at 058-059, *in camera*). In September 2007, Mr. Gilchrist informed the Microporous board that {

}.PX0077 at 003, *in camera*).

Response to Finding No. 281:

Complaint Counsel's finding number 281 is false. First, Complaint Counsel ignores the evidence that The Microporous Board had lost confidence in management, particularly Mike Gilchrist. (RFOF 401). Further, IGP Board members had multiple discussions with Gilchrist "disagreeing with his general assessment of the competitive landscape of the market." (RFOF

402). IGP's Board members questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day," and "Mike [Gilchrist] frequently blew comments out of proportion." (RFOF 402).

Setting aside Gilchrist's lack of credibility, the evidence is clear that Microporous began looking for customers in both the U.S. and Europe in the fall 2007 and solicited battery manufacturers to supply separators for motive applications. (RFOF 383-384). These customers included: TAB Battery, Midac, Moll Battery, Fiamm, Inci Aku, Mutlu, Aktex, WESTA, ISTA, and Banner Batterie. (RFOF 384). Nevertheless, Microporous was unable to secure a single MOU, commitment or supply agreement with any of these customers. (McDonald, Tr. 3831; Gilchrist, Tr. 539)(RFOF 384). As a result, Microporous' own Board became increasingly concerned about Microporous' continuing financial viability. (RFOF 398).

282. {

}. (Simpson, Tr. 3438, *in camera*). Microporous anticipated that, by the end of 2009, new sales of CellForce to manufacturers of motive batteries would increase its U.S. share of the motive market segment to 45-50%. (Gilchrist Tr., 398-399). Sales data estimated by Microporous for 2010 show that the change in HHI (4872) and the post-merger HHI (10000) for the motive market exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3185-3186).

Response to Finding No. 282:

Complaint Counsel's finding number 282 is false. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. In any event, Simpson's HHI calculations are not reliable as they fail to take into account {

} (See Response to Finding No. 280).

Further, Complaint Counsel's claim that Microporous was in the process of gaining market share is supported only by the testimony of Gilchrist. Such evidence is not reliable because of Gilchrist's tendency to blow comments out of proportion, his inaccurate assessment of the competitive landscape of the market, and the obvious distrust by his own Board. (See Response

to Finding No. 281). In any event, {

} (Simpson, Tr. 3363, *in camera*), {

.} (Simpson, Tr. 3348, 3364, *in camera*). {

} (PX0033 at 019, *in camera*). {

} (Simpson, Tr. 3478, *in camera*; Weerts, Tr. 4459. *in camera*; RFOF 1237-38). Dr. Simpson acknowledged at trial that the {

} (Simpson, Tr. 3355-56, 3341, 3348-50, 3358-59, *in camera*). Furthermore, Dr. Simpson's statement regarding {

} (Simpson, Tr. 3358-59, 3391, *in camera*).

283. After the acquisition of MPLP by Daramic there is only one option for Crown's industrial separator supply. (Balcerzak, Tr. 4128). When Daramic had quality problems with its separators at Crown, its salesman, Randy Hanschu understood that Crown had nowhere to turn. (PX0803 at 1 ("It is sure getting difficult to convince our customers we are not a monopoly."))

Response to Finding No. 283:

Complaint Counsel's finding number 283 is inaccurate and misleading. Prior to the acquisition Microporous had not been an option for Crown as CellForce had not been qualified by Crown for use in motive applications. (RFOF 806). {

} (RFOF 807).

{

}

(See Response to Finding No. 279). Further, Amer-Sil, BFR and other Asian producers are additional options for Crown. (See Response to Finding No. 279). Finally, Mr. Hanschu's statement was an off-hand comment, made out of frustration, and is inaccurate. (RX01664). Complaint Counsel has tried on several occasions to place significance on Mr. Hanschu's statement, but has refused to depose or call Mr. Hanschu to testify in the hopes that his statement will not be seen in its proper context. (RX01664). In the proper context, Mr. Hanschu's statement should be given no weight. (RX01664).

284. When EnerSys's contract with Daramic expires, it will continue to purchase separators from Daramic because it has no other choice. (Craig, Tr. 2611).

Response to Finding No. 284:

Complaint Counsel's finding number 284 is inaccurate. The only evidence Complaint Counsel cites to support this "fact" is the testimony of EnerSys' CEO who has been a vocal opponent to the Daramic-Microporous merger, and is in fact on the "warpath" to see that the merger is dissolved. (RFOF 727-26). In actuality, {

} (RX00062, *in camera*). As a result, {

} (RFOF 501, 686). {

} (RFOF 682). In fact, {

} (RFOF 681-84). In addition to

{

} (RFOF 685, 690-93, 700, 702).

285. During the Daramic Strike at the Owensboro facility, Crown experienced some order disruption, coming close to shutting down productions lines as a result of the strike. (Balcerzak, Tr. 4099).

Response to Finding No. 285:

Complaint Counsel's finding number 285 is false. In actuality, in regards to the Owensboro strike, Crown's purchasing director Balcerzak testified that in "the first week or so we thought we were going to be in deep trouble because we have a predominant -- the majority of our separator stock, including all of our industrial, came from that factory. As it turns out, by scrambling, bringing in management, using a couple of other plants, we were able to escape relatively unscathed." (Balcerzak, Tr. 4099).

286. Entek was unable to supply Crown with industrial PE separators during the Owensboro strike according to Mr. Balcerzak because Entek did not possess the proper tooling needed to make Crown's required profile. (Balcerzak, Tr. 4100-4101).

Response to Finding No. 286:

Complaint Counsel's finding number 285 is inaccurate and misleading. {
} (See Response to Finding No. 279). Particularly
considering {
} (RFOF 943-44).

287. MPLP documents reflect the fact that motive separators are a product market and reflect a highly concentrated North American geographic market projecting shares of 29 percent for Microporous and 71 percent for Daramic in 2008. (PX0072 at 024-025).

Response to Finding No. 287:

Complaint Counsel's finding number 287 is misleading and inaccurate. The market share figures Complaint Counsel cites are future projections contained in a 2007 document for the fiscal year ending December 31, 2008. (PX0072 at 024-025). Such projections are based entirely on Gilchrist's strategic plan which has been shown to be completely unreliable. (See Response to Finding No. 281). The evidence is clear, however, despite looking for customers in both the U.S. and Europe in the fall 2007, Microporous was unable to secure a single MOU, commitment or supply agreement with any of these customers. (RFOF 383-84).

Moreover, the evidence shows that {
 }. (PX0055 at 82, *in camera*;
 PX0174 at 009, *in camera*; PX0275 at 011, *in camera*). {
 } (PX0207 at 64-
 72, *in camera*; RX01558 at 025, *in camera*). {
 } (PX1688 at 001, *in camera*).

288. 2006-2007 Market Shares and HHI calculations for motive battery separators in N.A. are:

		Sales	Share		
{					
					}

{					
					}

(PX0080 at 60, *in camera*; PX0033 at 41, *in camera*).

Based on Microporous planned expansion, the estimated 2010 market shares and HHI calculations for motive battery separators in N.A. are:

	Share		
{			
			}

(PX0949 at 190-214, *in camera*; PX0949 at 224-233, *in camera*; PX0033 at 42, *in camera*).

Response to Finding No. 288:

Complaint Counsel’s finding number 288 is false. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and shall be disregarded. This finding presupposes that there is a set “motive” battery separator market in North America, which is not accurate. (RFOF 70-78). In any event, Simpson’s HHI calculations are defective as they fail to take into account {
 } (See Response

to Finding No. 280). Moreover, Microporous' planned expansion was more of a ruse designed to increase Microporous' purchase price, than it was an actual attempt to secure additional customers. (RFOF 413-20). And in any event, Microporous was not able to secure any customers to supply agreements or commitments. (See Response to Finding No. 281; RFOF 408). Consequently, Simpson's 2010 Market Share HHI is entirely unreliable.

C. Daramic has been the Primary Supplier of UPS but MPLP is a Market Participant and was about to Commercialize a Product

289. Prior to the acquisition, Microporous participated in the North American UPS market with its CellForce product. (Gilchrist, Tr. 300-301).

Response to Finding No. 289:

Complaint Counsel's finding number 289 is false. Complaint Counsel's attempt to paint a single project to produce a separator for a non-lead acid battery that was described as in its "infancy" as the "evidence" of Microporous' entry into the UPS market entirely fails. (PX0663 at 002, *in camera*; RFOF 335-65, 723, 1222-23, 1365). Further, while Complaint Counsel touts Microporous as a "Maverick" in its development of its "Project LENO" for use in UPS batteries (Robertson, Tr. 48; Simpson, Tr. 3202), Complaint Counsel conveniently ignores the fact that { } (PX0663 at 002, *in camera*; RFOF 355-65 (emphasis added)). Gel batteries are not flooded-lead acid batteries and thus have no import here. (RFOF 24, 103; Godber, Tr. 147-49; Gilchrist, Tr. 429-30). Moreover, {

} (Burkert, Tr. 2407-08, *in camera*; Axt, Tr. 2145, *in camera*).

In fact, the project had only been in development to create a product to be used by {

} neither approved the product nor requested its supply. (RFOF 355-65, 663, 722; Brillmyer, Tr. 1901-02; PX0909 (McDonald, Dep. at 74), *in camera*; PX0913 (Whear, Dep. at

227), *in camera*). Furthermore, the DARAK replacement prong of this project contemplated Microporous shipping and producing product in Europe with no North American impact. (RFOF 622, 355-365). While { } Microporous had not even entered into “preliminary talks” with any other potential customers regarding this potential product. (PX0921 (McDonald, IHT at 202-08, 1364), *in camera*).

Additionally, the evidence shows that { } actual participant in this “UPS” segment with { } impact present and future competitive conditions than Microporous. (RFOF 682-83, 1325, 1431). There is simply no evidence that Microporous would have entered into this alleged market and any entry would have been of minimal, if any, significance. (RFOF 355-65, 622, 1364).

290. Prior to the acquisition, Daramic participated in the North American UPS market with its Daramic CL product. (Burkert, Tr. 2318; Hauswald Tr. 988).

Response to Finding No. 290:

Complaint Counsel’s finding number 290 is incomplete and misleading. For example, Daramic CL is used in the “motive” and “UPS” applications. Additionally, Daramic HD is used in “motive,” “UPS” and “deep-cycle” applications. (RFOF 89, 95, 127-28). Daramic’s DARAK product is also used in this alleged market segment. (RFOF 100).

291. Daramic PE separators have 95% market share for UPS battery applications in North America. (Brilmyer, Tr. 1834).

Response to Finding No. 291:

Complaint Counsel’s finding number 291 is incomplete and misleading. First, Complaint Counsel fails to account for non-PE separators. For example, {

} (RFOF 130, 133). {

} (RFOF 135). {

} (RFOF 139).

Complaint Counsel also ignores significant competitors in the alleged UPS segment.

For example, the evidence is clear that {

} (RFOF 970, 991, 1024). For

example, {

} (RX00062, *in camera*). As a result, {

} (RFOF 501). In fact, {

} (RFOF 992). Additionally, {

} (RFOF 970, 1091). Finally, {

} (RFOF 1024, 1026).

292. As a result of the acquisition, Daramic has “complete control” of the industrial flooded reserve power separator markets world-wide. (PX0076 at 002, Gilchrist, Tr. 422).

Response to Finding No. 292:

Complaint Counsel’s finding number 292 is false. Complaint Counsel limits its “fact” to flooded batteries in an attempt to circumvent the competition from non-PE separators. (*See* Response to Finding No. 291). Complaint Counsel also ignores the substantial evidence that {

} (*See* Response to Finding No. 291). Finally, Complaint Counsel’s

“complete control” allegation is clearly without merit when considering that in the alleged UPS

market Daramic {

} (RX000927 at 005-16, *in camera*; RFOF 253).

D. Daramic and Entek were Primary Suppliers of SLI but MPLP is a Market Participant and was Expanding to Serve Customers in that Market

293. Prior to the acquisition, Microporous participated in the North American SLI market with its PE product. (Gilchrist, Tr. 311).

Response to Finding No. 293:

Complaint Counsel's finding number 293 is false. There is simply no evidence that Microporous would have begun selling SLI separators in North America "but for" the acquisition. (RFOF 318, 576-82, 1336). Prior to the acquisition, Microporous had never had a commercial sale of SLI material, had no contracts for the sale of SLI products, and in fact, it had never had a contract for the sale of any SLI product in its entire history. (RFOF 318, 576-82, 1336 (*emphasis added*)).

294. Prior to the acquisition, Daramic participated in the North American SLI market with its Daramic HP product. (PX0669 at 003, *in camera*).

Response to Finding No. 294:

Complaint Counsel's finding number 294 is inaccurate and incomplete. Daramic HP is used in most end-use applications, including stationary and automotive batteries. (RFOF 87). Additional Daramic products, such as Daramic Standard, Daramic V, Daramic HP-S, Daramic HPR, Daramic HPO and Daramic Duralife can also be used in SLI applications. (RFOF 88, 90-94).

295. In North America, Daramic and Entek had virtually the entire automotive separator market prior to the acquisition. (PX0171 at 004). However, MPLP had manufactured and sold SLI separators in North America and considered itself a competitor in that market. (Gilchrist, Tr. 308, 313, 341-342).

Response to Finding No. 295:

Complaint Counsel's finding number 295 is inaccurate. Microporous was never a competitor in the North American automotive market. The only "commercial sale" of SLI

separators by Microporous was made to a company called Voltmaster. (RFOF 336). The material that was sold to Voltmaster was {

} (RFOF 336; PX0077, *in camera*). Microporous was then able to sell it to Voltmaster as a “one time” sale – without any intention of producing any other SLI material going forward. (RFOF 336). {

} Nor does it overcome the evidence that prior to the acquisition, Microporous had no contracts for the sale of SLI products, and in fact, it had never had a contract for the sale of any SLI product in its entire history. (RFOF 318, 576-82, 1336 (*emphasis added*)).

296. Entek is a global supplier of SLI separators that operates plant facilities in northern England and on the West Coast of the United States. The West Coast plant supplies the Asia Pacific markets. (Gilchrist, Tr. 307-308, 310-311).

Response to Finding No. 296:

Respondent has no specific response.

297. At the time of the acquisition, MPLP, Daramic and Entek were the only firms in North America with production lines for PE separators. (Gilchrist, Tr. 307-308, 342, 616).

Response to Finding No. 297:

Complaint Counsel’s finding number 297 is inaccurate and mischaracterizes the capabilities of Microporous’ production lines. Prior to the acquisition, Microporous supplied separators from its only manufacturing facility in Piney Flats, Tennessee. (RFOF 332). This facility actually consisted of two plants; the first plant housing the ACE-SIL® and FLEX-SIL® lines and the second plant housing a single PE line on which CellForce was made. (RFOF 333-34). While the PE line is capable of producing both CellForce and a pure PE product (e.g., SLI), Microporous’ only significant sales from the line were of the CellForce product. (RFOF 336). In fact, Microporous had not been successful in producing a pure PE product. (RFOF 336). One

commercial run of pure PE was produced for Johnson Controls in late-2003 into early-2004 for an SLI end use, but Johnson Controls ultimately did not purchase these separators. (RFOF 336).

298. When it comes to PE separators there are only two options in the industry after the acquisition, Entek and Daramic. (Balcerzak, Tr. 4128).

Response to Finding No. 298:

Complaint Counsel's finding number 298 is false. First, Microporous was never a competitor in the PE market. (See Response to Finding Nos. 293, 295, 297). Further, Complaint Counsel ignores a multitude of separator manufacturers either currently producing, or considering producing, PE separators, such as BFR, NSG, Alpha Beta, Anpei, Separindo, Sebang, Baotou, Epoch, Ameri-Sil, Nippon Muki, Korindo, Global Yuasa. (RFOF 685-702, 941-42, 977-1000, 1015-19, 1031-32, 1034-49).

299. Microporous was a recent entrant in the SLI separator market. Microporous had begun testing PE material for SLI at JCI in 2003, and in November of 2005 JCI was still testing material from Microporous for SLI batteries. (Trevathan, Tr. 3690-91).

Response to Finding No. 299:

Complaint Counsel's finding number 299 is false. At no point in time could Microporous be considered an entrant in the SLI separator market. During the 2003-2004 time period, Microporous did supply SLI samples to JCI for testing, but the samples were never able to qualify for use at JCI. (RFOF 486). This led JCI to have a general concern about the quality of the Microporous product. (RFOF 486). Microporous again solicited JCI in 2005 to supply some of JCI's separator needs, but no agreement was reached. (RFOF 487). In fact, although {

}

(RFOF 488). {

} (RFOF 488-89).

300. Microporous planned to produce polyethylene (PE) separators for automotive batteries on one of the two production lines at its recently built plant in Feistritz, Austria. (Gilchrist, Tr. 331-332). Several of Microporous's customers were interested in buying PE separators from this production line and Mr. Gilchrist, Microporous's CEO prior to the acquisition, was confident that actual sales would ensue. (Gilchrist, Tr. 345-346; 440-443, *in camera*).

Response to Finding No. 300:

Complaint Counsel's finding number 300 is inaccurate and speculative. First, as of the time of the acquisition, the plant in Feistritz, Austria was not yet operational. (RFOF 337). Moreover, although Gilchrist was confident actual sales would ensue from the Feistritz line, the Microporous Board was not confident in Gilchrist. (RFOF 401-04). In fact, the Board disagreed with Gilchrist's "general assessment of the competitive landscape of the market" and was concerned over a pattern of Gilchrist blowing comments out of proportion. (RFOF 402).

In March 2007, Microporous established a European entity Microporous Products GmbH and began taking strides to build a facility in Feistritz, Austria with the hopes that it would supply JCI and Exide with SLI separators from a production line at Feistritz. (RFOF 378-82, 372). However, by the Fall of 2007, Microporous' negotiations with JCI had ceased and an Exide commitment had not materialized. (RFOF 383). Thereafter, Microporous began looking for other customers to fill the capacity of the Feistritz line, but was not successful. (RFOF 383-84). At this same time, Microporous' Board directed Microporous to leverage its existing strengths, and not just become another player in the crowded PE market. (RFOF 389). The Board's concerns were based on the fact that with respect to the Feistritz SLI line, Microporous had no commitments or signed contracts for that line. (RFOF 395, 400, 408). Thus, the evidence is clear that Microporous did not have any customers interested in buying PE separators from the Feistritz production line. In fact, Microporous never had a contract for the sale of any SLI product in its entire history. (RFOF 318, 576-82, 1336).

301. {

} (Simpson, Tr. 3439, *in camera*). Dr. Simpson noted that a Microporous document predicted future market shares for 2010 in a North American SLI battery separator market. (Simpson, Tr. 3439, *in camera*). {

}
(Simpson, Tr. 3186; PX0033 at 041 (Simpson Report), *in camera*).

Response to Finding No. 301:

Complaint Counsel’s finding number 301 is false, pure speculation, and has no basis in fact. As an initial matter it should be noted that Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of it as such is improper and shall be disregarded. In any event, Simpson’s HHI calculations are defective. First, {

} (RFOF 1190).

Additionally, {

} (RFOF 1221). {

} (RFOF

1231-32). {

} (Simpson, Tr. 3439, *in camera*). {

} (Riney, Tr. 4959-61, *in camera*). {

}

(Gilchrist, Tr. 470-72). Reviewing Mr. Gilchrist’s testimony with that of Mr. Heglie and other witnesses, it is apparent that Mr. Gilchrist was prone to exaggeration about Microporous’ prospects. (RFOF 1230). Simpson gave no consideration to this significant defect with his methodology. (RFOF 1230).

302. One measure of Microporous's impact on the SLI market is the use of the {
 } (PX0080 at 060, *in camera*). Using these estimated sales, Microporous would have had {
 } (PX0080 at 60, *in camera*).

Response to Finding No. 302:

Complaint Counsel's finding number 302 is false, misleading, and entirely speculative. Prior to the acquisition, Microporous had never had a commercial sale of SLI material, had no contracts for the sale of SLI products, and in fact, it had never had a contract for the sale of any SLI product in its entire history. (*See* Response to Finding No. 293). The evidence also shows that {
 } (Riney, Tr. 4959-61, *in camera*). It is utter speculation to suggest Microporous would have had any SLI separator sales in 2009, let alone a 6% share of the alleged SLI market.

303. Similarly, Daramic market share charts for SLI in North America give MPLP a 4 percent share of SLI sales, Entek 49 percent, and Daramic 47 percent, but nothing to any Asian producer. (PX0264 at 003).

Response to Finding No. 303:

Complaint Counsel's finding number 303 is also false, misleading, and entirely speculative. (*See* Response to finding No. 302). Further, there is significant evidence that Microporous had taken absolutely no steps to proceed with the installation of a production line to supply SLI separators {
 } in Piney Flats. (RFOF 385, 374-76, 1147). Additionally, the "new" line the FTC alleges was intended for Piney Flats consisted of 11 million square meters of capacity in an alleged market segment with {
 }.
(RFOF 407, 428, 943, 968, 1059, 1089, 1090, 1108, 1113, 220, 1331). The addition of such minimal capacity under such circumstances is de minimus, particularly in comparison to {
 } (RFOF 927). {
 } SLI separator business even before the JCI/Daramic contract ended, as all of Daramic's sales {
 } shipped to Mexico. (Roc,

Tr. 1695-96, 1764). Further, since { } business from Daramic, any possible entry into an SLI market by Microporous was reduced to irrelevance in the competitive landscape. (RFOF 306-09, 946-57).

304. At the time of the acquisition,{ } (Gilchrist, Tr. 440-441, *in camera*).
 { } (Gilchrist, Tr. 441-442, *in camera*).

Response to Finding No. 304

Prior to the acquisition, Microporous had partnered with JCI to do some testing on CellForce for use in a unique and specialized SLI application called a “start-stop” battery. (RFOF 366). The project was not a high priority for JCI, however, and they were dedicating minimal time and resources to it. (RFOF 366). Ultimately, neither JCI nor any other battery manufacturer ever approved CellForce for these specialized start-stop SLI applications. (RFOF 366). Results from the testing of CellForce in the “start-stop” battery varied. (RFOF 367).
 {

{ } (RFOF 367). In any event, {

}

(RFOF 490; *See* Response to Finding No. 299).

305. 2006-2007 Market shares and HHI calculations for SLI battery separators in N.A. are:

		Sales	Shares		
{					}

{					}

(PX0949 at 190-214, *in camera*; PX1833 at 13-65, *in camera*; PX0033 at 41 (Simpson report), *in camera*).

Response to Finding No. 305:

Complaint Counsel's finding number 305 is false. As an initial matter it should be noted that Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Further, this finding presupposes that there is a set "motive" battery separator market in North America, which is not accurate. (RFOF 70-78). In any event,

{

} (See Response to Finding No. 301). In

any event, Simpson's numbers demonstrate quite effectively that Daramic did not have a monopoly power or a monopoly in his automotive separator market.

306. Based on Microporous planned expansion, estimated 2010 market shares and HHI calculations for SLI battery separators in N.A. are:

	Sales	Shares		
{				
				}

(PX0080 at 60, *in camera*; PX0033 at 41 (Simpson report), *in camera*).

Response to Finding No. 306:

Complaint Counsel's finding number 306 is false. As an initial matter it should be noted that Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. Further, this finding presupposes that there is a set "motive" battery separator market in North America, which is not accurate. (RFOF 70-78). In any event,

{

} (See Response to Finding No. 301).

1. Entek is not an uncommitted entrant in any non-SLI product market

307. Dr. Simpson explained that { } is not a market participant in the deep-cycle and motive markets because it was not an uncommitted entrant under the Merger Guidelines. (Simpson, Tr. 3461-3462, *in camera*).

Response to Finding No. 307:

Complaint Counsel's finding number 307 is false. As an initial matter it should be noted that Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and shall be disregarded. {

}

(Simpson, Tr. 3461, *in camera*). Simpson is incorrect. (RFOF 1218-25). The Merger Guidelines do not require that an uncommitted entrant have an effect pre-merger. Rather, the Merger Guidelines simply state that a firm will be considered as an uncommitted entrant if it can enter in less than a year as such a firm, making such a quick entry, would have likely influenced the market pre-merger and post-merger. (RFOF 1219). {

} (Simpson, Tr.

3343, *in camera*). {

} (Simpson, Tr. 3344, *in*

camera). {

} (Simpson, Tr. 3344, *in camera*). {

} (Simpson, Tr. 3344, *in camera*). {

}

(Simpson, Tr. 3445, *in camera*), {

} (Simpson, Tr. 3478, *in camera*). {

} (RFOF 1221). {

} (RFOF 1222). {

} (Simpson, Tr.

3352, *in camera*). {

} (Simpson, Tr. 3352, *in camera*).

{

} (RFOF 1225). Consequently, {

} market share in the alleged deep-cycle, UPS and motive power segments based on

{ } uncommitted entrant. (RFOF 682-83, 940, 968, 970, 1218, 1220, 1238, 1325,

1431).

308. Entek does not manufacture industrial product. {

(Weerts, Tr. 4503, *in camera*; RX00114 at 008, *in camera*). { }

(Weerts, Tr. 4503-4504, *in camera*). }

Response to Finding No. 308:

Complaint Counsel’s finding number 308 is false. {

} (Weerts, Tr.

4492, *in camera*). {

} (Weerts, Tr. 4456-57, *in camera*; RFOF 938).

Moreover, {

} In fact,

{

} (RFOF 940,

943-44, 946, 968,1092-93, 1220).

309. {

} (Weerts, Tr. 4504, *in*

camera). {

} (Weerts, Tr. 4492, *in camera*; RX00114 at 004, *in*

camera). {

}

(Weerts, Tr. 4492-4493, *in camera*; PX1833 at 004, *in camera*).

Response to Finding No. 309:

Complaint Counsel’s finding number 309 is inaccurate and misleading. Complaint

Counsel fails to consider { }.

} (Weerts, Tr.

4459-60, *in camera*). {

} As a

result, {

} (RFOF

943).

310. {

} (PX1830 at 011, *in camera*).

Response to Finding No. 310:

Complaint Counsel's finding number 310 is false. {

} For example, {

} (RFOF 962). Further, {

} (RFOF 964). In fact, {

} (RFOF 966, 968, 970). {

} (Burkert, Tr. 2311, 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*; RX201; Burkert, Tr. 2448, *in camera*). Further, as evidenced at trial, {

} (Gagge, Tr. 2514, *in camera*).

311. {

} (Weerts, Tr. 4503-4504, *in camera*). {

(RX00114 at 008, *in camera*).

Response to Finding No. 311:

Complaint Counsel's finding number 311 is false. {

} (RFOF 968-

70). {

} (Weerts, Tr. 4522, *in camera*). As a result, {

}

(RFOF 968).

312. {

4484, *in camera*; PX1815 at 001, *in camera*). {

} (Weerts, Tr.

} (Weerts, Tr. 4507, *in camera*). {

} (PX1810 at 001, *in camera*).

Response to Finding No. 312:

Complaint Counsel's finding number 312 is inaccurate and misleading. Complaint

Counsel again fails to consider {

}. {

} (RFOF 966). {

} (Weerts, Tr. 4484, *in camera*). {

} (RFOF 943). Consequently, {

} (RFOF 966). In regards to the Douglas Battery

"opportunity", the quote Complaint Counsel contends Douglas solicited came from a contract employee who was finishing his contract work for Douglas. (PX1810 at 001). {

} (Douglas, Tr. 4064-65; RFOF 834).

313. {

Tr. 4515-4516, *in camera*).

} (Weerts,

Response to Finding No. 313:

Complaint Counsel’s finding number 313 is inaccurate and misleading. First, {

} (RFOF 938). Further, {

} (RFOF

939). As a result, {

}

(Weerts, Tr. 4522, *in camera*; RFOF 940). Ultimately, the evidence is clear that {

} (RFOF 940).

314. {

(Weerts, Tr. 4515-4516, *in camera*). {

}

} (Weerts, Tr. 4516, *in camera*). {

} (Weerts, Tr. 4516, *in camera*).

Response to Finding No. 314:

Complaint Counsel’s finding number 314 is incomplete and misleading. {

}. (See Response to Finding Nos. 311, 313).

315. Entek exited the industrial PE separator market in the early part of this decade. (Balcerzak, Tr. 4097). { }.
(Seibert, Tr. 4174, *in camera*).

Response to Finding No. 315:

Complaint Counsel's finding number 315 is false. Not only does {

} (RFOF 938; *See* Response to Finding No. 310; Weerts, Tr. 4492, *in camera*; RX00114, *in camera*; RFOF 948-50, 963-72).

316. {

} (PX1833 at 008, *in camera*). {

} (PX1806 at 001, *in camera*).

Response to Finding No. 316:

Complaint Counsel's finding number 316 is inaccurate and misleading. {

} (RFOF 969-70). In fact, because of { } quickly
shift its existing production facilities from producing SLI battery separators to all other types of
PE separators, and {

} sufficient to constrain any anticompetitive events
alleged as a result of the acquisition. (RFOF 969).

317. There are significant sunk costs for Entek to enter the deep-cycle, motive, or UPS markets. Calender rolls cost approximately \$20,000 to \$50,000 a piece. (Gaugl, Tr. 4553-4554). The lead time from order to delivery of a calender roll takes approximately 12 to 14 weeks. (Gaugl, Tr. 4553). Microporous has approximately 20 calender rolls at its two facilities. (Gaugl, Tr. 4618). Daramic estimated its calender rolls cost up to \$80,000 a piece and it has approximately 100 different ones. (Whear, Tr. 4678).

Response to Finding No. 317:

Complaint Counsel's finding number 317 is inaccurate and misleading. {

} (RFOF 157). It takes a calender roll vendor anywhere from 2 days to 5 weeks to make and sell a new calender roll. (RFOF 158).
Nevertheless, {

} (RFOF 1112-13, 932, 938, 934, 943-45, 969, 947).

318. Trojan did not reach out to Entek as a potential supplier of deep-cycle battery separators because Trojan had previously tested Entek separators for golf applications in the mid-90s and the performance was not there. (Godber, Tr. 289). The technology that Entek had available then is the same as Entek has available today. (Godber, Tr. 289). Since the mid-90s, Entek has not called on Trojan for its deep-cycle business. (Godber, Tr. 290).

Response to Finding No. 318:

Complaint Counsel's finding number 318 is inaccurate and misleading. Since 2003, 92% to 96% of Trojan's battery separator purchases have been Flex-Sil. (RFOF 744). Further, until the acquisition of Microporous by Polypore in 2008, Microporous was Trojan's exclusive battery separator supplier. (RFOF 744). {

} (RFOF 740). In fact, because of FLEX-SIL®'s uniqueness, Trojan has invested substantial time and effort in marketing FLEX-SIL® to its customers.

Additionally, testimony and documents show unequivocally that several other additives for PE separators for antimony suppression exist, and that another competitor { } could produce a PE/rubber deep-cycle separator easily with a small capital cost in approximately six-months or less. (RX00676; PX2174; RFOF 1078, 1092-93). In fact, there was evidence that {

} (RFOF 809, 1235, 962). {

} excess capacity,

there was adequate evidence that other separator manufacturers can, and will, invest the capital and time to produce these separators for the low-end deep-cycle products in order to fill idle lines. (RX01120, *in camera*; RX00061, *in camera* {
}).

319. East Penn does not know whether Entek currently sells deep-cycle separators. (Leister, Tr. 4041). East Penn did purchase some deep-cycle separators from Entek in the past, but stopped buying those separators at least three years ago. (Leister, Tr. 3985). At that time, East Penn was paying Entek higher prices for deep-cycle separators than East Penn is currently paying to Daramic for HD separators. (Leister, Tr. 4041).

Response to Finding No. 319:

Complaint Counsel's finding number 319 is not accurate. {
} (Leister, Tr. 3993). {
} (RFOF 786-87).

2. Suppliers outside North America are not Market Participants in North America

320. {
}. (PX0916 (Dauwe, Dep. at 15); Gilchrist, Tr. 306-307; PX0078, *in camera*). {
}. (PX0916 (Dauwe, Dep. at 14)). {
}. (PX0916 (Dauwe, Dep. at 18-19)).

Response to Finding No. 320:

Complaint Counsel's finding number 320 is not entirely correct. First, {
} (Axt, Tr. 2272, *in camera*; Burkert, Tr. 2449-51, *in camera*; RX00239, *in camera*; RX00193; RX00203, *in camera*; RX00199 *in camera*; Axt, Tr. 2277, *in camera*; Burkert, Tr. 2456, *in camera*; RX00223, *in camera*; Burkert, Tr. 2450, *in camera*). Documentary evidence shows that {

} (RX01203, *in camera*; RX00195; RX00194). Evidence adduced at trial showed that
{
} (Burkert, Tr. 2451, *in camera*; PX1262; RX00199, *in camera*; RX00239, *in camera*; Berkert, Tr. 2456, *in camera*). In fact, {
}
(Gagge, Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280; RX00215, *in camera*).
Moreover, {
} (RX00215, *in camera*).

Finally, EnerSys used Amer-sil for increased production during the fall 2006 *force majeure*.
(Axt, Tr. 2287-88).

321. There are regional suppliers in India, China, Indonesia and Korea that produce separators for local customers. They include Anpei and BFR, Chinese manufacturers of SLI separators, Korindo, an Indonesian manufacturer of SLI and industrial separators, and Global Industrial, a Korean manufacturer of SLI and industrial separators. (Gilchrist, Tr. 307-308, 424, 430).

Response to Finding No. 321:

Complaint Counsel's finding number 321 is inaccurate and misleading. Battery separator manufacturers in Asia and other parts of the world are not appropriately categorized as regional players as Complaint Counsel suggests. Separator manufacturers such as BFR, Anpei, Alpha Beta, Amer-Sil and several others are all global competitors whose reach impacts both the alleged North American and global market.

For example, {

} (RFOF 685; RX00239, *in camera*; RX00193; RX00203, *in camera*).

{

(RFOF 685; RX01203, *in camera*).

Moreover, Asian separator manufacturers, including BFR, have sought to sell PE separators to customers located in North America. (RFOF 201). For example, East Penn obtained a quote for the sale of PE separators and samples from Anpei. (RFOF 201). {

} (RFOF

201). {

} (RFOF 201). {

} (RFOF 201). {

} (RFOF 201).

In addition, {

} (RFOF

1013, 1008). Further, {

} (RFOF 199). In fact,

Anpei, Separindo, Baotou, Sebang, Epoch are all PE separator companies in Asia competing with Daramic for business including in South America. (RFOF 200).

Finally, {

} (RFOF 941). {

} (RFOF 941). {

} (RFOF 942). {

}

(RFOF 942). {

} (RFOF 942). In fact, {

} (RFOF 197).

322. {
 }
 2740, *in camera*). {
camera). {
 }. (Hall, Tr. 2740, *in camera*). {
 }. (Hall, Tr. 2836, *in camera*). {
 }. (Hall, Tr. 2826, *in camera*). {
 }. (Hall, Tr. 2715-2716,
 }. (Hall, Tr. 2741, *in*

Response to Finding No. 322:

Complaint Counsel’s finding number 322 is incomplete. Significantly, {

} (RX00051; RX00055; Hall, Tr. 2860, *in camera*; RFOF

493). In fact, {

} (RFOF 493).

323. Dr. Kahwaty{
 (RX00945-179). Using these market shares, Daramic’s acquisition of Microporous
 increased the HHI by 189 points to 3920. (Simpson, Tr. 3189). These figures understate
 the change in HHI because Dr. Kahwaty had erroneously assigned some Daramic sales to
 Entek. (Simpson, Tr. 3190). {
 }. (Simpson, Tr. 3438, *in*
camera).

Response to Finding No. 323:

Complaint Counsel’s finding number 323 is false. While Dr. Kahwaty’s calculations are only the “starting point” for analyzing the competitive effects of the merger, it is clear that his HHI figures analyzed in the context of the relevant evidence prove the lack of any competitive harm as a result of the merger. For example, {

} (RFOF 1362). {

} - smaller than in the worldwide calculation because Microporous exported a significant amount of its production outside of North America, so its worldwide share was more than its North American share. (RFOF 192, 338-42). Moreover, the evidence shows that Microporous' extremely modest PE market share { } in Complaint Counsel's North American geographic market and its high cost structure was not sufficient to enhance Daramic's ability to impose unilateral effects. (RX00114, *in camera*; RX01119, *in camera*; PX0949; *in camera*; RX00115, *in camera*). The Guidelines themselves explain that a market share of { } is not likely to be of concern. Ultimately, {

}

a. { }

(Kahwaty, Tr. 5071, *in camera*);

b. { } (Kahwaty, Tr. 5071, *in camera*);

c. { } (Kahwaty,

Tr. 5072, *in camera*);

d. {

} (Kahwaty, Tr. 5072, *in camera*);

e. {

} (Kahwaty, Tr. 5072-73, *in camera*);

f. { } (Kahwaty, Tr. 5073, *in camera*);

g. { } (Kahwaty, Tr. 5073, *in camera*);

h. {

} (Kahwaty, Tr. 5074, *in camera*);

i. { } (Kahwaty, Tr. 5075, *in camera*);

j. { } (Kahwaty, Tr. 5075, *in camera*); and

k. {

} (Kahwaty, Tr. 5077-81, *in camera*).

VI. Competitive Effects

A. MPLP and Daramic were Closest Competitors in 3 of 4 Markets

324. { } (Simpson, Tr. 3192-3194, *in camera*).

Response to Finding No. 324:

Complaint Counsel's finding number 324 is vague, inaccurate and a misrepresentation of the evidence. First, this finding is vague in that it does not identify a specific product market. Second, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Third, Dr. Simpson's cited testimony does not anywhere state that the acquisition enabled Daramic to increase price unilaterally. The pages cited by Complaint Counsel relate Dr. Simpson's general description of what unilateral effects are and "examples" of how that fits into his analysis. Additionally, Dr. Simpson's economic conclusions regarding potential adverse unilateral effects is fundamentally flawed and unsupported by the evidence which shows that Daramic could not, as a result of the acquisition of Microporous, unilaterally exercise market power to increase prices and decrease output, resulting in "unilateral" anticompetitive effects. (RFOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489). The Guidelines and

case law impose several preconditions for application of the unilateral effects concept which Dr. Simpson ignored. E.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). See also Respondent's Post-Trial Brief at 24-27 (hereinafter "RPT Brief"). Finally, this proposed finding is flatly contradicted by the evidence. (RFOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489).

325. Mr Seibert, the Vice-President and Business Director for sales, marketing, and technical assistance, {

} (Seibert, Tr. 4287- 4290, *in camera*). {

}. (Seibert, Tr. 4288, *in camera*).

Response to Finding No. 325:

Complaint Counsel's finding number 325 misrepresents the evidence, is misleading and incomplete. The statements made by Mr. Seibert as quoted in this finding were made during his deposition which was held on November 19, 2008, less than one month after the announcement of the 2009 price increases and prior to either any finalization or negotiation with customers relating to those increases. (PX0904 (Seibert Dep. at 235-236), *in camera*; RX00533; RX00535, *in camera*; RX00536, *in camera*; RX00538, *in camera*). In fact, when asked at the trial whether { } Mr. Seibert answered { } (Seibert, Tr. 4289, *in camera*). Thus, the record at the time of the trial makes clear that {

} (Seibert, Tr. 4289, *in*

camera). There is no contrary evidence.

326. MPLP's low-priced competition made it a maverick in the separator industry. Historically, there was not an "aggressive rivalry among competitors." (PX0482 at 002). According to Daramic's worldwide VP of sales and marketing, that changed when MPLP entered the market with its PE-based CellForce separators. (PX0482 at 002; Roe, Tr. 1281).

Response to Finding No. 326:

Complaint Counsel's finding number 326 is unsupported by record evidence and is misleading. The facts show that MPLP was not a low-priced competitor and there is no factual basis supported the idea that MPLP was any sort of "Maverick." See RPT Brief at 21-22 (RFOF 314, 316-18, 325, 338-40, 354-368; PX1503 at 002, *in camera* (outlining Daramic's new projects including a lower cost Darak replacement in 2003 – five years before MPLP started looking at such a project)). {

} (PX0442 at 004; PX1076, *in camera*; Gillespie, Tr. 3084-85). For instance, MPLP's proposed "Industrial" prices to Exide ranged from 1.33% to 35.75 % higher than Daramic's prices. Only one product for Exide to be sold to Lille, France was priced lower than Daramic – and that was a mere 1.87% lower. (PX0442 at 004; PX1076, *in camera*). (RFOF 1200, 1366, 1384). Similarly, looking at US pricing between Daramic and MPLP, Daramic's quotes to Exide, US Battery, East Penn, Bulldog, Crown and Trojan were all lower than MPLP's prices. (PX0442 at 002). {

} (PX0482 at 002).

1. Daramic was MPLP's only competitive Constraint in Deep-cycle

327. Flex-Sil has unique properties that differentiate it from other battery separators. (PX0131 at 14). Dr. Simpson explained that because Flex-Sil is differentiated from other products, its owner has market power, and thus would not lose all of its sales if it were to increase price above cost. (Simpson, Tr. 3176). Consequently, in Dr. Simpson's opinion, "the owner of Flex-Sil has the incentive to increase price until it gets to the point where the profit that it loses as sales shift to other products just begins to exceed the additional profit that it gets from getting a higher price on those sales it continues to make." (Simpson, Tr. 3177; PX2251 at 017, *in camera*).

Response to Finding No. 327:

Complaint Counsel's finding number 327 is irrelevant in that Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Notwithstanding, Respondent agrees that Flex-Sil has unique properties that differentiate it from other battery separators such that it is, in fact, its own product market. (RFOF 117-126, 1200-01; RPT Brief at 13-15). Additionally, Dr. Simpson's statement is pure speculation and has absolutely no basis in the empirical evidence presented at trial which, in fact, showed that although MPLP had "owned" Flex-Sil since 1980, it did not raise prices on Flex-Sil for **10 years** – from 1994 until at least 2004 – a time that HD did not even exist. (Trevathan, Tr. 3576-77; RFOF 315; PX0454). Thus, contrary to Dr. Simpson's statement and this finding, the "owner" of Flex-Sil did not raise prices until after the introduction of the product that Dr. Simpson claims is competitive indicating that HD has not restrained prices on Flex-Sil and further proving that they are not competitive products.

328. Dr. Simpson rejects Dr. Kahwaty's argument that Flex-Sil's pricing is constrained by a long-term contract with Trojan which set its price below the profit maximizing level because MPLP was recently willing to offer concessions to buyers of Flex-Sil and MPLP presumably would be unwilling to lower price further if it already thought that it had set too low a price. (Simpson, Tr. 3181-3182).

Response to Finding No. 328:

Complaint Counsel's finding number 328 is irrelevant in that Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Complaint Counsel offer no actual "evidence" that MPLP offered price concessions to buyers of Flex-Sil, nor do they offer any evidence that Dr. Simpson's "presumption" that MPLP would be unwilling to lower prices further if it already thought prices were too low, is correct. As noted above, MPLP did not increase prices on any of its products for 10 years, despite significant declining margins and profits. Dr. Simpson's presumption has no basis in

fact. (Trevathan, Tr. 3576-77). {

} (RX00983, *in camera*)

329. Daramic HD was the closest independently-owned substitute for Flex-Sil. Thus, if the owner of Flex-Sil were to increase price a little more, some of the sales that would be lost would shift to Daramic HD. (Simpson, Tr. 3177-3178). If Flex-Sil and Daramic HD are owned by the same owner, then the joint owner recovers some of the profit on the lost Flex-Sil sales that shift to Daramic HD. (Simpson, Tr. 3178). “[I]n this way a price increase that would not make sense for an independently owned Flex-Sil (or Flex-Sil and CellForce) would make sense if they also owned Daramic HD.” (Simpson, Tr. 3178, PX2251 at 017, *in camera*; Kahwaty, Tr. 5514-5515, *in camera*).

Response to Finding No. 329:

Complaint Counsel’s proposed finding 329 is incomplete, misleading and irrelevant. First, Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded. Further, Complaint Counsel has not, and cannot, offer sufficient evidence to show that Flex-Sil and HD are substitutes as the anti-trust laws define that term. See, e.g., FTC v. Swedish Match, 131 F.Supp.2d 151, 165 (D.D.C. 2000). The evidence that Flex-Sil is significantly more expensive than HD, yet few if any customers have switched to HD, is staggering. (RFOF 1, 66, 124, 535-539, 548-49, 745-754, 751, 864-865, 868-70, 875, 877, 1339; Gillespie Tr. 2954-2955; PX00442, *in camera*; RX00677, *in camera*; PX1040 at 002, *in camera*, PX1063, *in camera*; RFOF 271, 278, 545-49, 550, 1201, 1338-39). MPLP had increased Flex-Sil prices by at least 6% every year for the three years prior to the acquisition, and had announced increased prices for 2008 prior to the acquisition. (RX00630; RX00750, *in camera*; RX00776). In fact, in 2007, MPLP announced two increases on the Flex-Sil product to Trojan totaling 12%. (RX00721, *in camera*). This is significantly higher than a SSNIP, yet the evidence is replete that Trojan did not switch one single meter of its Flex-Sil use to HD. (RFOF 746-47, 751, 755). After the acquisition, in at least one case Daramic rescinded the announced 6% increase on Flex-Sil. (RX00537, *in camera*). These facts fly in the face of Dr. Simpson’s unsubstantiated testimony and opinions.

330. Daramic analyzed the effect of rubber price increases on Flex-Sil versus HD in an effort to gauge the impact of rubber prices on the prices of the two competing products because of MPLP's new rubber pass-through agreements. (PX0948; Whear, Tr. 4785- 4786).

Response to Finding No. 330

Complaint Counsel's finding 330 is misleading and incomplete. First, the document cited by Complaint Counsel is dated in 2005 – when Daramic was only just beginning its introduction of its HD material. All the document does is analyze the relative increase in cost to produce two products that both use rubber as an ingredient. The costs increases that were analyzed simply show that the estimated cost to produce both products would go up. (PX0948). Importantly, Mr. Graff asks in the prior email whether the increase in the price of Flex-Sil will cause customer to “switch” to Daramic's HD product, however, the facts and history show that even when the cost of Flex-Sil went up by 12% to many customers, the majority {

} continued to purchase predominantly Flex-Sil rather than switch to HD. (RFOF 1, 66, 124, 535-539, 548-49, 745-755, 864-865, 868-70, 875, 877, 1339; Gillespie Tr. 2954-2955; PX00442; RX00677; PX1040-002, PX1063; PX048; FOF 271, 278, 545-49, 550, 1201, 1338-39; RX00721).

331. {
}. (Gilchrist, Tr. 467, *in camera*).

Response to Finding No. 331:

Respondent has no specific response to this finding other than to note that HD was lower priced because it was, and is, technologically inferior. (Qureshi, Tr. 2043-44; RFOF 746-47).

332. None of the Asian battery separator manufacturers are producing a deep-cycle separator containing an antimony suppression additive. (Thuet, Tr. 4396).

Response to Finding No. 332:

Complaint Counsel's finding number 332 is misleading and irrelevant. Many manufacturers of deep-cycle batteries use separators without an antimony suppression additive, thus whether an Asian manufactuer produces such a separator is irrelevant to the questions

before this Court. (Wallace, Tr. 1973 (Both JCI and East Penn have used PE in their deep-cycle batteries); Leister, Tr. 3993; Thuct, Tr. 4443; Balcerzak, Tr. 4092). Further, there was evidence at trial that {

} (Hall, Tr. 2851, *in camera*, 2880-81, *in camera*).

333. Exide believes that following Daramic's acquisition of MPLP, Exide no longer has the same leverage for the purchase of deep-cycle battery separators that it had prior to the acquisition, because now there is only one provider of deep-cycle separators for Exide to negotiate with. (Gillespie, Tr. 2953-2954).

Response to Finding No. 333:

Complaint Counsel's proposed finding 333 is incomplete, vague and misleading. First, this proposed finding is vague because it is not clear which particular separators are being referenced here, as many separators for many applications could be described as 'deep-cycle.' Second, Exide's behavior belies Mr. Gillespie's self-serving testimony. {

} despite the fact that {

} (RFOF 535-537, 541, 545, 547; RX00677;

RX01119; PX1040-002, PX1063). Thus, the difference in price for Exide in purchasing {

} (RX00677,

PX0489; RFOF 535-539, 541, 545, 546, 547). Such an enormous difference does not provide "leverage" for any customer and Mr. Gillespie's testimony to the contrary is disingenuous. Furthermore, there is ample evidence that Exide's size and power give it significant leverage over all of its suppliers – including Daramic. (RFOF 581-603, 1441, 1447; Respondent's Post Trial Br. at pp. 28, 30, 44-47; Respondent's Response to Complaint Counsel's Finding of Fact (hereinafter "CCFOF") 326, 607).

334. Prior to Daramic's acquisition of MPLP, in addition to offering {
} golf cart purchases of golf cart
separators. (Gillespie, Tr. 2995-2997, *in camera*). Now that MPLP is no longer an
independent competitor, Daramic is {
} (Gillespie, Tr. 2997, *in camera*).

Response to Finding No. 334:

Complaint Counsel's proposed finding 334 is a misstatement of the facts and a
misrepresentation of the record. The pricing and credit for Exide's purchase of HD was based
solely and entirely on the {

} (RX00968 at 002, *in camera*). In addition, {

} (RFOF 535-539; PX00442; RX00677). The reason the credit is no
longer offered after the end of 2009 is { } - not
because Microporous is "no longer an independent" competitor. To suggest otherwise is
completely disingenuous. (RX0968; RFOF 535-537). This proposed finding also ignores the
record evidence that {

} (RFOF 73, 77, 790-91, 810, 1189, 1237, 1344).

i) Daramic DC Introduced to Compete with MPLP's Flex-Sil

335. Daramic spent many years trying to develop a battery separator that would work well in
deep-cycle applications. (PX0433 at 001).

Response to Finding No. 335:

Complaint Counsel's proposed finding 335 is incomplete and misleading. First, Complaint Counsel has not shown, and the evidence does not support, that there is a separate "deep-cycle" market. (Respondent Post-Trial Br. at pp. 9-15; RFOF 73, 77, 790-91, 810, 1189, 1237, 1344; PX0319 at 003). In fact, the document to which Complaint Counsel cite here describes Microporous' separators as "the specialty niche deep cycle golf cart segment." (PX0433 at 001). There is no indication that this "specialty niche" can be considered a deep cycle "market," particularly when significant evidence shows 85% of Complaint Counsel's "motive" market is "deep cycle." (PX0319 at 003).

336. Daramic made repeated attempts to develop a product to compete with MPLP's Flex-Sil separators in the deep-cycle market. (PX0433 at 001). Daramic first developed a separator known as {

}. (PX0911 (Roe, Dep. at 69-70)).

Response to Finding No. 336:

Complaint Counsel's proposed finding is misleading and inaccurate for the reasons articulated in Respondent's Response to CCFOF 335.

337. Daramic DC was Daramic's original deep-cycle separator introduced to the market in 2002. (PX0319 at 003).

Response to Finding No. 337:

Complaint Counsel's proposed finding 337 is incomplete, vague and misrepresentative. Although Daramic noted in the document cited that "Daramic DC was Daramic's original deep-cycle separator introduced to the market in 2002" the "market" that is referenced in the prior sentence is "the entire motive power battery market." (PX0319 at 003). Further illuminating the confusion between Complaint Counsel's product "markets" this same document goes on to note that "85% of the flooded [motive] market is considered deep-cycle." (PX0319 at 003).

338. Daramic DC was specifically designed for the golf cart application. (Whear, Tr. 4776).

Response to Finding No. 338:

Complaint Counsel's proposed finding 338 is vague and irrelevant. Not only was DC designed in the early 2000s, and has no application today, or in this matter, but Complaint Counsel do not have an alleged "golf cart" market and thus the design of an obsolete product for a non-existent market is irrelevant. (See also Respondent Post-Trial Br. at pp. 9-15; RFOF 73, 77, 790-91, 810, 1189, 1237, 1344; PX0319 at 003).

339. Daramic began testing { }, as a replacement for { }, in 2003. (PX0949 at 019, (Response to CID Request No. 8, *in camera*)).

Response to Finding No. 339:

Respondent has no specific response to this proposed finding.

340. Daramic's early work with U.S. Battery ultimately led to Daramic DC. (Qureshi, Tr. 2020). U.S. Battery and Daramic tested Daramic DC and found it to be quite acceptable. (Qureshi, Tr. 2020). The product was commercialized in about 2002. (Qureshi, Tr. 2021). U.S. Battery began purchasing Daramic DC in approximately 2003. (Qureshi, Tr. 2021). At the time U.S. Battery began purchasing Daramic DC, its price was much lower than the price of the Microporous Flex-Sil product. (Qureshi, Tr. 2021).

Response to Finding No. 340:

Complaint Counsel's proposed finding 340 is misleading and incomplete. The fact that the price of DC was "much lower" than Flex-Sil is significant and telling as in 2003 U.S. Battery did not replace any of their Flex-Sil purchases with DC – despite the "much lower" price which Mr. Qureshi admitted he could not dispute was approximately two to one (more than a SSNIP, certainly). (Qureshi, Tr. 2021, 2064). In fact, U.S. Battery designed a "new" type of battery – a "price leader" that was the cheapest battery U.S. Battery made called the US 1800. (Qureshi, Tr. 2021-22). From "day one" Daramic DC was the separator used in that battery – it was not a "replacement" for Flex-Sil at US Battery. (Qureshi, Tr. 2022).

341. U.S. Battery first used Daramic DC in a new economy line golf cart battery, the US 1800. (Qureshi, Tr. 2021; McDonald, Tr. 3946-3947). Microporous responded to Daramic's introduction of the DC separator by offering to lower the price of its Flex-Sil separator for use in the US 1800 battery to close to the price of the Daramic DC. (Qureshi, Tr. 2023; PX1764 at 002; McDonald, Tr. 3947). Once Microporous lowered the price of Flex-Sil for the U.S. 1800 battery, U.S. Battery approved and began purchasing both Flex-Sil and Daramic DC for use in the US 1800. (Qureshi, Tr. 2024). Mr. Qureshi

testified that there was no noticeable or functional differences between the US 1800 batteries with the Daramic DC separator and those with the Flex-Sil separator. (Qureshi, Tr. 2025).

Response to Finding No. 341:

Complaint Counsel's proposed finding 341 is incomplete and misleading. Complaint Counsel fail to acknowledge that not only did Microporous not lower the price of Flex-Sil generally, but that, further supporting the fact that separators cannot be put in separate "buckets" Mr. Qureshi testified that the 1800 separator "would not fit other batteries. Each battery uses its own specific size." (Qureshi, Tr. 2030). Taking Mr. Qureshi's testimony on this point completely discredits Complaint Counsel's "markets" and would suggest that if the Court were to accept Complaint Counsel's argument of "functional" substitutes, that, in fact, each single SKU separator forms its own product market, since each battery uses its own specific size separator and thus separators are not even functionally substitutable between batteries in the same product "markets" that Complaint Counsel allege. (Qureshi, Tr. 2030). This would be an absurd result and further proves that the correct market is, in fact, all PE separators. Furthermore, this statement is misleading in that Mr. Qureshi also testified that there was a 5-10% difference in reserve capacity between the Daramic product and Flex-Sil. (Qureshi, Tr. 2074-75). Contemporaneous documents also discredit Mr. Qureshi's testimony. (RX01093 at 002 ("We asked how the testing was going at Daramic with the batteries they made with . . . HD. Nawaz said the batteries had failed and that we didn't have anything to worry about as far as Daramic was concerned."); PX1764 at 002; PX1740 (price of Flex-Sil separators for US Battery are 16% and 18% higher than price of same separators made of CellForce, yet US Battery has not switched to CellForce); RX00780 ("[Nawaz] said the batteries failed prematurely.")).

342. U.S. Battery expanded the use of Daramic DC to 10 different types of deep-cycle batteries that it produced that were all previously using Flex-Sil. (Qureshi, Tr. 2025). The warranties on the batteries that incorporated Daramic DC in place of Flex-Sil carried U.S. Battery's normal one-year warranty. (Qureshi, Tr. 2026). U.S. Battery also used

Daramic DC on their economy line batteries that carry a six month warranty. (Qureshi, Tr. 2026). These economy line batteries also contain fewer lead plates to reduce their cost. (Qureshi, Tr. 2027). Less lead plates will lessen the product life. (Qureshi, Tr. 2027). The length of the warranty U.S. Battery puts on its batteries, is related more to the number of plates in the battery than the type of separator the battery is using. (Qureshi, Tr. 2085).

Response to Finding No. 342:

Complaint Counsel's proposed finding 342 is incomplete and misleading. Complaint Counsel ignore the fact that as of the date of Mr. Qureshi's testimony at trial, US Battery continued to use Flex-Sil for 95% of its batteries, despite the significant two-to-one price difference between Daramic's DC and HD separators and Flex-Sil. (Qureshi, Tr. 2065). Further, for the reasons set forth in Respondent's Response to CCFOF 340, Mr. Qureshi's testimony regarding the effectiveness of HD vis-a-vis Flex-Sil is questionable.

343. The November 9, 2005 Trip Report concludes that U.S. Battery's owner, Jon Anderson, "appreciates that we developed a competing product for rubber. . . Jon sees their benefit as having two suppliers in order to manage costs while maintaining product performance. Meanwhile, we benefit by continuing to gain incremental volume (and taking it away from Microporous Products) in a market where we are relatively new entrants." (PX0557 at 003). As the trip report confirms, U.S. Battery communicated to Daramic its interest in incorporating more HD into its higher quality batteries, and Daramic was interested in supplying more product to U.S. Battery. (Qureshi, Tr. 2029-30).

Response to Finding No. 343:

Complaint Counsel's proposed finding 343 is incomplete, irrelevant and misleading. First, at the time this report was written HD had not been commercialized and testing was not complete. (PX0557). The development of a product that is "intended" to compete with another product, but that ultimately is unable to compete with that product on the same basis, as is the case here, is immaterial. (Qureshi, Tr. 2065). Notwithstanding anything aspired to, or Daramic's interest, as set out in the cited document, the facts are that after this trip report Daramic never supplied HD or DC separators to US Battery for more than 11 individual batteries – only 5% of its production. (Quershi, Tr. 2065).

a. Daramic DC Won Business from MPLP's Flex-Sil

344. Beginning in 2003, U.S. Battery began manufacturing deep-cycle batteries with Daramic’s DC separator in place of Flex-Sil. (Wallace, Tr. 1945). Prior to purchasing Daramic’s separator, U.S. Battery was only buying Flex-Sil for its deep-cycle batteries. (Wallace, Tr. 1945-1946).

Response to Finding No. 344:

Complaint Counsel’s proposed finding 344 is false and incorrect. As noted above in Respondent Response to CCFOF 340, in 2003, US Battery began using Daramic’s DC separator in its new 1800 battery. (Qureshi, Tr. 2022). It was not a “replacement” for Flex-Sil at US Battery. Instead, from “day one” Daramic DC was the separator used in the 1800 battery. (Qureshi, Tr. 2022). Complaint Counsel’s characterization of Mr. Wallace’s testimony is improper and misleading here, as Mr. Wallace did not testify that US Battery purchased DC separators “in place” of Flex-Sil, only that US Battery began buying DC separators for the 1800 battery in 2003. (Wallace, Tr. 1945). Mr. Qureshi’s later testimony makes clear that the use of the DC separator was not as a replacement for Flex-Sil.

345. {

} (Whear, Tr. 4840, *in camera*).

Response to Finding No. 345:

Complaint Counsel’s proposed finding 345 is incomplete and misleading for the reasons articulated in Respondent’s Response to CCFOF 341-342. US Battery has never used any Daramic separator in more than 11 battery types, or 5% of their separator purchases. (Qureshi, Tr. 2065).

ii) MPLP Responded to Competition

346. Prior to purchasing Daramic’s DC separator, U.S. Battery was only buying Flex-Sil for its deep-cycle batteries. When Microporous found out that U.S. Battery was additionally buying Daramic’s DC separator for its deep-cycle batteries, it lowered its pricing on Flex-Sil separators. (Wallace, Tr. 1945-1946).

Response to Finding No. 346:

Complaint Counsel's proposed finding 346 is incorrect and misleading for the reasons set forth in Respondent's Response to CCFOF 341.

iii) Daramic Improved Product and Introduced HD

347. Daramic developed the HD separators to replace its DC separators. (Roe, Tr. 1196). Daramic HD separators are manufactured by combining PE with a latex rubber additive. (Hauswald, Tr. 699-700). HD separators provide improved performance over the DC separators. (Roe, Tr. 1196; (PX0911 (Roe, Dep. at 69-70)). HD separators provide better antimony suppression and less water loss in deep-cycle batteries than the old DC separators. (Roe, Tr. 1196). HD separators also provide improved end-of-charge performance over time than standard PE separators. (PX0423 at 002).

Response to Finding No. 347:

Complaint Counsel's proposed finding 347 is incomplete and misleading. A significant part of the reason that Daramic {

} (PX0949 at 019, (Responses to CID

Request No. 8) *in camera*).

348. U.S. Battery tested Daramic HD product and the Microporous Flex-Sil product side by side and determined the two "are very comparable." (Qureshi, Tr. 2033). The main advantage of HD is its cost advantage. (Qureshi, Tr. 2033).

Response to Finding No. 348:

Complaint Counsel's proposed finding 348 is misleading and calls into question Mr. Qureshi's credibility in light of the fact that, despite these statements, and the fact that US Battery approved of the DC, and then HD, product in 2003 and 2005 respectively, and the fact that HD costs half as much as Flex-Sil, US Battery has never purchased more than 5% of its separators as HD from Daramic. (Qureshi, Tr. 2021, 2064-65).

349. Exide had tested previous versions of Daramic separators for deep-cycle batteries and none of the versions prior to HD had passed Exide testing. (Gillespie, Tr. 2937).

Response to Finding No. 349:

Complaint Counsel's proposed finding 349 sheds doubt on the testimony of Mr. Qureshi repeatedly cited by Complaint Counsel above that the Daramic DC product was "quite acceptable" and comparable to Flex-Sil. (Respondent's Response to CCFOF 340). This finding is also irrelevant in that whether HD passed Exide testing is immaterial to any issue before the Court.

350. Daramic HD was developed to compete in the deep-cycle market. (Roe, Tr. 1195-1196; PX0911 (Roe, Dep. at 56); PX1791; PX1744 at 004, *in camera*; PX1071; PX222 at 001, *in camera*).

Response to Finding No. 350:

Complaint Counsel's proposed finding 350 is inaccurate and incomplete. Mr. Roe actually testified at trial that {

} (Roe, Tr. 1195-1196; See also Respondent Post-Trial Br. at pp. 9-15; RFOF 73, 77, 790-91, 810, 1189, 1237, 1344; PX0319 at 003). Likewise, not a single document cited by Complaint Counsel mentions a "deep cycle" market. (PX0222 at 001, *in camera* ({

}); PX1071 ("RE: "Golf Cart Market"); PX1744 at 001, *in camera* {
}); PX1791 ("Golf cart batteries" compared to "SLP")(See also PX0319 at 003 (85% of "motive" market is "deep cycle"))).

351. {
} (Seibert, Tr. 4304, *in camera*). {
} (Seibert, Tr. 4308-4309, *in camera*). {
} (Seibert, Tr. 4309-4310, *in camera*).

Response to Finding No. 351:

Complaint Counsel's proposed finding 351 is misleading and incomplete. Mr. Seibert testified that, {

} (Seibert, Tr. 4309, *in camera*). This is borne out

} (PX0557; Whear, Tr. 4812, *in camera*). {

} (PX0557 at 002; Whear, Tr. 4812,
in camera).

Response to Finding No. 353:

Complaint Counsel's proposed finding 353 is incomplete, irrelevant and misleading.
Notwithstanding which battery manufacturers Daramic may have {

}

(RFOF 121, 124, 341, 352, 744, 746-747). {

} (RFOF 66, 548-49, 745-754, 864-865, 1339; Gillespie Tr. 2954-2955)(See also,
Respondent's Response to CCFOF 343; Respondent's Post Trial Br. at pp. 13-15).

354. Because Daramic felt that HD performed better than rubber separators such as Flex-Sil, and PE based separators with rubber additives, such as CellForce and Daramic DC, Daramic decided to phase out Daramic DC and replace it with Daramic HD. (PX0695 at 003; Wallace, Tr. 1947, 1960-1961). US battery switched its DC purchases to HD when DC was discontinued by Daramic in 2006. (Wallace, Tr. 1947).

Response to Finding No. 354:

Complaint Counsel's proposed finding 354 is contradicted by contemporaneous documents and testimony and how "Daramic felt" about how HD performed in 2004 – over a year before it was commercialized - is immaterial to whether it, in fact, did perform better or any issue in this case. (PX0557). Additionally, a significant part of the reason that Daramic

{

} (PX0949 at 019, (Responses to CID Request No. 8, *in camera*); RX00780
("batteries failed prematurely."); RX01093 at 002 ("HD...failed"); PX1764 at 002).

355. Daramic HD's first commercial sales took place in 2005. (Roe, Tr. 1209).

Response to Finding No. 355:

Complaint Counsel's proposed finding 355 is incomplete in that contemporaneous documents show that the first commercial sales of HD did not take place until at least after November 2005. (PX0557 at 002 (November 2005 document noting that HD is not yet available commercially)).

356. Daramic HD was specifically targeted as an alternative to Microporous's rubber separator, Flex-Sil, being used in golf cart and floor scrubber batteries. (PX0319 at 003). Pierre Hauswald, as general manager of Daramic, participated in developing the Daramic HD strategy, as described in PX0319. (Hauswald, Tr. 688:22-24).

Response to Finding No. 356:

Complaint Counsel's proposed finding 356 is incomplete, misleading and irrelevant for the reasons articulated in Respondent's Response to CCFOF 352-53).

357. Tests conducted by Daramic accurately showed { (Whear, Tr. 4839, *in camera*). Daramic is currently still testing HD in comparison to Flex-Sil. (Whear, Tr. 4787). }

Response to Finding No. 357:

Complaint Counsel's proposed finding 357 is inaccurate and misrepresents Mr. Whear's testimony. {

} (Whear, Tr. 4839, *in camera*). However, he also testified that Daramic had not done enough "true side-by-side comparison" to "really understand" the differences. (Whear, Tr. 4704). Further, there is significant evidence that {

} as set out more thoroughly in Respondent's Responses to CCFOF 343, 353. (See also Respondent's Post Trail Br. at pp. 13-15). {

} (RFOF 747).

358. Prior to the acquisition, Daramic tried to sell Daramic HD to Trojan, for use in its deep-cycle batteries, including golf cart batteries. (Hauswald, Tr. 659-660).

Response to Finding No. 358:

Complaint Counsel’s proposed finding 358 is incomplete in that Complaint Counsel fail to note that despite HD’s commercial availability since 2005, and the fact that {

} (RFOF 121, 124, 341, 352, 744, 746-747). It is wholly irrelevant whether

Daramic tried to sell any of its products, including HD, {

} (RFOF 121,

124, 341, 352, 744, 746-747).

359. In 2006, U.S. Battery switched all its applications that were using Daramic DC to Daramic’s replacement product, Daramic HD, (Qureshi, Tr. 2028). Daramic HD is superior to Daramic DC in terms of cycle life. (Qureshi, Tr. 2028).

Response to Finding No. 359:

Complaint Counsel’s proposed finding 359 is misleading, as {

}

(See Respondent’s Response to CCFOF 343, 345, 347).

360. A November 9, 2005 Daramic Trip Report to U.S. Battery confirms that U.S. Battery viewed HD as a superior to DC. (PX0557 at 002). Based on a comparison of Daramic HD to Daramic DC in enveloped golf cart batteries, Daramic reported that “Nawaz [Qureshi] wants to switch all DC product immediately to HD. . . . Nawaz want to make a running change as soon as it is available.” (PX0557 at 002). Moreover, Daramic noted that U.S. Battery’s Nawaz Qureshi “provided a list of four (4) new product lines he would like to switch away from rubber. **NOTE:** Some of these new sizes include mid-level product line.” (PX0557 at 002). Included within the four new products, was the “US 2000 (mid-level golfcart battery).” (PX0557 at 002). The Daramic Trip Report also states that “[i]t may be up to us to determine how much more business we want to take away from Microporous Products and when we want to take it.” (PX0557 at 002).

Response to Finding No. 360:

Complaint Counsel's proposed finding 360 is incomplete, irrelevant and misleading for the reasons articulated in Respondent's Response to CCFOF 343, 353; PX0557; Qureshi, Tr. 2065; RFOF 121, 124, 341, 352, 744, 746-747).

361. { } (PX0904 (Seibert, Dep. at 131, *in camera*)). In response to Mr. Keith's email that said "We know we can price the product where we want to either get business or cause Amerace to reduce theirs," Mr Seibert wrote "knowing that we're 'competitive' should we take prices down 5% to 10% to get even more aggressive?" (PX0329 at 001).

Response to Finding No. 361:

Complaint Counsel's proposed finding 361 is incomplete, misleading and irrelevant for the reasons articulated in Respondent's Response to CCFOF 330, 353 and 358. Any "attempt" by Daramic to { }
}

(RFOF 121, 124, 341, 352, 744, 746-747).

362. In February 2007, Mr. Roe, informed the individuals at Daramic who were directly in charge of HD strategy that HD was meant for the same market as MPLP's Flex-Sil separators. (PX0316 at 002; Roe, Tr. 1200-1201). Mr. Keith, a Daramic salesman, specifically noted the competition between HD and Flex-Sil, stating that Daramic "must continue to improve our service on HD or we stand a good chance of losing golf car business back to Amerace Flex-Sil." (PX0413 at 5).

Response to Finding No. 362:

For the reasons articulated in Respondent's Response to CCFOF 330, 353 and 358, Complaint Counsel's proposed finding 362 is irrelevant, misleading and contrary to the weight of the evidence. (RFOF 66, 121, 124, 341, 352, 548-49, 744-754; 864-865, 1339; Gillespie Tr. 2954-2955)(See also, Respondent's Post Trial Br. at pp. 13-15).

363. { } believed that the { } separators could match the antimony suppression of { } separator. (PX0911 (Roe, Dep. at 58-59, *in camera*)). Daramic even advertised to customers that HD matched the antimony poisoning retardation of the Flex-Sil separators. (PX0423 at 002; Roe, Tr. 1202-1203). This advertisement was part of the marketing product literature that was provided to battery manufacturers. (Roe, Tr. 1203).

Response to Finding No. 363:

Complaint Counsel's proposed finding 363 is incomplete and misleading. Mr. Roe's testimony and the document cited related to Daramic's {

} (PX0911 (Roe, Dep. at 58-59, *in camera*);

PX0423 ("New" product); PX0557)). Later documents show that not only did {

} Daramic today has determined that has not had

enough "true side-by-side comparison" to "really understand" the differences. (Whear, Tr. 4704;

PX0913 (Whear Dep. at 112); RFOF 747; Respondent's Responses to CCFOF 343, 353;

Respondent's Post Trial Br. at pp. 13-15; RX00780; RX01093 at 002; PX1764 at 002).

364. Additionally, Daramic provided battery manufacturers with test results comparing Daramic HD to rubber separators. (PX0423 at 002). The test results indicated that HD outperformed pure rubber separators as well non-active separators over the life of a battery. (PX0423 at 002). These test results were clearly designed to compare {
} separator available on the market.
(PX0911 (Roe, Dep. at 59, *in camera*)).

Response to Finding No. 364:

For the reasons articulated in Respondent's Response to CCFOF 363, Complaint Counsel's proposed finding 364 is incomplete, misleading and irrelevant as the document in question was "marketing material" produced at or about the time that HD was commercialized and without "true" side-by-side testing. Further, what Daramic contended in its 2005 marketing material is irrelevant in light of the significant evidence that {

} (Respondent's

Response to CCFOF 333, 334, 341-43; Respondent's Post Trial Br. at 13-15; RFOF 66, 121, 124, 341, 352, 548-49, 744-754; 864-865, 1339; Gillespie Tr. 2954-2955).

365. Daramic informed customers that the HD separators are superior to CellForce. (RX00598 at 001).

Response to Finding No. 365:

Complaint Counsel's proposed finding 365 is misleading, irrelevant and inaccurate.

Nothing in the document cited references CellForce. (RX00598 at 001). Further, as set out fully

in Respondent's Response to CCFOF 355, 363, what Daramic informed customers in November 2005, prior to HD even being commercially available is immaterial to any issue in this matter, or to whether HD, is in fact, superior to CellForce or any other product.

366. When Daramic introduced the HD separators it understood that on a performance basis they were close to the level of MPLP's Flex-Sil separators. (PX0433 at 001). However, Daramic was not satisfied with simply being close to the performance of Flex-Sil, and it continued to work hard to improve the HD separators.

Response to Finding No. 366:

Complaint Counsel's proposed finding 366 is unsupported and improper. Contrary to the Court's Order requiring citation supporting each finding of fact, Complaint Counsel here provides no support for its second sentence and thus it should be disregarded. Additionally, nothing in the document to which Complaint Counsel do cite supports either statement here. The document cited, in fact, states that Daramic had done nothing more than "get close" (technically) to Microporous' Flex-Sil product despite years of attempting to develop a competing product. (PX0433 at 001).

367. {
} (PX0911 (Roe, Dep. at 227, *in camera*)). For example, when HD was introduced to the marketplace with a 12 mill backweb thickness there were problems associated with wrinkling of the separators. (Roe, Tr. 1312-1313). Daramic was subsequently able to overcome this wrinkling problem by increasing the backweb thickness of the HD separators to 13 mill. (Roe, Tr. 1312-1313).

Response to Finding No. 367:

Complaint Counsel's proposed finding 367 is a misstatement of the evidence and is misleading. Mr. Roe's testimony was that {

} and, further, that the change

from 12 mil backweb to 13 mil backweb on HD was a manufacturing and process issue, not a quality issue. (Roe, Tr. 1312-1313; PX0911 (Roe, Dep. at 227, *in camera*)).

368. Exide understood that Daramic was marketing the HD separators for use in golf cart batteries. (Gillespie, Tr. 2937). When Daramic introduced the HD separators, Mr. Tucker Roe approached Mr. Gillespie and asked that Exide test the HD in golf cart

batteries to see how it performs. (Gillespie, Tr. 2937). Daramic wanted to know what it would take for Exide to get HD into Exide's golf cart batteries. (Gillespie, Tr. 2937-2938). {
(Gillespie, Tr. 2996, *in camera*).

Response to Finding No. 368:

Complaint Counsel's proposed finding 368 inaccurate and misleading. Exide was contractually bound to {

} (RX00968 at 002, *in camera*). Thus, the fact that {

} (RFOF 535-539;

PX00442, *in camera*; RX00677). The fact that Exide {

}

(RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547).

369. From Exide's perspective, Daramic's interest in getting Exide's golf cart business was a ten on a scale of one to ten. (Gillespie, Tr. 2938-2939; *see also* PX1071 at 001-002 (May 2006 email from Mr. Roe to Mr. Gillespie "we are aggressively pursuing this market")).

Response to Finding No. 369:

Complaint Counsel's proposed finding 369 inaccurate and misleading. Exide was contractually bound to {

} (RX00968 at 002, *in camera*). The fact that Daramic was "aggressively" pursuing sales of its product is immaterial to whether Flex-Sil and HD are economically, functionally or legally substitutes. Further, Complaint Counsel have not alleged a "golf cart" market and cannot prove their "deep cycle" market so this finding is additionally irrelevant. (See Respondent's Response to CCFOF 335, 350-51, 387).

370. When Daramic introduced the HD separators Exide was interested in buying HD for its deep-cycle batteries for performance and commercial reasons. Exide's testing indicated that HD met Exide's performance criteria for deep-cycle batteries. Daramic offered Exide a competitive price on the HD separators. Additionally, Exide received a "double kiss" when buying HD because it also received a credit back from Daramic for every purchase of HD under their contractual agreements. (Gillespie, Tr. 2937-2938).

Response to Finding No. 370:

Complaint Counsel's proposed finding 370 inaccurate and misleading. Exide was contractually bound to {

} (RX00968 at 002, *in camera*). The pricing and credit for Exide's purchase of HD was based solely and entirely on the {

} (RFOF 535-539; PX00442, *in camera*; RX00677).

The fact that Exide {

} (RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547). Further, Complaint Counsel have not proved a "deep cycle" market. (See Respondent's Response to CCFOF 335, 350-51, 387).

371. Prior to Daramic's acquisition of MPLP, Daramic was attempting to grow HD's sales in the deep-cycle segment. (Roe, Tr. 1209; PX0736 at 002). In fact, in February of 2006, Mr. Roe informed Exide's head of procurement that Daramic was "aggressively pursuing" sales in the "golf cart/deep-cycle and motorcycle battery business." (PX1071 at 001-002; Roe Tr. 1209-1211). In order to grow HD's market share in the deep-cycle market, Daramic provided HD samples to most of the significant deep-cycle battery manufacturers including Trojan, Exide, US Battery, and Crown. (PX0262 at 003).

Response to Finding No. 371:

Complaint Counsel's proposed finding 371 inaccurate and misleading. First, as noted repeatedly herein, Complaint Counsel have failed to prove a "deep cycle market." (Respondent's Response to CCFOF 335, 350-51, 387; See also PX0736 at 003 ("Deep Cycle Battery Market [includes] Industrial batteries. . . fork lift, pallet trucks. . . [and] golf cart, floor sweeper, RV/Marine, electric wheelchair, renewable energy systems..."). Further, this proposed finding is irrelevant and misleading in that the fact that Daramic was "aggressively" pursuing sales of its product is immaterial. Additionally, Exide was contractually bound to {

} (RX00968 at 002,

in camera). **Finally, notwithstanding to which battery manufacturers Daramic may have**

{

} (RFOF 66, 121, 124, 341,

352, 548-49, 745-754, 864-865, 1339; Respondent's Response to CCFOF 343; Respondent's Post Trial Br. at pp. 13-15).

372. { (PX0904 (Seibert, Dep. at 106-107, *in camera*)). Daramic's February 2007 HD Product Strategy Presentation showed that {

} (PX0023 at 010, *in camera*).\

Response to Finding No. 372:

Complaint Counsel's proposed finding 372 is irrelevant, misleading and inaccurate. It is irrelevant which separators are "measured" against each other – there is no legal standard for identifying a "product market" based on which products are measured against which other products. . . FTC v. Whole Foods Market, Inc. 548 F.3d 1028, 1037 [from sec IV(B) of the opinion] (DC Cir. 2008). Further, the document to which Complaint Counsel cites here says nothing about one product "surpassing" or "equaling" the other it simply shows what the

characteristics of each product is. (PX0023 at 010, *in camera*). Finally, Complaint Counsel have not proved a “deep cycle” market. (See Respondent’s Response to CCFOF 335, 350-51, 387).

373. {
 (PX0263 at 003-004, *in camera*). {
 008, *in camera*). { } (PX0263 at
 }. (PX0263 at 008). { (PX0263 at
 008). { } (PX0263 at 008, *in camera*).

Response to Finding No. 373:

Complaint Counsel’s proposed finding 373 is irrelevant, misleading and incomplete. Daramic’s goals are immaterial to the issues in this case, as there is no evidence that Daramic was ever likely to achieve the goals outlined on the document to which Complaint Counsel cites. (PX0263 at 008, *in camera*). This “budget” document for 2007 was developed prior to 2007, and the reality as observed today is that by the first quarter of 2008 – over a year since the creation of this document, Daramic had failed to achieve even one of the goals on which Complaint Counsel relies to support this finding: HD was not qualified for OEM anywhere, Daramic did not increase its share of US Battery beyond 5%, let alone 35%, and Exide continued to purchase significantly more Flex-Sil separators than HD separators despite over a million dollars worth of incentive to help Daramic meet this goal. (RFOF 548, 746; Respondent’s Response to CCFOF 342, 353, 389). The lofty aspirations of the company are insufficient to support a factual finding when the reality is entirely contrary to the stated goal.

374. Daramic wrote in their September 2007 America Monthly Sales Report that East Penn and US Battery were concerned about receiving a consistent supply of HD separators from Daramic. (PX0305 at 007). In fact, US Battery wanted to increase its purchases of HD separators from Daramic. (PX0305 at 007). In the Monthly Sales Report, Daramic noted it must continue to improve its service or it would “stand a good chance of losing golf car business back to Amerace Flex-Sil.” (PX0305 at 007).

Response to Finding No. 374:

Complaint Counsel's proposed finding 374 is incomplete and misleading. The document to which Complaint Counsel cites for this proposition says nothing about US Battery wanting to increase its purchase of HD separators from Daramic only that Daramic has "opportunities." (PX0305 at 007). The fact is that Daramic did not obtain any additional HD business from US Battery after 2005-06 beyond the separators it supplied to US Battery for only 11 of its batteries. (Respondent's Response to CCFOF 343, 345, 353, 359, 389). Importantly, the same document notes that Daramic missed its budget for HD, and that Exide told Daramic not to expect any additional business. (PX0305 at 007).

a. Customers Viewed Daramic HD and MPLP's Deep-cycle Products as Substitutes

375. Exide regards Flex-Sil and Daramic HD separators to be substitutes for each other. (Gillespie, Tr. 2933). Exide uses Flex-Sil and Daramic's HD separators in its flooded lead acid batteries for use in golf cart and floor scrubber applications. (Gillespie, Tr. 2932). Exide does not use any other type of separators in its deep-cycle batteries. (Gillespie, Tr. 2933). No other separators meet Exide performance criteria for deep-cycle batteries. (Gillespie, Tr. 2933).

Response to Finding No. 375:

Complaint Counsel's proposed finding 375 is inaccurate and misleading. Notwithstanding Mr. Gillespie's testimony, Exide's actions do not bear out that it considered HD and Flex-Sil to be substitutes for each other. Since 2001 Exide has been contractually bound to {

} (RX00968

at 002, *in camera*). Despite this, and significant {

} (PX0305 at 007; RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547).

376. Flex-Sil and HD are used as exact substitutes in Exide's most common golf cart battery, the GC110, which makes up approximately 80% of Exide's deep-cycle sales. (Gillespie, Tr. 2941-2944; PX1401 and PX1402 (demonstrative batteries)). With the exception of the separator, there are no differences between these batteries. The batteries have the exact same labels and there is no way to tell the difference between them without cutting them open. (Gillespie, Tr. 2941-2944). For the end user, there is no difference in the price or warranty between Exide's GC110 batteries which use HD and those that use Flex-Sil. (Gillespie, Tr. 2944).

Response to Finding No. 376:

Complaint Counsel's proposed finding 376 is incomplete and misleading. First, the GC110 battery is a lower end after market battery from Exide. (Gillespie, Tr. 3090-3091). Not only is HD not qualified for Exide's higher end batteries, it has not even begun testing HD in its high end batteries despite the huge price differential. (Gillespie, Tr. 3091). Further, documents in evidence prove that, in fact, the HD separator in Exide's GC110 battery does not perform as well as the Flex-Sil separator in that same battery. (PX1075 at 001 ("HD typically runs 10% less than Flex-Sil...")). Additionally, the two batteries are not, in fact, identical. Each was made at a different facility. (Gillespie, Tr. 2941-42). In December 2007, Daramic noted to Exide that "none of the Bristol volume has converted to Daramic HD. Approximately 800,000 square meters of volume is as available to convert. Based on the current selling and the 33% credit, Exide can save \$745,000 per year..." (PX0261 at 007). Nevertheless, Exide told Daramic in the fall of 2007 not to expect any HD business from the Bristol plant, "this year [2007] or next [2008]." (PX0305 at 007; PX0385). Clearly Exide, one of the companies leading the charge against this acquisition, has a significant incentive to produce batteries before this Court containing both "Flex-Sil" and "HD" separators; however, delving deeper into the motivations for this, and the fact that, despite a huge cost saving available to Exide prior to the merger it was refusing to switch production from Flex-Sil to HD in its Bristol plant, puts considerable doubt on the reliability of this proposed fact. (See also, RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547; Respondent's Response to CCFOF 388).

377. The testing conducted by US Battery comparing Flex-Sil and HD showed comparable results. (Wallace, Tr. 1972; Qureshi, Tr. 2004, 2063).

Response to Finding No. 377:

Complaint Counsel's proposed finding 377 is incomplete, irrelevant and misleading. Mr .Wallace's testimony was suspect in that he was asked whether "Flex-Sil and HD" were identical and he was only able to answer that they were "comparable." (Wallace, Tr. 1972). However, again, US Battery's actions speak louder than their carefully chosen words. Not only has US Battery never put HD, or DC, in any of its premium batteries, it has not even approved the product for those batteries. (Wallace, Tr. 1967). Further, US Battery advertises Flex-Sil on its website as the "premium" separator that it uses, and nowhere mentions HD. (Wallace, Tr. 1963-64; RX01643). Additionally, Mr. Qureshi testified that DC worked exactly like Flex-Sil. (Qureshi, Tr. 2025). Yet, this is simply not credible in light of the significant testimony that the {

} (Roe, Tr. 1196; PX0911 (Roe, Dep. at 69-70; PX0557; Whear, Tr. 4812, *in camera*; RX01089; Godber Tr. 172, 271; Balcerzak, Tr. 4124, 4135-36; RX01093 at 002; RX00835; RX01334; RX01329).. Finally, and perhaps most telling, US Battery continues to purchase upwards of 95% of their separators as Flex-Sil, despite a two to one price difference. (See Respondent's Response to CCFOF 343, 345, 353, 359, 342, 389).

378. US Battery's 1800 model deep-cycle battery contains either Flex-Sil or Daramic HD today with no distinction in their performance or warranty claims rate. (Wallace, Tr. 1946). Based on its battery performance testing, U.S. Battery found that Flex-Sil and HD separators are comparable products, i.e., one is not better than the other. (Wallace, Tr. 1971-1972).

Response to Finding No. 378:

Complaint Counsel's proposed finding 378 is incomplete, irrelevant and misleading for the reasons articulated in Respondent's Response to CCFOF 377 and other paragraphs cited therein.

379. In 2007, Mr. McDonald suggested “doctor[ing]” an HD/Flex-Sil comparison test data in order to protect Flex-Sil sales volume at Exide. (McDonald, Tr. 3951-3954; PX0497 at 001). Mr. McDonald knew Exide was intent on switching some of its purchases from Flex-Sil to HD and felt he needed data to show Exide that Flex-Sil was superior to HD. (McDonald, Tr. 3955).

Response to Finding No. 379:

Complaint Counsel’s proposed finding 379 is inaccurate, misleading and misrepresentative of the document and the testimony. The document to which Complaint Counsel cite for this proposed finding makes clear that the test results to which Mr. McDonald was referring showed “compelling” data on the Flex-Sil separator versus HD. (PX0497 at 001). As Mr. McDonald explained at trial, and as is clear from his words in the actual document, “What I meant by “doctor up data” was I did not want to put in front of Exide any customer names that was on documents, so we’d have to change what our graphs look like so that it would not -- it would show like customer A, customer B or customer 1, customer 2 or battery 1, battery 2.” (McDonald, Tr. 3951-52, 3956; PX0497). As noted throughout this document, {

} and thus is not representative of a “substitutable” product. (Respondent’s Response to CCFOF 333, 368, 370; RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547).

380. Prior to Daramic’s acquisition of MPLP, JCI purchased HD separators from Daramic for use in golf cart batteries. (Hall, Tr. 2703-2705; 2874, *in camera*). JCI was engaged in discussions with MPLP for supply of separators for golf cart batteries prior to Daramic’s acquisition of MPLP. (Hall, Tr. 2704). JCI was interested in MPLP’s deep-cycle separators in order to have an alternative to Daramic’s HD separators because JCI wanted to “see competition.” (Hall, Tr. 2706-2707). JCI had {

}. (PX1515 at 006, *in camera*). Discussions with MPLP continued even after the discussions about a possible MPLP expansion to support PE SLI separator business with JCI had fallen apart, and continued right up to the time period when MPLP was acquired by Daramic. (Hall, Tr. 2704-2705).

Response to Finding No. 380:

Complaint Counsel’s proposed finding 380 is irrelevant and misleading. {

} (PX1515 at 006,

in camera). {

} (Hauswald, Tr. 909, 943-44, *in camera*).

381. JCI's contract with Entek { } (Hall, Tr. 2874, *in camera*; RX00072, *in camera*).

Response to Finding No. 381:

Complaint Counsel's proposed finding 381 is completely irrelevant and misleading as the fact that the contract does not cover the sale of golf cart separators is immaterial to whether { } actually supplies, or plans to supply such separators. {

} (Hauswald, Tr. 909, 943-44, *in camera*). Thus, {

} as Complaint Counsel suggests, then there {

} and Complaint Counsel's claim that Daramic has a

monopoly in this fabricated market must be incorrect.

382. Exide benefits from purchasing HD because { }. (Gillepsie, Tr. 2944; Gillespie, Tr. 2996, *in camera*). Exide has no issues with the quality of the HD separators. (Gillepsie, Tr. 2944).

Response to Finding No. 382:

Complaint Counsel's proposed finding 382 is inaccurate and misleading. The reason that Exide "benefits" from purchasing HD is based solely and entirely on the {

} (RX00968 at 002, *in camera*).

In addition, {

} (RFOF 535-539;

PX00442; RX00677). To suggest otherwise is completely disingenuous. (RX0968; RFOF 535-537).

383. After the merger, Mr. Qureshi met with Daramic's David Gunter and told him that in identical applications, there were no noticeable differences between HD and Flex-Sil. (Qureshi, Tr. 2088-2089; *see also* PX0682 at 002, *in camera* {

}. Emphasis in original)).

Response to Finding No. 383:

Complaint Counsel's proposed finding 383 is incomplete and misleading. Yet again, Mr. Qureshi parsed his words carefully, very specifically noting each time that {

} (Qureshi, Tr. 2088-89; PX0683, *in*

camera). However, importantly, HD is not used in US Batteries' premium products, which comprise 80% of its business, thus the fact that a premium product like Flex-Sil performs comparably to HD in an economy and low-end line of products at US Battery is immaterial to whether they are, in fact, substitutes. (Wallace, Tr. 1967; See Respondent's Response to CCFOF 343, 345, 353, 359, 342, 389). A Honda performs "comparably" to a Rolls Royce in that they carry passengers from point A to point B, but that does not make them substitutes for antitrust purposes.

384. Daramic HD is undergoing testing at Crown as a replacement for Flex-Sil in its golf batteries. (Balcerzak, Tr. 4138). Crown has qualified HD in deep-cycle golf cart application. (Balcerzak, Tr. 4123-4124).

Response to Finding No. 384:

Complaint Counsel's proposed finding 384 is inaccurate, misrepresentative of the testimony and misleading. Mr. Balcerzak clearly testified that HD "did not perform as well as Flex-Sil, and as a result, our engineer did not consider it a suitable substitute for golf."

(Balcerzak, Tr. 4124, 4135-36). The fact that a product is “qualified” to be used “in a pinch” is immaterial, as Mr. Balcerzak noted “[w]e make golf car batteries out of a lot of materials. Would it make a high-performing golf car battery? No.” (Balcerzak, Tr. 4123).

b. HD Took Sales from MPLP

385. HD competed with Flex-Sil for deep-cycle applications. (Godber, Tr. 152-153).

Response to Finding No. 385:

Mr. Godber’s actions belie his self-serving words here and thus, for the reasons articulated in Respondent’s Response to CCFOF 330, 353, 357-58, 361, 371, this proposed finding is false, not credible and misleading. (See also, RFOF 18, 121-125, 548-549, 745, 747; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762, McDonald, Tr. 3822; RX1094).

386. MPLP’s CEO knew {
}. (Gilchrist, Tr. 467-468, *in camera*).

Response to Finding No. 386:

Mr. Gilchrist’s actions belie his self-serving words here and thus, for the reasons articulated in Respondent’s Response to CCFOF 330, 353, 357-58, 361, 371, this proposed finding is false, not credible and misleading. (See also, RFOF 18, 121-125, 548-549, 745, 747; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762, McDonald, Tr. 3822; RX1094).

387. Daramic successfully increased the sales of HD in every year between the introduction of HD and Daramic’s acquisition of MPLP. (Roe, Tr. 1209). Daramic was gaining market share in the deep-cycle market in part through customers who were converting the separators that they were using in their deep-cycle batteries from Flex-Sil to HD. (Roe, Tr. 1212-1213; 1277-1278). Both Exide and US Battery switched from Flex-Sil to HD for a portion of their deep-cycle golf car batteries. (Roe, Tr. 1212-1213).

Response to Finding No. 387:

Complaint Counsel’s proposed finding 387 is misleading and incomplete. Complaint Counsel have not, and cannot, prove a “deep cycle” market, as set out in more detail in Respondent’s Response to CCFOF 350, 351. (PX0319 at 003 (85% of “motive” market is “deep cycle”); Seibert, Tr. 4309, *in camera*). (See also Respondent’s Post Trial Br. at pp. 13-15).

388. Exide began switching from Flex-Sil to HD separators for its deep-cycle batteries in 2005. (Gillespie, Tr. 2936-2937).

Response to Finding No. 388:

Complaint Counsel's proposed finding 388 is incomplete, vague and misleading. First, this proposed finding is vague because it is not clear which particular separators are being referenced here, as many separators for many applications could be described as 'deep-cycle.' Second, Exide's behavior belies Mr. Gillespie's self-serving testimony. {

} despite the fact that {

} (RFOF 535-537, 541, 545, 547; RX00677; RX01119; PX1040-002, PX1063). Thus, the difference in price for Exide in purchasing {
} (RX00677, PX0489; RFOF 535-539, 541, 545, 546, 547). Further, as the contemporaneous documents make clear, HD was not commercially introduced until after November 2005, and Exide did not purchase any meaningful quantities until 2006, thus Mr. Gillespie's testimony is not credible. (RX01119; PX0557; FOF 535-539, 541, 545, 546, 547).

389. U.S. Battery switched from Flex-Sil to HD separators for some of its deep-cycle batteries. (Gilchrist, Tr. 368-370).

Response to Finding No. 389:

Complaint Counsel's proposed finding 389 is incomplete and misleading. As of the date of Mr. Qureshi's testimony at trial, US Battery continued to use Flex-Sil for 95% of its batteries, despite the significant two-to-one price difference between Daramic's DC and HD separators and Flex-Sil. (Qureshi, Tr. 2065). In fact, despite having seven years to make the switch from HD to Flex-Sil, US Battery has only done so for 11 of its batteries. (Respondent's Response to CCFOF

343, 345, 353, 359). Finally, as articulated above at Respondent's Response to CCFOF 335, 350-51, 387, Complaint Counsel have failed to prove a deep cycle market.

390. Today, US Battery is pleased with the performance of HD such that its purchases have increased over time and have grown to include additional models in its product line. (Wallace, Tr. 1947-1948). US Battery planned additional purchases of the HD separator in its Group 27 and 31 lines of batteries prior to Polypore's purchase of Microporous. (Wallace, Tr. 1948). US Battery also planned to put HD in its US 2000 model battery which has a one year warranty. (Wallace, Tr. 1978). The longest standard warranty offered by US Battery is one year. (Wallace, Tr. 1965).

Response to Finding No. 390:

Complaint Counsel's finding number 390 is misleading. Complaint Counsel incorrectly implies that the US 2000 is a premium battery because it is covered by a one-year warranty. In fact, the evidence reveals that the "US 2000 is sort of a medium battery as opposed to a premium battery, in terms of capacity and performance." (Qureshi, Tr. 2029). Premium batteries make up at least 80% of U.S. Battery's deep-cycle business, and U.S. Battery does not use Daramic HD separators in its premium batteries. (Wallace, Tr. 1967). Furthermore, it is CellForce not FLEX-SIL which U.S. Battery considered as an alternative to using HD in US 2000. (Qureshi, Tr. 2038).

391. U.S. Battery sells deep-cycle flooded batteries containing Daramic's HD separators to manufacturers of scissor lifts and boom lifts, including JLG Industries and Skyjack. (Wallace, Tr. 1934-1935).

Response to Finding No. 391:

Complaint Counsel's finding number 391 is misleading. Complaint Counsel attempts to suggest that HD is qualified for use in original equipment end-use applications. However, contrary to the suggestions of Complaint Counsel, Daramic HD has not been qualified by U.S. Battery for deep cycle batteries that are used in original equipment end-use applications. (McDonald, Tr. 3822; Roe, Tr. 1762). While U.S. Battery stated that have sold batteries containing HD to companies who manufacture original equipment (i.e. JGL Industries and Skyjack), there is evidence that HD has not qualified for original equipment end-use applications

suggesting that the batteries containing HD are purchased by original equipment manufacturers for replacement purposes. (Wallace, Tr. 1934-35).

392. Daramic felt that it was within its discretion, when and how much of US battery's deep-cycle business it wanted to win away from MPLP. (PX0557 at 002, *in camera* ({
})).

Response to Finding No. 392:

Complaint Counsel's finding number 392 is misleading and irrelevant. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" state of competition do not indicate the state of competition years later. Complaint Counsel lifted the quote above from a document written on November 5, 2005. (PX0557 at 002). Daramic has since discovered that HD is not competitive with FLEX-SIL, and U.S. Battery has never switched from FLEX-SIL® to Daramic HD in a golf cart battery. (McDonald, Tr. 3945-46, 3956-58).

393. {

}. (PX0261, *in camera*). In this proposal,
Daramic encouraged Exide to {
} (PX0261 at
002, 007, *in camera*). Daramic believed that Exide {
}. (Roe, Tr. 1789, *in camera*).

Response to Finding No. 393:

Complaint Counsel's finding number 393 is misleading. While Daramic put this offer on the table, Exide's past sourcing decisions gave Daramic little hope of securing significant volumes from Exide for golf cart applications. Specifically, Daramic's current supply agreement with Exide requires {

} per year. (RX00976, *in camera*, RX00968, *in camera*, RX01517, *in camera*). If Exide fails to {

} (RX00968, *in camera*; RX01517, *in camera*). In 2008, the purchase of HD separators (instead of FLEX-SIL®) generated a credit of about { } for Exide. This means that the HD separators { } percent less expensive than the price it paid for FLEX-SIL® during that time. (RX01119, *in camera*; RX00945, *in camera*). Despite the fact that HD is “considerably” lower in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much Flex-Sil as it did HD. (Gillespie, Tr. 3092). {

} (RX00677, *in camera*; PX0949, *in camera*) This difference is considerably more than a SSNIP 5-10% price difference between Flex-Sil and HD.

394. Daramic’s December 2007 HD sales pitch to Exide hit its mark, and the following month, Mr. Roe informed Daramic’s management that Exide was interested in { } (PX0222 at 001, *in camera*).

Response to Finding No. 394:

Complaint Counsel’s finding number 394 is misleading. For its response to Complaint Counsels finding, Respondent incorporates by reference Finding No. 393. Furthermore, Exide has conceded that FLEX-SIL® is a different type of product, with different consistency, and requiring different machines than Daramic’s HD product or Microporous’ CellForce product. (Gillespie, Tr. 2935-36). Exide also admits that its purchase of FLEX-SIL® separators for its golf cart batteries is not due to price. (Gillespie Tr. 3092).

c. HD Constrained Pricing of MPLP

395.

{ } (Simpson, Tr. 3193, *in camera*). { } (Simpson, Tr. 3193, *in camera*).

Response to Finding No. 395:

Complaint Counsel's finding number 395 is irrelevant as Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, the evidence shows that Simpson's deep cycle product market is flawed in that it fails to account for the use of PE only separators by battery manufacturers.

- a. { } (Simpson, Tr. 3308, *in camera*).
 - b. { } (Simpson, Tr. 3309, *in camera*).
 - c. East Penn's witness testified that East Penn uses straight PE separators in some of its deep cycle batteries. (Leister Tr. at 3978-80).
 - d. { } (Simpson, Tr. 3310-11, *in camera*).
- { }
(Seibert, Tr. 4194-95, *in camera*). { }

(Seibert, Tr. 4194-95, *in camera*). {

} (Seibert, Tr. 4194-95, *in camera*).

396. Prior to the acquisition, as a result of competition between Microporous and Daramic, customers buying deep-cycle separators had some leverage in pricing negotiations with separator suppliers. Daramic's HD separator had been making inroads into the deep-cycle golf car market prior to the merger. (McDonald, Tr. 3943-3945). HD sales had been growing among MPLP golf car customers. (McDonald, Tr. 3945). Due to the threat of HD's emerging presence in the deep-cycle market, MPLP lowered prices on its Flex-Sil separator attempting to protect market share. (McDonald, Tr. 3943). Trojan, Exide and US Battery all used HD as a competitive threat to Microporous' deep-cycle battery separators. (Gilchrist, Tr. 379-380, 406).

Response to Finding No. 396:

Complaint Counsel's finding number 396 is misleading. First, the evidence clearly shows that the only "inroads" HD was making in Complaint Counsel's so-called "deep cycle market" was in low-end batteries for aftermarket end-uses and even that was limited.

(McDonald, Tr. 3946). Furthermore, the evidence shows that Microporous never gained incremental volume by lowering its price on its FLEX-SIL product. (McDonald, Tr. 3943).

Finally, Mr. Gilchrist testimony that customers used HD as a “competitive threat” should be disregarded by the Court due to Mr. Gilchrist lack of credibility and understanding of the competitive landscape of the market. For instance, IGP Board members had multiple discussions with Gilchrist “disagreeing with his general assessment of the competitive landscape of the market.” (RFOF 402; PX2301 (Heglie, Dep. p. 91)). IGP’s Board members also questioned the credibility of Gilchrist because they “would hear one thing one day, and a different thing the next day.” (RFOF 402; PX2301 (Heglie, Dep. 164)). Mr. Heglie also noted that “Mike [Gilchrist] frequently blew comments out of proportion” (RFOF 402; PX2300 (Heglie, IHT 84)).

397. In 2005 the possibility that US Battery could also retaliate against an effective price increase by purchasing HD prevented MPLP from removing a material rebate program US Battery enjoyed. (PX0509; McDonald, Tr. 3912).

Response to Finding No. 397:

Complaint Counsel’s finding number 397 is misleading. Microporous only saw Daramic’s HD product as a substitution for FLEX-SIL in “low end products.” (McDonald, Tr. 3912). U.S. Battery did, however, develop a new low-end battery in which they use HD. (McDonald, Tr. 3913). U.S. Battery has never switched from FLEX-SIL® to Daramic HD in a golf cart battery. (McDonald, Tr. 3945-46, 3956-58).

398. On no less than three occasions between 2006 and 2007, Exide used HD to successfully constrain the price of Flex-Sil. (Gillespie, Tr. 2945-2953). Exide benefitted from the competition between Daramic and MPLP for the sale of deep-cycle battery separators. (Gillespie, Tr. 2945-2946). With both HD and Flex-Sil qualified for use in deep-cycle batteries, Exide had some added leverage in negotiations with both Daramic and MPLP. (Gillespie, Tr. 2945-2946). Having two potential suppliers of deep-cycle separators mitigated Exide’s risk and exposure in the supply chain, by mitigating the risk of sole-sourcing and by providing a backup source of supply in case of disruption of supply capability. (Gillespie, Tr. 2945). Additionally, the knowledge that both Daramic and MPLP wanted Exide’s deep-cycle business provided Exide with leverage in negotiations. (Gillespie, Tr. 2946).

Response to Finding No. 398:

Complaint Counsel's finding number 398 is misleading and inaccurate. The facts show that Exide pricing "leverage" stemmed not from the threat of Daramic's HD product but from the Exide's promise of a future long-term contract to supply SLI separators. In March 2006, Exide had determined that the "[p]rices and [t]erms currently offered by Amerace are uncompetitive" and that Microporous had an "arrogant attitude" and "take it or leave it" approach. (RX00314). Prior to talks of long-term supply agreements, Microporous did not appear to be threatened by Exide's so-called "leverage" with Daramic's HD product.

{

} (Gillespie, Tr. 3041, *in*

camera, 3085-86). And when negotiations over a long-term supply agreement began to deteriorate in late-2007, Exide began to lose its "leverage" with respect to pricing on Microporous separators. {

} (Gillespie, Tr. 3120-21, *in camera*;

PX1097, *in camera*; RX00652; RX00263, *in camera*; RX00661, *in camera*). The only option provided to Exide for avoiding the Microporous price increases prior to the Acquisition was to provide to Microporous "An updated MOU by Feb 14!! . . . A redline of the original contract proposal by Feb 14th . . . A commitment (contract) ready at the meeting on the 27 granting Microporous a minimum of 3,000,000 square meters of industrial motive power business in Europe to start no later than April 1, 2008." (RX01033).

Furthermore, the evidence proves that FLEX-SIL® and HD are not economic substitutes for each other. (RFOF 544-550). For example, despite the fact that HD is "considerably" lower

in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much FLEX-SIL® as it did HD. (Gillespie, Tr. 3092). {

} (RX00677, *in camera*; PX0949, *in camera*) This difference is considerably more than a SSNIP 5-10% price difference between FLEX-SIL® and HD. Exide also admits that its purchase of FLEX-SIL® separators for its golf cart batteries is not due to price. (Gillespie Tr. 3092).

Finally, the evidence raises questions of credibility about Exide’s intent and Gillespie’s testimony in this proceeding (RFOF 550, 601), and Gillespie’s testimony on this issue should be disregarded.

399. In 2006, Exide used HD as leverage in negotiations with MPLP to get better pricing and payment terms from MPLP. (Gillespie, Tr. 2946-2950). In March 2006, MPLP informed Exide that it was raising prices on the Flex-Sil separators and decreasing Exide’s payment terms. (PX1059 at 001; PX0636 at 002). At that time, Exide told MPLP that “we will begin to explore other opportunities to obtain golf cart separators.” (PX1059 at 001). One day later, Gordon Ush, Exide’s CEO informed Mr. Gilchrist that MPLP’s pricing action were “forcing us to run quicker to alternate supply”. (PX0636 at 001). Mr. Gillespie personally told Mr. Gilchrist that Exide had qualified HD and would move the majority (and possibly all) of the deep-cycle purchases to Daramic in response to MPLP’s pricing actions. (Gillespie, Tr. 2946-2948).

Response to Finding No. 399:

Complaint Counsel’s finding number 399 is misleading and inaccurate. For its response to Complaint Counsel’s finding, Respondent incorporates by reference its response to Finding No. 398.

400. Within two weeks time, Daramic became aware that Exide had threatened to move from Flex-Sil to HD. (PX1710 at 001). On March 17, 2006, Mr. Hauswald informed Mr. Toth that MPLP “found out that we are taking their market share with our Daramic HD, for the golf cart business.” (PX1710 at 001).

Response to Finding No. 400:

Complaint Counsel’s finding number. 400 is misleading. The facts show that any hopes Daramic had in “taking market share” from Microporous were slim despite the significant costs

savings HD provided to Exide. This was because HD and FLEX-SIL were not competitive products. First, Exide admitted that HD is not qualified for OEM use – meaning that no matter what the price, HD cannot be used in those types of batteries. (Gillespie, Tr. 3091; RX1094). Additionally, using HD saves Exide “a lot of money” and, in an analysis of pricing between HD and Flex-Sil, HD was “considerably” lower in cost. (Gillespie, Tr. 2944, 2947, 2996). Despite the fact that HD is “considerably” lower in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much Flex-Sil as it did HD. (Gillespie, Tr. 3092). {

} (RX00677, *in camera*;

PX0949, *in camera*) This difference is considerably more than a SSNIP 5-10% price difference between Flex-Sil and HD.

401. Eventually, Exide and MPLP came to an agreement on the pricing of Flex-Sil, with Exide receiving more favorable pricing terms and obtaining pricing concessions from MPLP. (Gillespie, Tr. 2949; *see also* PX0635 (April 2006 email from Mr. Gilchrist to Mr. Ullsh noting “we are anxious to return our relationship with Exide to a more cooperative realm. And as such [...] I am extending our terms to Exide to 50 days.”)).

Response to Finding No. 401:

Complaint Counsel’s finding number 401 is misleading. Despite these minor pricing concessions from Microporous in 2006, Daramic HD remained considerably more expensive than FLEX-SIL. For example, any HD separators { } percent less expensive than the price it paid for FLEX-SIL® during that time. (RX01119, *in camera*; RX00945, *in camera*). Furthermore, Mr. Gillespie admitted that using HD saves Exide “a lot of money” and, in an analysis of pricing between HD and FLEX-SIL®, HD was “considerably” lower in cost. (Gillespie, Tr. 2944, 2947, 2996). If HD were truly competitive with FLEX-SIL as Complaint Counsel alleges, Exide would like switch all of its volume to HD and no minor pricing concession from Microporous would have been sufficient to justify the

additional expense. {

} (RX00677, *in camera*; PX0949, *in*

camera).

402. Exide believes that in this instance the only reason that they “were able to negotiate or have this leverage” to obtain lower prices and better pricing terms from MPLP was because it had HD as a “viable option.” (Gillespie, Tr. 2949-2950).

Response to Finding No. 402:

Complaint Counsel’s finding number 402 is misleading and inaccurate. The facts show that the only “leverage” Exide had with respect to Microporous’ pricing was the promise if a long term supply agreement to drive their expansion plans. For its further response to Complaint Counsel’s finding, Respondent incorporates by reference its response to Finding No. 398.

403. In 2007, Exide used HD as leverage with MPLP to fight off a rubber surcharge on Flex-Sil separators. (Gillespie, Tr. 2950-2953; Gilchrist, Tr. 377-379). In 2007, MPLP sought to impose on Exide a rubber surcharge on the price of Flex-Sil separators. (Gillespie, Tr. 2950-2951; Gilchrist, Tr. 375-376). Prior to Daramic’s acquisition of MPLP, Exide refused to pay the rubber surcharge to MPLP because Exide had HD as a “viable alternative to switch the business” and informed MPLP that “if you levy the surcharge, you’re going to lose that business.” (Gillespie, Tr. 2951-2953).

Response to Finding No. 403:

Complaint Counsel’s finding number 403 is misleading and inaccurate. The facts show that the only “leverage” Exide had with respect to Microporous’ pricing was the promise if a long term supply agreement to drive their expansion plans. For its further response to Complaint Counsel’s finding, Respondent incorporates by reference its response to Finding No. 398.

404. Also in 2007, Exide used HD as leverage to fight off a price increase on Flex-Sil separators. (Gillespie, Tr. 2953). At that time, MPLP attempted to impose a base price increase on the Flex-Sil separators being sold to Exide. Exide refused to pay this price increase because at that time it had the ability to threaten to move its deep-cycle business to Daramic. (Gillespie, Tr. 2953; *see also* PX1097, *in camera* (February 05, 2008 email from Exide to MPLP regarding {

}).

Response to Finding No. 404:

Complaint Counsel's finding number. 404 is misleading and inaccurate. The facts show that the only "leverage" Exide had with respect to Microporous' pricing was the promise if a long term supply agreement to drive their expansion plans. For its further response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding No. 398.

405. Exide experienced price decreases or no price increases from MPLP due to competition from HD. (Gillespie, Tr. 2947-2953).

Response to Finding No. 405:

Complaint Counsel's finding number 405 is misleading and inaccurate. The facts show that the only "leverage" Exide had with respect to Microporous' pricing was the promise if a long term supply agreement to drive their expansion plans. For its further response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding No. 398.

406. Trojan also used the threat of switching to Daramic's HD as leverage in pricing negotiations with Microporous. (Gilchrist, Tr. 371-372, 379; PX1663).

Response to Finding No. 406:

In Complaint Counsel's finding number 406 and in finding numbers 407-433, Complaint Counsel contends that the existence of Daramic's HD product resulted in price reductions or breaks from Microporous for various customers prior to the acquisition. These proposed findings are inaccurate and misleading. Complaint Counsel has ignored the evidence that confirms that Daramic HD was not a "competitive threat" to Microporous' CellForce or Flex-Sil. Daramic HD was introduced in the spring 2005 at about the time of the BCI conference. (Godber, Tr. 178). A year later, Roger Berger wrote an email to Mike Gilchrist, Steve McDonald and Rick Wemberly at Microporous putting into perspective the status of Daramic HD:

At this point in time, I do not believe that Daramic HD is a threat to our business. I believe this to be true in both the deep cycle battery segment as well as motive power

Exide – John Bayer told me on two occasions that he hasn't seen anything in his testing that would indicate that HD is a threat to Flex-Sil

Trojan, we have been told that initial HD testing was not great, saying that batteries failed at about 300 cycles

...

...

If Daramic HD was a threat to our business, either Flex-Sil for deep cycle or CellForce for motive power, I believe we would have heard more about it by now

(RX 00780, Email dated March 3, 2006).

Moreover, Steve McDonald, the Vice President for Sales of Microporous, confirmed in his testimony that HD was not a competitive threat: (1) “[Trojan] shared with me that the HD product did not meet the cycle requirements that they have for their customers, that it was an inferior product to the Flex-Sil.” (McDonald, Tr. 3817); (2) that HD was not “any threat to [Microporous’] products” (McDonald, Tr. 3818); and (3) that HD was not a threat “to our business in either the deep cycle or the CellForce motive power market.” (McDonald, Tr. 3820).

McDonald further testified that Exide was the only customer who bought any HD and that Exide did it so “that they would receive a rebate against other products that they would purchase, so it was an incentive to change some of their Flex-Sil.” (McDonald, Tr. 3821).

Complaint Counsel's finding number 406 is misleading and inaccurate. Gilchrist did not testify as clearly as Complaint Counsel suggests. While Gilchrist testified that HD was positioned “as a potential competitive product to our supply” (Gilchrist, Tr. 372, *emphasis added*), he was very general in his testimony and repeatedly underscored his bias against Daramic and his questionable credibility. (RFOF 748-57). If HD was a “threat” in discussions with Microporous, it was not a real threat in that both Trojan and Microporous knew that HD's performance was less than CellForce and substantially less than Flex-Sil. (RFOF 747).

Moreover, Trojan had only qualified HD for a low-level aftermarket off-brand product. (RFOF 745-46). Finally, any alleged threat with respect to HD was inconsistent with the fact that Trojan was under a long-term contract with Microporous and Trojan's purchases of CellForce were on average less than 6% of its total purchases from Microporous. HD was not a replacement for Flex-Sil, and if CellForce was 6% or less of Trojan's purchases, the "threat" had no "leverage." (RFOF 748, 751).

407. Trojan used { } with MPLP. (Godber, Tr. 258, *in camera*). Likewise, Mr. Gilchrist testified that Trojan would bring up HD "every time there was us instigating the need for a price increase." (Gilchrist, Tr. 406).

Response to Finding No. 407:

Complaint Counsel's finding number 407 is inaccurate and misleading. Underscoring his vagueness and lack of credibility, Gilchrist testified that, over three years, he remembered that HD had come up "at least three times." (Gilchrist, Tr. 406, *emphasis added*). Gilchrist and Godber are not credible support for this finding. (RFOF 401-405, 409). Respondent incorporates its response to proposed finding number 406 into this response.

408. Trojan met with Daramic in February 2005 to discuss the fact that Daramic was going to introduce the HD product at the BCI convention in April, and that test results showed the product would do as well as Flex-Sil. (Godber, Tr. 178). At the time, Trojan was concerned with Microporous's capacity to supply it with separators and was also interested in learning if the HD product had some pricing advantage. (Godber, Tr. 182-183).

Response to Finding No. 408:

Respondent has no specific response to Complaint Counsel's finding number 408. Respondent incorporates its response to proposed finding number 406 into this response.

409. Trojan discussed the potential of using the Daramic HD separator at an internal meeting on February 21, 2005 because of its "[n]eed for a second source to ensure supply and competitive pricing." (PX 1651; Godber Tr. 183-184). After February 2005, Daramic's potential ability to offer a competitive product became a platform for discussions with Microporous regarding price reductions and capacity. (Godber, Tr. 183-184; *see also* PX0429 (email from Rick Godber to Mike Gilchrist: "We now understand that Daramic May have a separator that can compete in performance, and may have cost advantages to Flex-Sil and CellForce.")).

Response to Finding No. 409:

Complaint Counsel's finding number 409 is inaccurate and misleading. First, Complaint Counsel's proposed finding is based on events in February 2005, at a time which Trojan had done no testing of HD (RFOF 745) and the product was just being introduced into the marketplace. Second, Trojan's testing of HD showed CellForce outperformed it by 10-15% and Flex-Sil outperformed its own CellForce by 15-20%. Accordingly, it is illogical that Trojan would have used an inferior product as a "platform" for lowering pricing. (RFOF 745-53). Respondent incorporates its response to proposed finding number 406 into this response.

410. At the 2005 BCI convention, Daramic made a presentation about the HD product, which left people very excited that Daramic had a product that could match Flex-Sil performance. (Godber, Tr. 187-188; *see also* PX1653 (email from Trojan's technical director stating: "Daramic's technical presentation at BCI was well received by the people I talked to. . . . Their [Daramic's] presentation will generate additional interest in HD separators which will make it a common separator for deep-cycle applications in time.). Trojan received samples of and pricing for the HD separator in May 2005. (Godber, Tr. 188). The pricing on the HD separator was, depending on the product line, 10 to 28 percent below what Trojan was currently paying Microporous for Flex-Sil. (Godber, Tr. 188).

Response to Finding No. 410:

Complaint Counsel's finding number 410 is inaccurate and misleading. As stated in response to finding number 409, no testing had taken place at this time. Moreover, as set forth in finding 410, this was a "presentation." Additionally, Trojan's CEO testified that he shared testing results with Microporous, which, if he truly did that, there was no opportunity for leverage in that HD's performance as shown by Trojan's testing was inferior to that of CellForce. Respondent incorporates its response to proposed finding number 406 into this response.

411. Trojan tested Daramic's HD separator and approved it in its Pacer line of golf cart batteries. (Godber, Tr. 171). Today, CellForce, Daramic HD, and Flex-Sil are qualified for use in Trojan's Pacer batteries. (Godber, Tr. 172).

Response to Finding No. 411:

Complaint Counsel's finding number 411 is misleading in that Trojan's "Pacer line of golf cart batteries" is low-end after market. (RFOF 745). Accordingly, HD's qualification for use in Trojan's Pacer batteries is indeed a very narrow and limited qualification. Complaint Counsel's effort to suggest more widespread approval and qualification is without support. In fact, Trojan had never tried to qualify CellForce for use in OEM applications until late 2008 – well after the acquisition. (Godber, Tr. 277-78). Respondent incorporates its response to proposed finding number 406 into this response.

412. Trojan was able to get Microporous to provide cost reductions based on Trojan threatening to test and switch to Daramic's HD separator. (Godber, Tr. 190-191; *see also* PX1655 at 001 (email from Trojan to Microporous stating: "[HD] appears to be a fairly immediate replacement for CellForce at a substantial lower cost. Longer term it may work as a Flex-Sil replacement in our products.")). The cost savings were around \$200,000 to \$300,000, which represents two percent of Trojan's spend with Microporous at that time. (Godber, Tr. 191-192; PX1659 ("total savings to Trojan will be about \$350,000."); 1657 at 001 "As you can see, based on the volumes you gave us there is a potential annual savings of over \$288,000.").

Response to Finding No. 412:

Complaint Counsel's finding number 412 is misleading. The context of Mr. Godber's testimony is that the savings were attributable to redesign and reengineering by Microporous – not price concessions. (Godber, Tr. 282-83). Furthermore, Godber is not a credible witness. (RFOF 749-56). Respondent incorporates its response to proposed finding number 406 into this response.

413. Prior to the introduction of HD separators by Daramic, Microporous did not respond positively to Trojan's request for price reductions. (Godber, Tr. 199). After the introduction of the Daramic HD separator, however, Microporous told Trojan that it was going to work with Trojan to reduce its costs to alleviate the need for Trojan to start using HD separators. (Godber, Tr. 199-200). Mr. Godber, Trojan's CEO testified that Daramic HD was mentioned by both him and Microporous's CEO, Mike Gilchrist, during their discussions relating to Microporous's price reductions. (Godber, Tr. 200).

Response to Finding No. 413:

Complaint Counsel's finding number 413 is misleading and inaccurate – there were no price reductions. Instead, savings attributable to redesign and reengineering by Microporous

were obtained. (RFOF 412). Respondent incorporates its response to proposed finding number 406 into this response.

414. Mr. Godber testified he does not recall any instance where Trojan successfully used any product other than HD as leverage in price negotiations with Microporous. (Godber, Tr. 223).

Response to Finding No. 414:

In response to Complaint Counsel's finding number 414, and as stated above, Godber's credibility is questionable. Respondent incorporates its response to proposed finding number 406 into this response.

415. During the 2005 discussions with Microporous regarding cost reduction related to the threat of switching to Daramic HD, Trojan also was trying to accelerate its ability to use more CellForce since it was less expensive than Flex-Sil. (Godber, Tr. 191). At the time, Trojan was not able to get all the CellForce that it wanted from Microporous because there was limited capacity and a large demand from the motive market. (Godber, Tr. 195).

Response to Finding No. 415:

Respondent has no specific response to Complaint Counsel's finding number 415. Respondent incorporates its response to proposed finding number 406 into this response.

416. From 2005 to the time of the acquisition, Trojan continually used the threat of buying Daramic HD to get lower prices from Microporous. (Godber, Tr. 200-215). In October 2005, Trojan used the threat of moving business to HD as leverage against Microporous to negotiate down a proposed energy charge from 5.5 percent to 3.75 percent. (Godber, Tr. 200-201).

Response to Finding No. 416:

Complaint Counsel's finding number 416 is inaccurate and misleading. As of October 2005, Trojan had not completed any testing of HD. (RFOF 745). In addition, Trojan and Microporous were in a long-term contract or relationship that went all the way back to the mid-1980s. These facts, and Godber's doubtful credibility, undercut this proposed finding of fact. Respondent incorporates its response to proposed finding number 406 into this response.

417. In early 2006, Microporous attempted to increase the prices it charged Trojan by around 6.5 percent for Flex-Sil and by 4.5 percent for CellForce. (Godber, Tr. 202). Trojan did

not accept the price increases. (Godber, Tr. 202). Mr. Godber testified that in his negotiations with Microporous, Trojan used the only ammunition it had -- the threat of switching to HD separators -- to reduce the amount of the price increase down to 4.5 percent across the board for all Microporous separators. (Godber, Tr. 202). At the time Trojan was negotiating the price increase, Mr. Gilchrist stated: "We must put the specter of Daramic's [HD] product totally behind us." (PX1660 at 004; Godber, Tr. 203-204).

Response to Finding No. 417:

Complaint Counsel's finding number 417 is inaccurate and misleading. The proposed finding is inconsistent with the testimony of Steve McDonald and the email Roger Berger wrote on May 6, 2006. Respondent incorporates its response to proposed finding number 406 into this response.

418. During 2007 pricing negotiations, {
}. (Gilchrist, Tr. 371-372, 379, 468, *in camera*, 535, 609-610; PX1789 at 041, *in camera*).

Response to Finding No. 418:

Complaint Counsel's finding number 418 is inaccurate and misleading. The testimony from Gilchrist that is cited does not support the contention that Trojan threatened Microporous to switch to HD separators for its deep cycle batteries during 2007 pricing negotiations. In fact, one of the cited pages of Gilchrist's testimony affirms that Trojan was "the only deep cycle customer that we had that didn't purchase any HD." (Gilchrist, Tr. 535). The other Gilchrist references are again Gilchrist's general statements which, as stated previously, are unreliable. Further, PX1789 does not support this contention. {

} (PX1789 at 041, *in camera*). Thus, PX1789 is an unsubstantiated, untestified to, handwritten note which, even on its face, only references a possibility ("might"). Respondent incorporates its response to proposed finding number 406 into this response.

419. In August 2007, Microporous once again proposed a price increase to Trojan on its Flex-Sil and CellForce products of 6.5 and 4.5 to 5 percent, respectively. (Godber, Tr. 204).

The price increases covered separators that went into Trojan's OE and aftermarket golf batteries. (Godber, Tr. 293-295). The August 2007 price increase led to heated discussions in which Trojan told Microporous "[y]ou're forcing us to again now go look at an alternative like Daramic HD, which was the only alternative." (Godber, Tr. 204-205; *see also* PX0428 at 004, *in camera* ("appears to be a perception we have no options. . . . I felt they [IGP] needed to understand there are alternatives.")). A Trojan internal email exchange confirms that Trojan was contemplating HD as an alternative on some of its product lines and was also contemplating giving up the exclusive separator design that Microporous provided Trojan in return for its sole source commitment. (Godber, Tr. 206-207; PX1663).

Response to Finding No. 419:

Complaint Counsel's finding number 419 is inaccurate and misleading. Godber's testimony is not credible. The documents cited in support are general references to "alternatives." Moreover, those documents, particularly PX1663, confirm that Trojan was not making a serious threat, if any threat at all, because the documents are clear that if there is any consideration of an alternative, it is with respect to the "low end" ("keep the low end . . . market it open to other alternatives, while continuing premium product with Amerace"). (PX1663). PX1663 and its wording confirm Respondent's responses stated above: Any conversations about HD were at the low end, which is the 6% or less of Trojan's buying – not a formidable threat. Moreover, PX1663 confirms that Trojan would continue buying "premium product" from Microporous, i.e., Flex-Sil, which was, on average, 94% of its purchases, and which Gilchrist himself described as the industry standard. (Gilchrist, Tr. 535). Respondent incorporates its response to proposed finding number 406 into this response.

420. {

} (Godber, Tr. 214-215; PX1664, *in camera*). By accepting these price increases, Trojan and Microporous agreed that there would be no further price increases available to Microporous on December 1, 2008. (Godber, Tr. 214-215). Thus, the next price increase to { } could not occur until { }. (Godber, Tr. 235, *in camera*). Mr. Godber testified that { } and I agreed" that

{ } would be allowed no further price increases over and above the signed { }.
(Godber, Tr. 214-215; 235, *in camera*; PX1664, *in camera*).

Response to Finding No. 420:

Complaint Counsel's finding number 420 is inaccurate and misleading. The citations set forth in finding 420 do not support the statement that "Trojan's use of HD as competitive threat to Microporous effectively constrained Microporous' across the board price increases" (PX1664). Instead, the references cited only indicate that after negotiations, certain agreements were reached, with Godber's particular spin on those negotiations. In fact, Godber's testimony at page 235 indicates that Daramic had a very different interpretation of the events referenced in finding number 420. The tone of the negotiations between Microporous and Trojan is set forth in PX0428 previously cited by Complaint Counsel. Those exchanges confirm that Trojan was using its size and market power to negotiate price reductions as a power buyer. (RFOF 759-764). Respondent incorporates its response to proposed finding number 406 into this response.

421. {

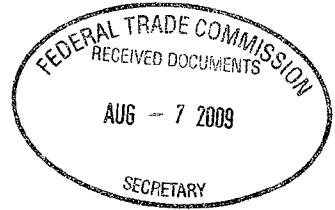
} (Gilchrist, Tr. 408-409; PX1664, *in camera*). {

} (Gilchrist, Tr. 410, 526, *in camera*).

Response to Finding No. 421:

Complaint Counsel's finding number 421 is inaccurate and misleading. With respect to "Trojan's threat to switch to HD separators," Respondent incorporates by reference its responses to the preceding paragraphs concerning Trojan. Gilchrist's testimony is unreliable and is illogical in the face of documents such as PX1663 and the fact that 94% of Trojan's purchases were for Flex-Sil. Moreover, as stated above, the only Trojan product for which HD had been approved, which was back in the spring 2006 and for which no purchases of HD had ever been made, was the Pacer battery, a low-end, after-market battery. (RFOF 745). Respondent incorporates its response to proposed finding number 406 into this response.

ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

Docket No. 9327

PUBLIC

**RESPONDENT'S RESPONSES TO COMPLAINT COUNSEL'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

VOLUME II of III

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422. {
}. (PX0950 at 14-16, *in camera*).

Response to Finding No. 422:

Respondent has no specific response to Complaint Counsel's finding number 422.

Respondent incorporates its response to proposed finding number 406 into this response.

423. {
}. (PX0950 at 14-16, *in camera*).

Response to Finding No. 423:

Respondent has no specific response to Complaint Counsel's finding number 423.

Respondent incorporates its response to proposed finding number 406 into this response.

424. {
}. (PX0950 at 14-16, *in camera*).

Response to Finding No. 424:

Respondent has no specific response to Complaint Counsel's finding number 424.

Respondent incorporates its response to proposed finding number 406 into this response.

d. MPLP Responded to HD with CellForce

425. When MPLP began to recognize the HD threat, Mr. McDonald and his sales force began to offer CellForce at a cost savings as a means of combating the lower cost Daramic deep-cycle separator. (McDonald, Tr. 3949).

Response to Finding No. 425:

Complaint Counsel's finding number 425 is misleading because it is incomplete. Mr. McDonald testified that Microporous offered CellForce to Exide for costs savings. (McDonald, Tr. 3949). McDonald did not say that they offered CellForce generally for cost savings to combat "the lower cost Daramic deep cycle separator." Moreover, Exide was purchasing HD by virtue of the economic fact that it got an additional credit from Daramic for purchasing HD. (RFOF 535, 545-49). Respondent incorporates its response to proposed finding number 406 into this response.

426. In response to the competition from Daramic's HD separator, Microporous developed the CellForce separator and offered to sell it to U.S. Battery. (Wallace, Tr. 1952-1953). Prior to US Battery's use of HD Microporous had not offered it CellForce for deep-cycle application. (Wallace, Tr. 1953).

Response to Finding No. 426:

Complaint Counsel's finding number 426 is misleading. Microporous did not develop the CellForce separator in response to competition from Daramic's HD separator. CellForce's development started in 1999 and was completed well before the introduction of HD in 2005. (CCFOF 276). Other testimony from a US Battery employee about Microporous' reasons for offering CellForce are speculation and hearsay and should not be accepted. Respondent incorporates its response to proposed finding number 406 into this response.

427. U.S. Battery approved the purchase of CellForce and planned to purchase this new brand of separators from Microporous. (Wallace, Tr. 1977).

Response to Finding No. 427:

Respondent has no specific response to Complaint Counsel's finding number 427.

Respondent incorporates its response to proposed finding number 406 into this response.

428. Trojan has determined that 25 percent of its deep-cycle batteries could use CellForce instead of Flex-Sil. (Godber, Tr. 173). The same 25 percent of Trojan's batteries that could use CellForce, also could use Daramic HD instead of Flex-Sil. (Godber, Tr. 173).

Response to Finding No. 428:

Respondent has no specific response to Complaint Counsel's finding number 428.

Respondent incorporates its response to proposed finding number 406 into this response.

429. Currently, 16 percent of Trojan's deep-cycle batteries contain CellForce. (Godber, Tr. 176). The percentage of Trojan's batteries using CellForce was expected to grow to 21 percent prior to Daramic's acquisition of Microporous. (Godber, Tr. 176). Microporous expected to satisfy Trojan's demand for CellForce through its Austrian expansion. Microporous informed Trojan that "once we get this [the Austrian expansion] up and going, we has some more CellForce that will be available in the states. (Godber, Tr. 224).

Response to Finding No. 429:

Complaint Counsel's finding number 429 is misleading and based on hearsay and as such does not support the proposed finding. Respondent incorporates its response to proposed finding number 406 into this response.

430. Trojan wanted to expand its use of CellForce to get a cost savings because CellForce was less expensive. (Godber, Tr. 225). Trojan had plans to move a considerable amount of its Flex-Sil batteries to CellForce when Microporous got its Austrian plant up and running in Spring 2008. (Godber, Tr. 226-227). The conversion to CellForce was delayed approximately 4 months once Daramic acquired Microporous, which resulted in Trojan paying approximately \$140,000 more for its separators than it had been expecting to. (Godber, Tr. 228-229).

Response to Finding No. 430:

Complaint Counsel's finding number 430 is misleading and incomplete. Testimony with respect to what Trojan proposed to do with respect to ordering CellForce is dubious in view of the attitude of Trojan as evidenced by its emails regarding cost increases as are set forth in PX0428. Moreover, Godber's testimony on which this finding of fact is based was elicited at trial for the first time and is from a person who was "wholeheartedly" in support of pursuing the matter before the FTC and whose testimony on its face has been purposely slanted against Daramic. (RFOF 756-63). There is no written documentation confirming Trojan's "plans." The so-called delay was the result of Daramic's strike at its Owensboro plant. (Godber, Tr. 228). Most significantly, Trojan's purchasing history as set forth in RFOF 744, indicates significant doubt about whether Trojan truly intended to move to CellForce as Godber testified. Respondent incorporates its response to proposed finding number 406 into this response.

e. Flex-Sil, HD and CellForce Compete for OEM Business

431. Microporous's CellForce separator competes with Daramic's HD separators used for deep-cycle battery applications. For example, Trojan purchased CellForce for some of its deep-cycle batteries. (Gilchrist, Tr. 360-361).

Response to Finding No. 431:

Complaint Counsel's finding number 431 is incomplete and is based on the testimony of Gilchrist, whose credibility is in substantial doubt. Trojan has never purchased one single HD

separator from Daramic. (Godber, Tr. 272). Trojan purchased minimum amounts of CellForce. (RFOF 744). What Gilchrist would have known about those uses is highly doubtful.

Respondent incorporates its response to proposed finding number 406 into this response.

432. Trojan has qualified CellForce for some OEM floor scrubber accounts. (Godber, Tr. 277). US Battery sells to a variety of customers including original equipment manufacturers like Skyjack and JLG Industries. Included in these sales to OEM customers are batteries containing HD separators. (Wallace, Tr. 1933-1935).

Response to Finding No. 432:

Respondent has no specific response to Complaint Counsel's finding number 432.

Respondent incorporates its response to proposed finding number 406 into this response.

433. { (PX1744 at 004, *in camera*). }

Response to Finding No. 433:

Complaint Counsel Finding No. 433 is incorrect. Further, Respondent incorporates its response to proposed finding number 406 into this response. {

} (PX1774-005, *in camera*). {

} (PX1774-05, *in camera*). {

} (PX1774-01, *in camera*).

B. The acquisition had anti-competitive effects in the deep-cycle market

1. An anticompetitive effect of the acquisition is Daramic's refusal to honor MPLP commitments to Trojan.

434. Just prior to Daramic's acquisition of Microporous, Trojan was in discussions with Microporous on a contract extension and had agreed to most major terms including contract length and the pricing formula. (Godber Tr. 215-217). The current contract between Microporous and Trojan was set to expire in 2010 and Trojan wanted to create a longer-term arrangement so that it would be protected in the event that Microporous was sold. (Godber, Tr. 215).

Response to Finding No. 434:

Complaint Counsel Finding No. 433 is incomplete. {

} (RFOF 756-761). At the

time of the acquisition, there was no finalized contract between the two sophisticated companies, and as such any terms were speculative. (Godber, Tr. 216).

435. After the acquisition Daramic stated to Trojan that it wanted to stand behind the commitments that Microporous had made to Trojan. (Godber Tr. 218-219). In a letter to Trojan's Rick Godber on March 31, 2008, about one month after the acquisition, Daramic's Pierre Hauswald wrote:

Mike [Gilchrist] has explained to me that just before Daramic acquired Microporous, you and he were very, very close to concluding a new supply contract between Trojan and MP that would have gone through 2019. We are prepared to stand behind the commitments MP made to you before this acquisition. So, if you are still interested, we just need to work out the very few details that were still open when you last discussed this topic with Mike, and then we could finalize the extension. . . . I just wanted you to know that we are still willing to honor the commitments MP made to you personally and to Trojan. (PX1666).

Response to Finding No. 435:

Complaint Counsel Finding No. 435 is incomplete. {

} (RFOF 756-761). In an

effort to reach out to customers who had been working with Microporous, Daramic contacted Trojan on March 31, 2008. In the letter, PX1666, Daramic stated their interest in discussing a long term contract with Trojan on April 9, 2008, when Trojan would be visiting their facilities. (PX1666). Because negotiations between Microporous and Trojan had been ongoing at the time of the acquisition, Daramic could not attempt to honor the non-existent agreement. Thus, Daramic stated that they were "prepared to stand behind the commitments" that had been discussed, but not agreed to, between Microporous and Trojan. (PX1666). Daramic understood that an agreement binding the two companies had yet occurred as they understood that Trojan

was free to move on to another supplier (PX1661, stating “On the other hand, if you don’t want to go in that direction (of a contract), that is ok too.”).

436. Notwithstanding Daramic’s pledge to “stand behind the commitments MP made” before the acquisition, {
} (Godber, Tr. 239, *in camera*). Those changes included the {

} (Godber, Tr. 239-240, *in camera*). None of these terms were in the draft contracts exchanged between Trojan and Microporous prior to the merger. (Godber, Tr. 240, *in camera*). {

} (Godber, Tr. 241, *in camera*).

Response to Finding No. 436:

Complaint Counsel Finding No. 436 is misleading and false. Respondent incorporates its reply to Finding No. 435. Daramic has worked to honored the short term pricing arrangement that was negotiated between Microporous and Trojan. (PX1664). That is separate and apart from the long term contract that is currently being negotiated. Daramic and Trojan are both sophisticated companies working out the terms of a long term supply agreement. {

} (Seibert, Tr. 4209, *in camera*; Godber, Tr. 246, *in camera*; Toth, Tr. 1542-1543).

Furthermore, Trojan has used aggressive tactics during it’s negotiations with Daramic in order to force an agreement between the two companies. (RFOF 760-61).

437. After the acquisition, Trojan was left with no alternatives to Daramic for deep-cycle separators. (Godber, Tr. 291).

Response to Finding No. 437:

Complaint Counsel Finding No. 437 is false. Prior to the acquisition Trojan, by choice, purchased almost all of their deep-cycle separators from Microporous, and only purchased percentage of deep cycle batteries from Daramic for their lower-end Pacer line. (Godber, Tr. 153, 271). In the years leading up to the acquisition, Trojan behaved as if they only had one

source for deep cycle as they only bought from Microporous. Since the acquisition nothing has changed as there is still only one supplier of Flex-Sil and CellForce, the only products that Trojan finds suitable for the majority of their batteries. (Godber, Tr. 153).

438. Microporous also notified Trojan of a {

} (Godber, Tr. 232-233, *in camera*). According to Mr. Godber, {

} (Godber, Tr. 235, *in camera*). Mr. Gilchrist confirmed this understanding in his testimony in this proceeding. (Gilchrist, Tr. 407-410). Mr. Godber was angry about the notice because of “the thought that they would be coming out with {

} (Godber, Tr. 232-233, *in camera*).

Response to Finding No. 438:

{

} (RFOF 756-761). {

} (Seibert, Tr. 4196, *in camera*). {

} (Seibert, Tr. 4196-4200, *in camera*). {

} (Seibert, Tr.

4200, *in camera*). {

} (Seibert, Tr. 4200, *in*

camera). {

} (PX2115, *in camera*; Seibert, Tr. 4205-08, *in camera*). {

} (PX2115, *in camera*;

Seibert, Tr. 4205-08, *in camera*). {

} (Seibert, Tr. 4209, *in camera*; Godber, Tr. 246, *in camera*;

Toth, Tr. 1542-1543.

439. {

} (Godber, Tr. 233, *in camera*). Trojan

{ (Godber, Tr. 234, *in camera*). { } (Godber, Tr. 234, *in camera*).

Response to Finding No. 439:

Complaint Counsel Finding No. 439 is misleading. Respondent incorporates its reply to Finding No. 438. During 2008, Daramic, and other business, experienced a tremendous increase in costs. (RX00542). { } (Seibert, Tr. 4194, *in camera*).

{ } (Seibert, Tr. 4200-4210, *in camera*; Seibert, Tr. 4209, *in camera*; Godber, Tr. 246, *in camera*; Toth, Tr. 1542-1543).

440. { } (Godber, Tr. 234, *in camera*). { } (PX0904 (Seibert, Dep. at 203, *in camera*)).

Response to Finding No. 440:

Complaint Counsel Finding No. 440 is incorrect. { } (RFOF 756-761). There is no evidence that Trojan requested any documentation regarding the price increase.

441. Notwithstanding the 2007 signed agreement between Trojan and Microporous regarding pricing, { } (Godber, Tr. 236-237, *in camera*). { } (Godber, Tr. 238, *in camera*). { } (Godber, Tr. 241, *in camera*).

Response to Finding No. 441:

Complaint Counsel Finding No. 441 is false and misleading. The short term price increase arrangement between Trojan and Microporous did not go beyond 2009. (PX1664). {

} (See Response to Finding No. 438).

As so many of the separator products available can be used in different applications, Trojan has the opportunity to use any number of different products in their batteries if they decide to move away from Daramic. (See Response to Finding No. 461). Furthermore, Trojan is not without potential suppliers. {

} (Godber, Tr. 278).

{ } (RX00150, *in camera*; RX00183, *in camera*). {

} (RX00061, *in camera*).

442. {

(Godber, Tr. 242-43, *in camera*). {

} Tr. 242, *in camera*).

Response to Finding No. 442:

Complaint Counsel's proposed finding 442 is disingenuous, irrelevant and misleading.

{

} (RFOF 742, 756). Mr. Godber concern is immaterial

to whether there is an anticompetitive effect of the merger, and clearly, with respect to Trojan, there is not. (RFOF 756-764). Additionally, the testimony Complaint Counsel cites should be in camera and is not.

443. {

camera). {
camera).

} (Godber, Tr. 247-248 *in*

} (Godber, Tr. 238, *in*

Response to Finding No. 443:

Complaint Counsel's proposed finding 443 is inaccurate, irrelevant and misleading.

{

} (Seibert,

Tr. 4209-4210, *in camera*). {

} (Seibert, Tr. 4210, *in camera*). {

} (Seibert, Tr. 4211, *in*

camera). {

} (Seibert, Tr. 4212, *in camera*).

In response to Trojan's continuing threats of a lawsuit, Daramic's CEO, in March 2009, initiated a telephone call to Trojan's CEO in response to Toth's request that he explained why there was this kind of disagreement that caused Trojan to threaten a lawsuit. Godber responded: "We need exclusivity and we need a long-term, secure supply position." (Toth, Tr. 1542-1543). Toth proceeded to give Trojan and Godber ideas about how the two companies could come together, to which Godber told Toth that he would have to call him back. (Toth, Tr. 1543-1544). Even after an additional message from Toth, however, Godber never returned the call. Instead, Daramic received another threat of a lawsuit, at which point Daramic decided to initiate a lawsuit in North Carolina in order to avoid suit in California. (Toth, Tr. 1544-1545). Even in his cross-examination, {

} (Godber, Tr. 250, *in camera*). Nonetheless,{

} (Godber, Tr. 251, *in camera*). Additionally, the testimony Complaint Counsel cites should be *in camera* and is not.

444. {
} (Gillespie, Tr. 3044-3045, 3132, *in camera*). After the
acquisition of MPLP, Daramic informed Exide that it {
}
(Gillespie, Tr. 3044, 3132-3133, *in camera*).

Response to Finding No. 444:

Complaint Counsel's proposed finding 444 is misleading and incomplete. Documents
and testimony make clear that {

} (RX00661, *in camera*). In fact, {

} (Respondent's Response to CCFOF
415, 562; RX01033). Further, Daramic actually reduced the price increases announced (and
clearly intended to be enforced) by Microporous {

} (Gillespie, Tr. 3120-21, *in camera*; PX1097, *in camera*;
RX00652; RX00263, *in camera*; RX00661, *in camera*).

445. {
(Gillespie, Tr. 3045, *in camera*). {
}
} (Gillespie, Tr. 3044-3046, 3121, 3132-3134, *in
camera*).

Response to Finding No. 445:

Complaint Counsel's proposed finding 445 is misleading and incomplete for the reasons
set forth in Respondent's Response to CCFOF 444 and documents, testimony and additional
paragraphs cited therein.

2. Daramic's post-acquisition strategy is to sell the higher priced Flex-Sil to deep-cycle customers that wanted a cheaper alternative

446. {

} (PX1740 at 001, *in camera*).

In a November 2007 Microporous Customer Contact Report to U.S. Battery, Microporous reported that U.S. Battery "was very comfortable with CellForce" and would decide if it would commit a certain volume once it received pricing. (PX1763 at 003). The report states that Microporous told U.S. Battery that it would have capacity available, but if U.S. Battery did not want to commit, Microporous needed to know so that it could sell the CellForce volume elsewhere. (PX1763 at 003).

Response to Finding No. 446:

Respondent has no specific response to this proposed finding.

447. On February 5, 2008, just three weeks before the acquisition, Microporous's North American Sales representative, Roger Berger, informed U.S. Battery's Mr. Qureshi that {

stated: { } (PX1741 at 004, *in camera*). Mr. Berger's email to Mr. Qureshi

Mr. Qureshi responded that { } (PX1741 at 004, *in camera*). The next day, { } (PX1741 at 003, *in camera*).

Response to Finding No. 447:

Respondent has not specific response to this proposed finding.

448. When US Battery approached Daramic for supply of its HD separator for a new battery it had been developing Mr. McDonald communicated to US Battery that Daramic did not have the appropriate tool to be able to produce an HD separator in the requested profile. (McDonald, Tr. 3823-3824). Neither could Daramic provide CellForce in the requested profile, again due to not having the proper tooling. (McDonald, Tr. 3823-3824). Instead, Mr. McDonald offered US Battery a Flex-Sil quotation. (McDonald, Tr. 3824).

Response to Finding No. 448:

Complaint Counsel's proposed finding 448 is incomplete and misleading. US Battery developed a "new" battery and assumed that Daramic would be able to provide HD separators for this battery despite the fact that Mr. Qureshi did not bother checking with Daramic first to ensure that it could be made. (Qureshi, Tr. 2093-94). As significant testimony at trial made clear, calender rolls, or "profile" tools, are vital to the production of a product in a specific

dimension and without such a tool a specific profile cannot be made. (RFOF 151-153). Furthermore, there was testimony that Daramic had significant difficulty running HD through its process for this U.S. Battery application. (Roe, Tr. 1312-1313; McDonald, Tr. 3823-24). It is disingenuous to suggest that a failure to have a tool “on hand” for a product that the manufacturer developed without input from Daramic, or Microporous, for a product that is admittedly difficult to run, is somehow unacceptable.

449. Notwithstanding Microporous’s willingness to sell U.S. Battery CellForce at a cost savings versus Flex-Sil, and notwithstanding U.S. Battery’s desire to use CellForce in its mid-level golf batteries premerger, Mr. Qureshi testified that the US 2000 battery currently is using Flex-Sil. (Qureshi, Tr. 2042). When asked why it is not using CellForce, Mr. Qureshi testified: “We were told that CellForce would not be available.” (Qureshi, Tr. 2042). Today, U.S. Battery continues to use the more expensive Flex-Sil in these mid-level batteries. (Qureshi, Tr. 2042).

Response to Finding No. 449:

Complaint Counsel’s proposed finding 449 is irrelevant and misleading. First, Mr. Qureshi also testified that US Battery intended to begin using HD in its 2000 level batteries, and, in fact, suggested that it was already doing so. (Qureshi, Tr. 2029). Second, there is no evidence regarding why CellForce may or may not be available, and, as noted above it is disingenuous to suggest that a failure to have a tool “on hand” for a product is somehow unacceptable. (Respondent’s Response to CCFOF 448). US Battery has had many years to switch its production from using Flex-Sil separators to HD or CellForce separators, and it is questionable and telling that it is only now, in this midst of this action, that it is complaining about not being able to do so, particularly when, through the date of trial, it purchased only 5% of its separators in the inferior HD product, and had never purchased any CellForce product. (Respondent’s Response to CCFOF 342, 377).

450. Since its acquisition of Microporous, the Daramic strategy {
001-002, *in camera*). { } (PX0617 at

} (PX0441 at 001-002, *in camera*).

Response to Finding No. 450:

Complaint Counsel's proposed finding 450 is misleading and inaccurate. {

} (PX0261 at 007, *in camera*; PX0305 at 007; PX0385).

Further, Mr. Hauswald testified that his words related to the potential that Daramic might not be able to supply such a large amount of HD without advance planning and in the midst of a possible labor strike at the only plant that produced HD at the time. (Hauswald, Tr. 1074-75).

451. In response to a June 12, 2008 email from Pierre Hauswald {

that { }, Steve McDonald, Daramic's Sales Manager for the Americas, proposed

camera). } (PX0617 at 001-002, *in*

Response to Finding No. 451:

Complaint Counsel's proposed finding 451 is irrelevant and misleading. What Mr. McDonald proposed in response to a request for suggestions is irrelevant to any matter in this case. There is no evidence that his proposal was taken seriously, or considered at all, and without more it is misleading to suggest that this document supports Complaint Counsel's proposed finding here.

452. Daramic has restricted the number of HD separators available to U.S. Battery for purchase. (Wallace, Tr. 1979). Consequently, U.S. Battery predominantly purchased Flex-Sil separators from Microporous for its deep-cycle batteries. (Wallace, Tr. 1972).

Response to Finding No. 452:

Complaint Counsel's proposed finding 452 is misleading and misrepresentative of the evidence. US Battery has always purchased upwards of 95% of its separators as Flex-Sil despite

having had access to DC and HD for many years. (Respondent's Response to CCFOF 343, 377, 441, 452). There is absolutely no evidence that there is any reason that there are "restrictions" from Daramic on the sale of HD separators beyond the fact that it only has one manufacturing facility that makes the product, or that the HD that US Battery had requested is in a profile size for which Daramic does not have the tool or the ability to produce. (Respondent's Response to CCFOF 448-49).

453. In the later part of 2008, after the merger, Mr. Qureshi at U.S. Battery had designed two deep-cycle batteries – the Group 27 and 31 batteries – that the company was previously purchasing from another company. (Qureshi, Tr. 2042-43). Mr. Qureshi designed the batteries to use Daramic HD. (Qureshi, Tr. 2044; PX1747). Daramic informed Mr. Qureshi that the separators he wanted for the batteries was not available in either CellForce or HD. (Qureshi, Tr. 2049). Mr. Qureshi testified that when these batteries go into production, they will be using Flex-Sil separators. (Qureshi, Tr. 2044). Mr. Qureshi testified that he "was somewhat surprised because now this product will cost us more. I had designed it with the more cost-effective separator, which we could not use." (Qureshi, Tr. 2049). Mr. Qureshi testified he had no understanding as to why Daramic could not make an HD or CellForce separator for these batteries. (Qureshi, Tr. 2049).

Response to Finding No. 453:

For the reasons articulated in Respondent's Response to CCFOF 448, Complaint Counsel's proposed finding 453 is irrelevant, misleading and incomplete.

454. {

} (PX1743 at 001-003, *in camera*). In an email to Daramic sales personnel, Harry Seibert wrote: {

} (PX1743 at 002, *in camera*).

Response to Finding No. 454:

Complaint Counsel's proposed finding 454 is misleading, misrepresents the evidence and inaccurate. {

} (PX1743, *in camera*). In 2008, Mr. Qureshi requested HD product in the following

dimensions "Width = 6.000 inches; Height = 5.625 inches; Overall thickness = 0.055" including 0.010" glass mat." (PX1747). These are not the same products and it is totally disingenuous for Complaint Counsel to suggest there is any connection between these two requests.

455. Prior to the merger, U.S. Battery had hoped to increase its purchase of Daramic's HD separators in the next two to three years to between 30 to 50%. (Qureshi, Tr. 2090). Daramic internal trip reports to U.S. Battery also recognized that U.S. Battery had hoped to achieve a more even balance in purchases between Daramic and Microporous prior to the merger. (See, e.g., PX1739 at 002, *in camera* {

}; PX0681 at 002 ("U.S. Battery prefers to split their business move (sic) evenly between Daramic and the competition thus enhanced stiffness appears to be key."); PX0326 at 001 ("U.S. Battery is presently purchasing 1 T/L [truckload] of Daramic for 5 T/L of MicroPorous Products material. They would like to achieve a more even balance between their two separator suppliers.")). Since the merger, U.S. Battery has been unable to purchase more HD from Daramic. (Wallace, Tr. 1980).

Response to Finding No. 455:

Complaint Counsel's finding number 455 is misleading and speculative. First, while U.S. Battery says that they plan to convert large volumes of batteries from FLEX-SIL to HD, they have yet to take any significant action. In 2007, over 90% { } of U.S. Battery's separator purchases were Flex-Sil separators. (Wallace, Tr. 1961-62; Qureshi, Tr. 2064-65; PX0949 at 229, *in camera*). This is true even though a FLEX-SIL separator costs twice as much as a Daramic HD separator. (Wallace, Tr. 1972; Qureshi, Tr. 2064).

Second, the evidence shows that premium batteries make up at least 80% of U.S. Battery's deep-cycle business. (Wallace, Tr. 1967). However, U.S. Battery does not use Daramic HD separators in its premium batteries. (Wallace, Tr. 1967). This is no surprise since {

} (McDonald, Tr. 3914; PX1746 at 002; RX00780 at 001; RX1093; RX657, *in camera*). U.S. Battery's test results confirm the more detailed testing of Daramic's HD product by Trojan Battery which revealed that CellForce performed better than HD by 10-15% and that Flex-Sil performed better than CellForce by 15-20%. (Godber, Tr. 271). For these reasons, U.S.

Battery has never switched from Flex-Sil to Daramic HD in a golf cart battery. (McDonald, Tr. 3945-46, 3956-58). U.S. Battery did develop a low-cost “brown-bag” battery using Daramic HD, but this product is not comparable to U.S. Battery’s premium products using FLEX-SIL. (McDonald, Tr. 3822; Roe, Tr. 1762; Whear, 4840).

Conveniently, U.S. Battery excuses its lack of action by claiming Daramic told us HD “was not available.” (Wallace, Tr. 1980). Yet U.S. Battery did not even personally speak to Daramic about this request despite its alleged importance and tremendous cost savings. (Wallace, Tr. 1980-81). Furthermore, this additional amount of HD was to be used in a new battery in development not to replace FLEX-SIL in existing batteries. (McDonald, Tr. 3824). Daramic unfortunately could not fulfill U.S. Battery’s request because the battery required a very thin type of separator and Daramic did not have the proper tooling to produce the desired thickness for its HD or CellForce product lines. (McDonald, Tr. 3824).

456. In April 2008, Mr. Qureshi met with Daramic’s salesperson, Mr. David Gunter, and discussed the then recent acquisition of Microporous. (Qureshi, Tr. 2051). Mr. Qureshi showed Mr. Gunter his displeasure with the acquisition and told him that it was “not healthy” because “anything that reduces competition in a free market system is not healthy.” (Qureshi, Tr. 2051-2052; see also PX0682 at 002, *in camera* {

} Emphasis in original)). Mr. Qureshi continues to believe that today over a year after the acquisition. (Qureshi, Tr. 2052).

Response to Finding No. 456:

Complaint Counsel’s finding number 456 is misleading and further shows the substantial bias of Mr. Qureshi and U.S. Battery with respect to this proceeding. Accordingly, the Court should disregard the testimony of Mr. Qureshi in its entirety.

457. Exide lost the leverage it had to get a competitive price when Daramic bought MPLP because there was “only one provider” of deep-cycle separators left. (Gillespie, Tr. 2953-2954).

Response to Finding No. 457:

Complaint Counsel's finding number 457 is misleading and inaccurate. The facts show that the only "leverage" Exide had with respect to Microporous' pricing was the promise of a long term supply agreement not Daramic's HD product. In March 2006, Exide had determined that the "[p]rices and [t]erms currently offered by Amerace are uncompetitive" and that Microporous had an "arrogant attitude" and "take it or leave it" approach. (RX00314). Prior to talks of long-term supply agreements, Microporous did not appear to be threatened by Exide's so-called "leverage" with Daramic's HD product. {

} (Gillespie, Tr. 3041, *in camera*, 3085-86). And when negotiations over a long-term supply agreement began to deteriorate in late-2007, Exide began to lose its "leverage" with respect to pricing on Microporous separators. {

} (Gillespie, Tr. 3120-21, *in camera*; PX1097, *in camera*; RX00652; RX00263, *in camera*; RX00661, *in camera*). The only option provided to Exide for avoiding the Microporous price increases prior to the Acquisition was to provide to Microporous "An updated MOU by Feb 14!! . . .A redline of the original contract proposal by Feb 14th . . . A commitment (contract) ready at the meeting on the 27 granting Microporous a minimum of 3,000,000 square meters of industrial motive power business in Europe to start no later than April 1, 2008." (RX01033).

The evidence further shows that Exide has had significant "leverage" with respect to pricing. (RFOF 557-62). Exide has used the fact that it is one of the largest battery manufacturers in the world as negotiating leverage with suppliers, including Daramic. (Gillespie Tr. 3070-71). Even with written supply agreement with fixed pricing, Exide still uses anything

“not clearly stated in the contract interpretation as leverage points” against Daramic. This includes technology, volumes and future business. (Gillespie Tr. 3071). These actions show the power and leverage Exide has vis a vis even its contractual suppliers. (Gillespie Tr. 3070-71).

Furthermore, the evidence shows that Complaint Counsel’s deep cycle product market is flawed in that it fails to account for the use of PE only separators by battery manufacturers.

- a. { } (Simpson, Tr. 3308, *in camera*).
- b. { } (Simpson, Tr. 3309, *in camera*).
- c. East Penn’s witness testified that East Penn uses straight PE separators in some of its deep cycle batteries. (Leister Tr. at 3978-80).
- d. { } (Simpson, Tr. 3310-11, *in camera*).

Even under Complaint Counsel’s so-called “deep cycle market,” HD was not a competitive with FLEX-SIL. First, HD is not qualified for OEM use – meaning that no matter what the price, HD cannot be used in those types of batteries. (Gillespie, Tr. 3091; RX1094). Second, the evidence proves that FLEX-SIL® and HD are not economic substitutes for each other. (RFOF 544-550). For example, despite the fact that HD is “considerably” lower in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much FLEX-SIL® as it did HD. (Gillespie, Tr. 3092). {

} (RX00677, *in camera*; PX0949, *in camera*) This difference is considerably more than a SSNIP 5-10% price difference between FLEX-SIL® and HD. Exide also admits that its purchase of FLEX-SIL® separators for its golf cart batteries is not due to price. (Gillespie Tr. 3092).

458. {

} (PX0904 (Seibert, Dep. at 191, *in camera*)).

Response to Finding No. 458:

Complaint Counsel’s finding number 458 is misleading. First, Complaint Counsel misstates the record. Mr. Seibert testified that Exide expressed an interest in increasing purchases of Daramic HD, but never stated that Exide desired to “decrease its separator purchasing from Microporous.” (PX0904 (Seibert, Dep. at 191, *in camera*)). Additionally, using HD saves Exide “a lot of money” and, in an analysis of pricing between HD and Flex-Sil, HD was “considerably” lower in cost. (Gillespie, Tr. 2944, 2947, 2996). Despite the fact that HD is “considerably” lower in cost, and saves Exide “a lot of money” Exide, in 2007, 2008 and through the hearing, still purchased twice as much Flex-Sil as it did HD. (Gillespie, Tr. 3092). {

} (RX00677, *in camera*; PX0949, *in camera*) This

difference is considerably more than a SSNIP 5-10% price difference between Flex-Sil and HD.

459. After the merger, when Daramic was unable to supply sufficient HD to Exide due to the strike at Owensboro, Exide was forced to purchase Flex-Sil, which was the only available alternate product for their deep-cycle batteries. (Roe, Tr. 1223). {

} (RX01260,

in camera). In purchasing Flex-Sil in place of HD during the strike, Exide had to pay a premium for Flex-Sil. (Roe, Tr. 1223-24). {

(RX01260, *in camera*). }

Response to Finding No. 459:

Complaint Counsel’s finding number 459 is misleading. {

}

(RX01260, *in camera*). In order to prevent interruptions in supply, Exide purchased FLEX-SIL as an alternative to HD. (Roe, Tr. 1223). While Daramic did not discount the price of FLEX-SIL, it did not charge Exide a premium on the product as suggested by Complaint Counsel.

Additionally, in a measure of good faith. Daramic offered to rescind the energy surcharge and credit Exide for any past surcharges it paid. (RX01260, *in camera*). The facts show that Daramic's request was driven out of necessity – nothing more.

460. Exide's post-acquisition experience is in contrast to Trojan's pre-merger experience with MPLP. When Microporous's CellForce capacity became constrained in 2006, Microporous offered to provide Flex-Sil product at CellForce pricing on Trojan's T-605, which at the time was using CellForce, so that Microporous could win CellForce business at a traction customer. (PX1659; Godber, Tr. 198). Through this arrangement, Trojan was able to purchase Flex-Sil for its T-605 batteries at a 10% discount. (Godber, Tr. 225).

Response to Finding No. 460:

Complaint Counsel's finding number 460 is misleading. Complaint Counsel attempts to compare to two very different situations – one driven by necessity to one driven by hopes of financial gain. Daramic's request to Exide was driven by a true crisis and Daramic had little choice but to request that Exide switch some product to HD in order to avoid potentially crippling interruptions in supply. (Roe, Tr. 1223-24). Microporous asked Trojan to switch from using CellForce to HD, not out of necessity but because Microporous was trying to "win some business" from a customer. (Godber, Tr. 198). As Microporous stood to make a profit off this convenient arrangement, it is not surprising that they offered Trojan some incentive for making the switch. Complaint Counsel has juxtaposed these examples to distort the facts and paint Daramic as the "bad guy" and Microporous as the "good guy." This is simply not the case.

C. MPLP was Daramic's only competitive Constraint in Motive

461. { (Simpson, Tr. 3193, *in camera*). { } (Simpson, Tr. 3193, *in camera*).

Response to Finding No. 461:

Complaint Counsel's Finding No. 461 is inaccurate. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and

should be disregarded. Second, Complaint Counsel's alleged "motive market" is not a proper product market in this case. Mr. Gilchrist himself admitted to the "reasonable similarity" between a motive power and deep cycle battery (Gilchrist, Tr. 325), just as Mr. Godber did when he testified that a "motive" battery is a "deep-cycle" battery – the difference is on usage rather than functionality. (Godber, Tr. 144-146). EnerSys Hawker used Ace-Sil – a product Complaint Counsel contend is outside of their alleged product markets entirely – extensively in "motive power" batteries. (Gilchrist, Tr. 316) And several witnesses testified that PVC separators from Amer-Sil are used in motive power batteries. (See, e.g., Gilchrist, Tr. 368).

As Mr. Whear testified in his deposition, further exposing the blurred lines between the products:

Q: Okay. Was there an intended a targeted application for Daramic HD?

A: The targeted application is where they were using antimony in their grids and they saw an issue with water loss and that was a concern for them.

Q: Okay. And that's as far as you know, . . . was a target . . . just anywhere that there was antimony? There wasn't any there wasn't a more specific target for Daramic HD?

A: . . . it has to be deep cycling applications and those are, as I just mentioned, very wide.

Q: Okay. So deep cycling applications?

A: Deep cycling motive power applications, yeah.

Q: Oh, it was designed for motive power?

A: Yeah, most of the stationary batteries don't . . . have antimony.

Q: Okay.

A: Batteries that sit still.

Q: Okay.

A: Do not have antimony.

Q: Okay. So...but you said that it was designed for motive power?

A: Um hum.

Q: So Daramic HD was designed for motive power?

A: Motive power, and most of our batteries provide motive power. [They] go in things that move – cars, fork trucks, floor scrubbers, boats, submarines...

Q: They're all, you would consider a floor scrubber a motive application?

A: Yeah. The batteries move the scrubber.

Q: And would golf carts be a motive application too?

A: Yeah.

PX0913 (Whear Dep. pp. 46-48).

This type of confusion and varying nomenclature is exactly why Complaint Counsel's product markets are incorrect and improper. Complaint Counsel's own expert was unable to identify which products went into which "product markets." (RFOF 1180-1201).

Further, this finding completely ignores evidence demonstrating that numerous separator manufacturers are poised to supply industrial motive separators to North American customers.

For example, {

} (FOF 968; Weerts, Tr. 4489,

in camera). {

} (FOF 968; Weerts, Tr. 4522, *in camera*). {

} (FOF 968; Weerts, Tr. 4522-23, *in camera*). {

} (FOF 970; Gillespie, Tr. 3037,

in camera).

{

} (FOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*;

RX00026, *in camera*; RX00027, *in camera* {

}; RX00061, *in camera*; RX00062, *in camera*). {

} (FOF

991; RX00061, *in camera*). {

} (FOF 992; Axt, Tr. 2218, *in camera*).

Additionally, Daramic faces competition with NSG for both automotive and industrial separators, both directly in Asia, and indirectly throughout the world. For example, Asian companies, such as Leoch in China, export industrial batteries containing NSG separators to North America. (FOF 1012; Thuet, Tr. 4348).

{

}

(FOF 1024; Axt, Tr. 2219, *in camera*). {

}

(FOF 1025; Axt, Tr. 2272-73, *in camera*). {

} (FOF 1026; Axt, Tr. 2272-73, *in*

camera).

{

} (Simpson, Tr. 3363, *in camera*), {

} (FOF 1237; Simpson, Tr. 3348, 3364, *in*

camera). {

} (FOF 1238; PX0033 at 019, *in camera*). {

} (FOF 1238; Simpson, Tr. 3478, *in camera*;
Weerts, Tr. 4459. *in camera*).

As a further response to this finding, Respondent incorporates its replies to Finding Nos. 790-792, 795, 796, 799, 802, 806 and 807.

462. Prior to the acquisition, Daramic and Microporous were the only suppliers of separators for motive power batteries used in fork-lifts to North American customers. (Gilchrist, Tr. 306-307, 342; Benjamin, Tr. 3533; Douglas, Tr. 4075-4076; Leister, Tr. 4027-4028). {

} (McDonald, Tr. 3949 (PX0506 *in camera*)).

Response to Finding No. 462:

Complaint Counsel's Finding No. 462 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to Finding No. 461. Significantly, this finding completely ignores evidence demonstrating that numerous separator manufacturers are poised to supply industrial motive separators to North American customers. (*See* Response to Finding No. 461).

Moreover, this finding is irrelevant and should be disregarded. PX0506 contains information about competition in 2006. (McDonald, Tr. 3948). The relevant issue in this case is competition going forward. Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

463. Mr. Roe stated that HD competed against CellForce in the "motive power traction market." (Roe, Tr. 1202; PX0316 at 002).

Response to Finding No. 463:

Complaint Counsel's Finding No. 463 is incomplete and misleading. At trial, Roe explained that Daramic sold HD into a very small segment of motive power batteries

(specifically, water-loss batteries), and that Microporous sold CellForce into the same very small segment. (Roe, Tr. 1201-02).

For a further response to this finding, Respondent incorporates its reply to Finding No. 461, including the portion of that reply concerning Complaint Counsel's alleged product markets.

464. Entek is not in the motive separator business anymore. (Axt, Tr. 2186, *in camera*). {

} (Axt Tr. 2186, *in camera*). {
}

(Axt Tr. 2189, *in camera*).

Response to Finding No. 464:

Complaint Counsel's Finding No. 464 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to Finding No. 461. Significantly, {

} (FOF 968; Weerts, Tr. 4489, *in camera*). {

} (FOF 968; Weerts, Tr. 4522, *in camera*). {

} (FOF

968; Weerts, Tr. 4522-23, *in camera*). {

} (FOF 970; Gillespie, Tr. 3037, *in camera*). {

}

Furthermore, EnerSys witnesses' testimony in this case is not credible, and their testimony on this issue should be disregarded. (FOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76;

Gagge, Tr. 2543-47; RX00192 at 001-2). {

}

465. For at least 6 years prior to the acquisition of MPLP by Daramic, Daramic and MPLP were the only competitors for North American battery manufacturers' motive power business. The only price competition that Daramic faced in the sale of motive power separators came from MPLP. (Roe, Tr. 1264-1266). Indeed, during the entire time period from 2003 until the acquisition of MPLP, the only competitor that Daramic lost North American motive power business to was MPLP. (Roe, Tr. 1278-1279; PX0911 (Roe, Dep. at 16, *in camera*)). During that time, MPLP was also the only battery separator manufacturer whose competition caused Daramic to lower prices on motive batteries. (Roe, Tr. 1264-1266, 1812-1813).

Response to Finding No. 465:

Complaint Counsel's Finding No. 465 is incomplete and misleading. Complaint Counsel misrepresents Roe's testimony concerning competition between Daramic and Microporous. Roe testified that in 2004 and 2005, Daramic lowered prices on its motive power separators in response to competition from Microporous. (Roe, Tr. 1265). Complaint Counsel's contention that for at least 6 years prior to the acquisition, the "only price competition that Daramic faced in the sale of motive power separators came from MPLP" is inaccurate and overreaching. In reality, Daramic has reduced prices on motive separators due to competition from Asian separator manufacturers. (Roe, Tr. 1812-13). Additionally, Daramic's market intelligence regarding competition with Microporous in 2005, 2006 and 2007 was inaccurate. (Roe, Tr. 1267, 1271-72, 1324-29, 1739-40, 1766, 1781-82, *in camera*).

Moreover, this finding ignores the current state of competition in the separator industry. The relevant issue in this case is competition going forward. Old documents reflecting an "old" state of competition do not indicate the state of competition years later. The evidence shows fierce and growing competition for industrial motive separators. (*See* Response to Finding No. 461).

466. MPLP was poised to capture substantial market share from Daramic in the motive market. (Simpson, Tr. 3185-3186, 3438, *in camera*; PX0131 at 062-065). {

} (PX0247, *in camera*; PX0153 at 2; PX0243, *in camera*).

Response to Finding No. 466:

Complaint Counsel's Finding No. 466 is vague, incomplete, misleading and speculative, and it should be disregarded. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, beyond Microporous' contract with EnerSys, Microporous had absolutely no new commitments for the supply of separators for motive power applications. A potential supply relationships with Exide never materialized. (*See* Response to Finding No. 862; FOF 382-383). Discussions between East Penn and Microporous "fizzled out" prior to Daramic's acquisition of Microporous, and East Penn did not give serious consideration to obtaining supply from Microporous. (FOF 781; Leister, Tr. 4019). {

} (FOF

814; Balcerzak, Tr. 4107-08, *in camera*). {

} (FOF 814; Balcerzak, Tr. 4107-08, *in camera*). Likewise, Microporous has had no competitive influence on Douglas. In fact, Microporous has not even discussed the supply of separators with Douglas since 2004. (FOF 832; Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*).

Significantly, this finding ignores {

} (FOF 814;

Balcerzak, Tr. 4106-08, *in camera*; FOF 828, 832, 838; Douglas, Tr. 4063, 4067-68, *in camera*; FOF 781; Leister, Tr. 4019).

The evidence, when considered in totality, demonstrates that Microporous was not poised to capture significant sales of motive power separators from Daramic.

For a further response to this finding, Respondent incorporates its reply to Finding No. 461, including the portion of that reply concerning Complaint Counsel's alleged product markets.

467. {
} (PX0950 at 14-16, *in camera*). {

} (PX0258 at 002; PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, *in camera*, 1350-1354, *in camera*).

Response to Finding No. 467:

Complaint Counsel's Finding No. 467 is incomplete and misleading. The evidence shows that {

} (FOF 257; Seibert, 4191-92, *in camera*; RX00542, *in camera*; RX00927 at 14-16, *in camera*). {

} (FOF 257; Seibert, Tr. 4194-95, *in camera*).

Contrary to Complaint Counsel's assertion, {

}. (PX0950 at 14-15, *in camera*).

For a further response to this finding, Respondent incorporates its replies to Finding Nos. 725-747.

468. Since the acquisition of MPLP in February 2008, Daramic has not lost any motive power business in North America to any competitors. (Roe, Tr. 1279). Nor has Daramic made any price concessions to North American customers for motive products due to competition from any other competitor. (Roe, Tr. 1812-1813). Post-merger, customers have less leverage in price negotiations with separator suppliers.

Response to Finding No. 468:

Complaint Counsel's Finding No. 468 is inaccurate and misleading. First, Complaint Counsel misrepresents Roe's testimony concerning the timeframe of competition. During this line of questioning at trial, Complaint Counsel was asking Roe about price reductions on motive separators in the 2004 to 2005 time period, not since the acquisition. (Roe, Tr. 1812-13; PX0409). It is inappropriate for Complaint Counsel to now attempt to use this testimony to support their claim that Daramic has made no price concessions due to competition from competitors other than Microporous. In reality, Daramic has reduced prices on motive separators due to competition from Asian separator manufacturers. (Roe, Tr. 1812-13).

Furthermore, Complaint Counsel's contention that "customers have less leverage in price negotiations with separator suppliers" following the acquisition is without evidentiary basis. The evidence in this case demonstrates that {

} (Toth, Tr. 1568; RX00927 at 5-16, *in camera*). For example, Exide has used the fact that it is one of the largest battery manufacturers in the world as negotiating leverage with suppliers, including Daramic. (Gillespie, Tr. 3070-71). Even with written supply agreement with fixed pricing, Exide still uses anything "not clearly stated in the contract interpretation as leverage points" against Daramic. This includes technology, volumes and future business. (Gillespie, Tr. 3071). These actions show the power and leverage Exide has vis a vis even its contractual suppliers. (Gillespie, Tr. 3070-71).

Likewise, {

} (Craig, Tr. 2557, 2561; Burkert, Tr. 2421-23, *in camera*). {

} (Axt, Tr. 2230-31, 2244, *in camera*).

469. {

} (PX2262 at 001-002, *in camera*).

Response to Finding No. 469:

Complaint Counsel's Finding No. 469 is incomplete, misleading and irrelevant, and it should be disregarded. The evidence in this case demonstrates that {

} (Craig, Tr. 2557, 2561; Burkert, Tr. 2421-23, *in camera*). EnerSys has a history of being a tough negotiator, often displaying a terse, overbearing attitude. (*See, e.g.*, FOF 623-628).

In October 2008, Daramic announced that due to extraordinary cost increases, including unprecedented energy cost increases, Daramic was increasing its pricing effective January 1, 2009. (RX00564). { } (FOF 632; Burkert, Tr. 2434, *in camera*). {

} (FOF 633; Axt, Tr. 2465, *in camera*). {

} (FOF 633; Seibert, Tr. 4193-94, *in camera*). {

} (FOF 633; Seibert, Tr. 4193-94, *in camera*).

{

} (FOF 634; Burkert, Tr. 2434, 2464-65, *in camera*; Seibert Tr. 4216-17, *in camera*; PX2264, *in camera*; RX00927 at 14-16, *in camera*). {

} (FOF 634; Seibert, Tr. 4217, *in camera*). Based on the foregoing finding, the Court finds {

}

EnerSys has itself announced price increases, including a 6% increase effective January 1, 2006 and another increase of 5% to 10% in 2006. (RX00231; RX00232). In reporting on its price increases in 2006, and in its subsequent Form 10-K filing for Fiscal Year 2008, EnerSys has noted cost increases for lead, copper, plastics and utilities. (RX00232; RX01185 at 016, 034, 044). No mention is made of polyethylene separators in these documents. In any event,

{

} (RX01185 at 044; Craig, Tr. 2553, *in camera*). And EnerSys attempts to “control [its] raw materials costs through strategic purchasing decisions” including hedging arrangements. (RX01185 at 034; RX01185 at 011).

In addition, Respondent notes that one of the options suggested by Daramic in PX2262 is {
} (PX2262 at 002, *in camera*). It is telling that EnerSys refuses to have the increase reviewed by an independent auditor, and instead continues to exert its market power by simply refusing to pay or negotiate the increase.

470. After the acquisition, Daramic raised the prices for CellForce separators sold to Bulldog Batteries by 10%. This price increase took effect on January 1, 2009. (Benjamin, Tr. 3522). Previously, Daramic charged Bulldog Batteries a 7% energy surcharge in 2008. (Benjamin, Tr. 3521). Bulldog has no ability to determine whether these increases are

justified by increases in Daramic's raw material costs. (Benjamin, Tr. 3524-3525). However, as compared to past pricing increases from separator suppliers, the President of Bulldog Batteries feels the 10% price increase is "pretty exorbitant." (Benjamin, Tr. 3525). For example, in the five year period during which it purchased CellForce separators from Microporous, the cumulative price increases from Microporous totaled about 3% and the largest price increase was 1-1/2%. (Benjamin, Tr. 3526).

Response to Finding No. 470:

Complaint Counsel's finding number 470 is misleading and incomplete. The energy surcharge to Bulldog was terminated as of December 31, 2008, prior to any price increase, thus the cumulative increase was 3%, identical to the increase by MPLP noted by Complaint Counsel in its finding. (RX00533). Further, Mr. Benjamin testified that Bulldog accepted the surcharge and price increase because it understood that they were based on raw material cost increases and that Daramic was just passing along those costs. (Benjamin, Tr. 3521-23; 3553-54). Additionally, Mr. Benjamin's testimony that Bulldog has no "ability" to determine whether raw material cost increase are justified is suspect in that his "ability" to determine whether cost increases were justified allegedly arose because he was able to compare prices for the CellForce that MPLP sold to him for 95% of his products with the cost of pure PE separators sold to Bulldog by Daramic for the 5% of its products that only Daramic could produce. This is a comparison of apples to oranges and is not a valid or legitimate "fact." (Benjamin, Tr. 3545).

471. After Daramic notified Bulldog Battery that a ten percent price increase effective January 1, 2009 would be occurring, Mr. Benjamin, the President, stated he did not try to negotiate a lower price with Daramic because "[t]here was no way to negotiate a lower price. There was no place to go." (Benjamin, Tr. 3522). After the announced price increase Bulldog Battery did not look to source their needs from another motive battery separator manufacture because there is no other supplier. (Benjamin, Tr. 3526).

Response to Finding No. 471:

Complaint Counsel's finding number 471 is incorrect and misleading. First, Complaint Counsel fails to note that the 10% price increase followed the termination of a 7% energy surcharge, thus the actual increase was only 3%. (RX00533; Benjamin, Tr. 3554). Further, Mr. Benjamin testified that Microporous had also instituted a price increase and rubber surcharge in

the previous year that Bulldog did not negotiate or attempt to reduce because they understood it was related to cost increases. (Benjamin, Tr. 3553-54; RFOF 913, 919-923). Similarly, Mr. Benjamin testified that he understood that Daramic was simply passing on costs that had increased over the year and that was the reason he did not protest the cost increases. (Benjamin, Tr. 3553-54; RFOF 914-923). Finally, Mr. Benjamin testified that 95% of the separators Bulldog uses are CellForce separators, thus both pre- and post-Acquisition Bulldog had nowhere else to source their needs as Bulldog has never approved HD and a special tool that only Microporous (and now Daramic) has access to is needed to produce Bulldog's product. (RFOF 900; 914-916).

1. Daramic viewed MPLP as a threat

472. The only motive competitor that Daramic lowered its prices to meet in North America was Microporous. (Roe, Tr. 1265). As far back as 2002, Daramic was lowering prices on motive products { } (PX0243 at 001, *in camera*; Roe, Tr. 1254). In 2002, Daramic lowered prices on industrial products to { } (PX0243 at 002, *in camera*). { } (PX0023 at 004, *in camera*).

Response to Finding No. 472:

Complaint Counsel Finding No. 472 is incorrect and nonsensical. { } (Roe, Tr. 1812-1813). In quoting Daramic lowered prices to "fight the aggressive offers" of Microporous, Complaint Counsel quotes themselves. Roe clarified the statement and said that he only "had conversations with Mr. Nasisi in the past regarding Microporous' quotations. (Roe, Tr. 1254).

Finally PX0023 deals with { }, and not the { } (PX0023, *in camera*). Furthermore, there is no connection between Complaint Counsel's statement that "Microporous is attacking with price" and "the benefits of competition between MPLP and

Daramic.” PX0023 lists {
} (PX0023, *in camera*).

Furthermore, in their effort to suggest that Daramic viewed Microporous as a threat, Complaint Counsel Findings No. 472-478 all concern a customer when Complaint Counsel did not call to offer testimony at trial.

473. In 2002, Daramic signed an exclusive supply agreement with C&D Battery to supply C&D with motive power PE separators. (PX0836 at 001; Roe, Tr. 1254). Daramic’s contract with C&D contained a competitive pricing clause which allowed C&D the opportunity to move product to a competitor if it received a lower priced offer and Daramic declined to match the offer. (PX0836 at 001; Roe, Tr. 1254-1255).

Response to Finding No. 473:

Complaint Counsel Finding No. 473 is incorrect. First, PX0836, a two page email, is not a substitute for the substantive contract between C&D and Daramic. Furthermore, Complaint Counsel did not call a representative from C&D at trial. In 2003 Daramic and C&D entered into a supply agreement for the motive power separator needs. (Roe, Tr. 1254). Roe testified that if and when C&D were presented with a lower price from one of Daramic’s competitors, then Daramic and C&D would have to negotiate a possible adjustment in price. (Roe, Tr. 1254). Complaint Counsel ignored Roe’s testimony Daramic was not required to match a competitors price. (Roe, Tr. 1254).

474. Soon after signing the contract with Daramic, C&D brought a lower-priced offer from MPLP for motive power separators to Daramic. (Roe, Tr. 1255; PX0836 at 001). In response to MPLP’s low priced offer, Daramic made price concessions to C&D in order to maintain the C&D business. (Roe, Tr. 1255-1257; PX0836 at 001). Daramic did not expect that MPLP would continue to offer C&D ever lower prices. (PX0836 at 001).

Response to Finding No. 474:

Complaint Counsel Finding No. 474 is incorrect. See Response to Finding No. 473. Daramic made a price concession to maintain the *relationship* that had developed between C&D and Daramic. (Roe, Tr. 1257(emphasis added)). During the early 2000, Microporous had made several price adjustments to gain market share in North America but this was the first time that

Daramic offered a price concession to C&D. (Roe, Tr. 1257). The price reduction did not match the price offered by Microporous (PX0836 at 01).

475. In early 2003, Daramic learned that MPLP was again offering even lower prices to entice C&D to switch from Daramic to MPLP. (PX0836 at 001). This time C&D informed Daramic that Daramic's prices were 60% higher than the MPLP offer. (PX0836 at 001). C&D again reminded Daramic about the competitive price clause in their contract. (PX0836 at 001). Mr. Roe was surprised that MPLP continued to offer lower prices. (Roe, Tr. 1257). In response to MPLP's second attempt to win C&D's business, Daramic again offered price concessions to C&D amounting to a savings for C&D of \$275,000. (PX0836 at 001). At the end of the day, Daramic gave C&D an 11.2% price reduction in April 2004 in order to maintain C&D's business in the face of competition from MPLP. (PX0409 at 001; Roe Tr. 1261).

Response to Finding No. 475:

Complaint Counsel Finding No. 475 is inaccurate and misleading. Complaint Counsel merges the two instances where Microporous offered a lower price to C&D based upon the explanation in PX0836. Daramic's price to C&D was \$2.586/sqm and Microporous' was \$1.62/sqm. (PX0836-01). After Daramic lowered, but did not match, Microporous' price and received concessions from C&D, Microporous lowered their price again. (PX0836-01). Daramic adjusted their price from \$2.58/sqm to \$2.05/sqm, still not matching Microporous' price (PX0409), but obtained additional changes were made to the contract to the benefit of Daramic. (PX0846-02). In 2004, when PX0386 was written, an agreement had not been reached between C&D and Daramic. (PX0386-01). C&D had not qualified Microporous' product at that time. (PX0386-01). Furthermore, Finding No. 475 is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

476. Daramic recognized the threat to its business, noting that "we have a new polyethylene competitor entering the North American market. Micro-Porous Products . . . they have attacked all the large manufacturers and to keep from losing business, we have adjusted prices as needed which has eroded our margins. . ." (PX0153 at 002).

Response to Finding No. 476:

Complaint Counsel Finding No. 476 is misleading and based on questionable information. For Finding No. 476, Complaint Counsel relies on a document from the 2003 time frame. Thus, Finding No. 476 is irrelevant because the relevant question is competition going forward. Old documents reflecting an “old” state of competition do not indicate the state of competition years later. There is no clear information as to when it was drafted, who it was drafted by, what its intended purpose was, and if it was in its final form. (PX0153). Furthermore, the document is incomplete as it references pages and charts that are not present. (PX0153-03-04). This document did not recognize a “threat” in Microporous, but merely noted that a new PE competitor was entering the North American market. (PX0153-02).

477. By the time Daramic was responding to the second low price offer from MPLP at C&D, Daramic had had enough of the competitive price clause in the C&D agreement, and Mr. Roe felt that the key to moving forward with C&D was to “eliminate the competitive clause of the agreement.” (PX0836 at 002). By eliminating the competitive price clause, Daramic felt that it could tie up 100% of the C&D business for the next three years and keep MPLP from supplying C&D. (PX0836 at 002; Roe, Tr. 1259).

Response to Finding No. 477:

Complaint Counsel Finding No. 473 is incorrect. Again, PX0836, a two page email, is not a substitute for the substantive contract between C&D and Daramic. Furthermore, Complaint Counsel did not call a representative from C&D at trial. Additionally, Roe’s desire for a change in terms of the contract does not necessarily result in said change—the contract had to be negotiated and resolved between both C&D and Daramic. At the time that PX0836 was drafted, C&D had not agreed to any new terms. (PX0836-01).

478. In June 2004, just two months after lowering prices to C&D, competition from MPLP forced Daramic to lower prices on motive power separators at EnerSys by about 14% from an average price of \$2.04 per square meter to an average price of \$1.75 per square meter. (PX0409 at 001; Roe, Tr. 1263-1264).

Response to Finding No. 478:

Complaint Counsel Finding No. 478 is incorrect. Competition from Microporous did not force Daramic to lower prices for C&D or EnerSys. Complaint Counsel relies on PX0409, chart

of Price Reductions between 2004-2005. (PX0409). {

} (PX409). This is true for EnerSys in PX0409, as the only comment was that Amerace's price quote was at \$1.60/sqm. Additionally, Roe only testified that the "chart indicates there was a price reduction effective June..." (Roe, Tr. 1263).

479. Several months later, Daramic again reacted to MPLP price competition on motive power separators by lowering prices by 3% at East Penn to maintain that business. (PX0409 at 001; Roe, Tr. 1262-1263).

Response to Finding No. 479:

Complaint Counsel Finding No. 479 is false. Respondent incorporates its replies to Finding No. 478. {

} (PX0409 at 001).

480. Competition between MPLP and Daramic resulted in lower prices for EnerSys in 2004. In 2004, EnerSys was able to use a bid from Microporous for its motive power business to negotiate a reduction in price from Daramic in the \$200,000 range for its North American motive separator business. (Axt Tr. 2121-2122; RX00208).

Response to Finding No. 480:

Complaint Counsel Finding No. 480 is false. {

} (RFOF 726-732).

Competition between Microporous and Daramic did not result in lower prices for EnerSys in 2004. RX00208 details a proposal from Daramic to EnerSys. (RX00208). In return for a 6% credit for all purchases of motive power EnerSys gave Daramic a backweb reduction on one separator size and a two year extension on the contract between EnerSys and Daramic.

(RX00208). The document relied on by Complaint Counsel, RX00208, does not make any mention of Microporous.

481. Competition between MPLP and Daramic resulted in lower prices for EnerSys in 2005.

{

} (Axt, Tr. 2242, *in camera*). {

} (Axt, Tr. 2243, *in camera*).

Response to Finding No. 481:

Complaint Counsel Finding No. 481 is false. Competition between MPLP and Daramic did not result in lower prices for EnerSys in 2005. {

}. (RFOF 726-732). {

} (Axt, Tr. 2230-31, 2244, *in camera*). {

(Axt, Tr. 2243, *in camera*). Despite Complaint

Counsel's assertions and Axt's testimony, as of 2005, Microporous did not have new technology in 2005. CellForce was available to the market as early as 1999. (RX01452 at 005).

482. In 2005, Daramic used the absence of competition from Microporous to "negotiate a little tougher" for higher prices with Exide. (PX0843 at 001).

Response to Finding No. 482:

Complaint Counsel Finding No. 482 is inaccurate and refutes their own previous Findings No. 472-481 which argue that Microporous *presented* competition to Daramic. {

}. (RX00976, *in camera*). {

} (RX01517 at 005, *in camera*). Because Exide opted to exercise their incentives, they needed to purchase a minimum amount of golf cart volume from Daramic.

Furthermore, PX0843 does not state anything about negotiating for higher prices. In fact, the internal email specifically says that price would be dealt with by the Sales department at a later point. (PX0843).

483. Daramic expected that it would continue to face price competition at C&D from MPLP in the future. (Roe, Tr. 1266). In 2005, Mr. Roe informed Mr. Hauswald that he expected there to be a “price fight” with MPLP for the C&D business when the contract expired at the end of 2006. (Roe, Tr. 1266-1267; PX0209 at 001). Mr. Roe also expected that Daramic’s prices would be higher than MPLP’s at the end of the contract period. (PX0209 at 001).

Response to Finding No. 483:

Complaint Counsel Finding No. 483 is misleading. Complaint Counsel ignores Roe’s testimony that all of his expectations were based on market information that he had at the time, (Roe, Tr. 1266-67) and frustration that occurred as a result of his previous negotiations with C&D. (Roe, Tr. 1267). Though Roe believed that there may be a “price fight” with Microporous, he simply stated that Daramic’s price would be higher than Microporous. (PX0209). He did not state that Daramic would drop to meet Microporous’ price.

484. Daramic had no interest in splitting C&D’s separator business with MPLP after 2006. (PX0209 at 01). In order to keep 100% of C&D’s business, Mr. Roe suggested that Daramic “play our card that we supply all or nothing.” (PX0209 at 001). Mr. Roe thought that an “all or nothing” strategy could be successful with C&D because he did not believe that MPLP was capable of supplying all of C&D motive and stationary separator needs at that time. (PX0209 at 001; PX0922 (Roe, IHT at 104-105, 115-116, *in camera*)).

Response to Finding No. 484:

Complaint Counsel Finding No. 484 is inaccurate and misleading. Complaint Counsel ignores Roe’s testimony that his statement about supplying all or nothing was “not a statement

[Daramic] ever reacted on.” (Roe, Tr. 1267). This is evidenced by the fact that {
} (RX00960, *in camera*).

Furthermore, Roe did not see Microporous as a competitor that could supply all of C&D’s needs.
(PX0209).

485. Competition between MPLP and Daramic resulted in lower prices for { } in 2006.
Daramic’s first offer {
} (Axt, Tr. 2165-66, *in camera*). {
} (Axt, Tr. 2166, *in camera*). {
} (Axt, Tr. 2166, *in camera*; PX1204, *in camera*).

Response to Finding No. 485:

Complaint Counsel Finding No. 485 is incorrect. Competition between Microporous and
Daramic did not result in lower prices for { } in 2006. {
}. (RFOF 726-732).

There is extensive evidence about the power that {
} (See RFOF 623-628). Though Microporous and Daramic were in
simultaneous negotiations with EnerSys, Microporous did not present a viable option for
EnerSys. {
} (See Response to CCFOF 1155-56, *in camera*).

486. Daramic saw Microporous as a threat in its 3-Year Strategy and that Microporous’s
planned capacity expansions could threaten additional Daramic industrial sales. (PX0171
at 008).

Response to Finding No. 486:

Complaint Counsel Finding of Fact No. 486 is misleading. See Response to Finding No.
1165. PX0171 is merely 2006 “discussion document.” (PX0171-001). As listed, one of
Daramic’s four goals is to grow their industrial market share. (PX0171-003). PX0171 discusses

Amerace's planned capacity expansions and that if Daramic wanted to secure the Amerace's volume it would execute a long-term contract with EnerSys OR acquire Amerace. (PX0171-008). {

(PX1224, *in camera*).

487. In its 3-Year Strategy, the key for Daramic to securing its motive sales was either execution of a long-term contract with EnerSys or the acquisition of Microporous. (PX0171 at 008).

Response to Finding No. 487:

Complaint Counsel Finding No. 487 is misleading. Respondent incorporates its replies to Finding No. 486.

488. Competition between MPLP and Daramic resulted in lower prices for EnerSys in 2007. In 2007, MPLP sought a rubber pass-through agreement with its customers, including EnerSys. (RX00210 at 001). {
} (RX00207, *in camera*). Nevertheless, after several weeks of negotiations, EnerSys accepted it with respect to Ace-Sil, but not for CellForce. (RX00210 at 001-002; McDonald, Tr. 3909; Burkert, Tr. 2313-2314, 2334-2336, 2358-2359, *in camera*). With respect to CellForce, EnerSys was able to threaten to switch its volume to Daramic in order to avoid the new rubber adjustment formula. (RX00210 at 001; Axt, Tr. 2246).

Response to Finding No. 488:

Complaint Counsel Finding No. 488 is incorrect and incomplete. There has been extensive evidence presented on the contract negotiations between Microporous and EnerSys. (See RFOF 667-677). {

} (Axt,

Tr. 2256, 2153, *in camera*; PX2300; PX2301).

{

} (RX00953 at 001-003, *in camera*). {

} (RX00953 at 003, *in camera*). {

}

(RFOF 678-679, *in camera*).

Complaint Counsel did not present any evidence of the use of Daramic as a threat by EnerSys. RX0210 only shows that Microporous was instructed not to push EnerSys further on their purposed price increase or their *volume* with EnerSys would be in jeopardy—to any number of other suppliers. (RX0201 (emphasis added)).

489. The availability of MPLP to EnerSys in 2007 also prevented Daramic from being able to force a new long term contract onto EnerSys. On November 7, 2007, Tucker Roe wrote an email to Larry Burkert in which he informed Mr. Burkert that {
} (RX00768 at 001, *in camera*). Mr. Roe added, however, that Daramic would {
} (RX00768 at 001, *in camera*).

Response to Finding No. 489:

Complaint Counsel Finding No. 489 is incorrect. {

} (PX1224 at 003, *in camera*; RX00964, *in camera*). {

} (PX1224, *in camera*; RX00964, *in camera*). {

} (Burkert, Tr. 2426-27, *in camera*).

Daramic announced a price increase to it's customers due to the escalating costs of production. (RX00831; RX00773; RX00606; RX01549; RX00590; RX00768 *in camera*). As they have done when faced with any price increase, {

} (RX00768, *in camera*). No where in the document that Complaint

Counsel relies upon was Microporous used as a threat by EnerSys.

490. EnerSys's Mr. Burkert responded to Mr. Roe's email stating that he was {

} (RX00768 at 001, *in camera*; Burkert, Tr. 2343-2344, *in camera*). Mr. Burkert testified that he was able to make that statement because he was {

} (Burkert, Tr. 2344, *in camera*).

Response to Finding No. 490:

Complaint Counsel Finding No. 490 is incorrect. Respondent incorporates its replies to Finding No. 489. {

} (See Respondent Findings of Fact 726-732, *in camera*.)

By { } that Complaint Counsel references, Microporous was not in a position to be a desirable supplier to { } and could not reasonably be “banked” upon. {

} (RX00207 at 010, *in camera*; PX2300 (Heglie, IHT 138-39, 164), *in camera*). The Microporous Board refused to allow Microporous to enter into any additional supply contracts that would required capital commitments. (RX00401 at 002). {

} (Trevathan, Tr. 3630-31) (RX00248 at 001-002; RX00401 at 001-002; Trevathan, Tr. 3628; Gilchrist, Tr. 454, *in camera*).

491. Daramic sold “HD to certain traction customers, primarily as a defensive move against Amerace’s CellForce.” (PX0316 at 002; PX0023 at 004, *in camera*). {

} (PX0023 at 010, *in camera*). Daramic’s February 2007 HD Product Strategy Presentation showed that {

} (PX0023 at 010, *in camera*).

Response to Finding No. 491:

Complaint Counsel Finding No. 491 is incorrect. Respondent incorporates its replies to Finding No. 463. HD and CellForce only competed in a very small segment of motive power batteries. (Roe, Tr. 1201-02). Furthermore, customer testing of HD against CellForce has revealed that CellForce performed better than HD by 10-15%. (Godber, Tr. 271).

2. MPLP took sales

492. Bulldog was MPLP's first big motive customer. (Benjamin, Tr. 3515).

Response to Finding No. 492:

Complaint Counsel's Finding No. 492 is vague, incomplete and unreliable. Bulldog's sales comprise only 10% of the total motive power battery sales in North America. (RFOF 883; Benjamin, Tr. 3507). Bulldog uses a .140 width separator profile for 95% of its batteries. (RFOF 884; Benjamin, Tr. 3534-35, 3545). In 2003, Bulldog began purchasing all of its separator requirements for the .140 width separator profile from Microporous. This represented 95% of Bulldog's battery separator needs. (RFOF 890; Benjamin, Tr. 3534-35). After the switch to Microporous, Bulldog began using Microporous' CellForce battery separator product for the .140 width separator. (RFOF 892; Benjamin, Tr. 3518, 3535).

493. In 2002-2003, Bulldog Battery switched to Microporous (*i.e.*, Amerace) for separators for its motive batteries because Daramic, its supplier at that time, was not providing reliable delivery and consistent product quality. (Benjamin, Tr. 3511-3512). Daramic had been supplying Bulldog Battery with a PE type separator which could run on a sleeve machine. Microporous began supplying Bulldog Battery with its newly developed CellForce product which could also run on a sleeve machine. (Benjamin, Tr. 3508, 3514).

Response to Finding No. 493:

Complaint Counsel's Finding No. 493 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to Finding No. 492. In addition, this finding ignores evidence demonstrating that the .140 width separator used by Bulldog is an off-size thickness for a battery separator. (RFOF 885; Benjamin, Tr. 3537). The .140 width separator used by Bulldog is the thickest battery separator found in forklift batteries. (RFOF 885;

Benjamin, Tr. 3537). In fact, Bulldog is the only North American manufacturer of motive power batteries that uses a .140 width separator. (RFOF 885; Benjamin, Tr. 3537). Because of its thickness, it is difficult for battery separator suppliers to manufacture a .140 width separator. (RFOF 886; Benjamin, Tr. 3537-3539). Bulldog has encountered several quality issues with the .140 width separator, including pinholes in the separator. (RFOF 887; Benjamin, Tr. 3538).

Moreover, this finding omits evidence showing that Daramic was working diligently to resolve the quality issues Bulldog was experiencing with the .140 width separator. (Benjamin, Tr. 3510).

494. In an effort to source motive separators from the only other motive separator supplier, Bulldog Battery proposed buying a tool for Microporous, if Microporous would run the tool for Bulldog. Microporous countered Bulldog's offer, by saying it would buy the tool if Bulldog would sign a one year contract. Bulldog agreed to Microporous's proposal. (Benjamin, Tr. 3513-3514).

Response to Finding No. 494:

Complaint Counsel's Finding No. 494 is incomplete and misleading. A battery separator supplier needs a particular calender roll in order to manufacture a .140 width separator. (RFOF 888; Benjamin, Tr. 3539-40). Before Microporous could supply .140 width separators to Bulldog, it was necessary for Microporous to purchase a new calender roll that was capable of manufacturing .140 width separators. (RFOF 894; Benjamin, Tr. 3512, 3514, 3540). Microporous required Bulldog to enter into a supply agreement with Microporous before it would agree to acquire the new calender roll. (RFOF 895; Benjamin, Tr. 3540).

For a further response to this finding, Respondent incorporates its replies to Finding No. 492 and 493.

495. Once Bulldog Battery became a customer of Microporous, Daramic would periodically contact them. Daramic would say to Bulldog "Well, you really need to come back to Daramic and buy our material, we can give you a better price, we can do this." (Benjamin, Tr. 3517). Daramic's motive separator pricing was lower than Microporous. (Benjamin, Tr. 3558).

Response to Finding No. 495:

Complaint Counsel's Finding No. 495 is incomplete and misleading. This finding omits evidence showing that Daramic would have needed to acquire and groove a new calender roll in order to be able to manufacturer a .140 separator for Bulldog. (RFOF 900; Benjamin, Tr. 3541). Benjamin's testimony explaining that there was not much of a difference in the prices being offered by Daramic and Microporous. (Benjamin, Tr. 3516). In fact, the pricing terms offered by Daramic did not even provide a reason for Bulldog to consider switching back to Daramic. (Benjamin, Tr. 3516). Pricing was not a factor in Bulldog's decision to keep Microporous as its sole supplier for the .140 width separator. (RFOF 901; Benjamin, Tr. 3516).

496. In motive, Daramic intended to leverage its HD product to respond to competition from Microporous. (PX0171 at 004).

Response to Finding No. 496:

Complaint Counsel's Finding No. 496 is irrelevant, incomplete and misleading. PX0171 was prepared in September 2006. {

} (Roe, Tr. 1267, 1324-29, 1739-

40, 1781-82, *in camera*). This finding is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" states of competition do not indicate the state of competition years later. Moreover, contrary to Complaint Counsel's assertion, nothing in PX0171 suggests that Daramic planned to use HD to respond to competition from Microporous.

For these reasons, this finding should be rejected.

497. In 2006, after Bulldog Battery had switched to Microporous, Daramic unsuccessfully tried to win back this business by offering Bulldog Battery lower pricing on Daramic HD. (Benjamin, Tr. 3516, 3518, 3557). Bulldog Battery continued to source most of its motive battery separators from Microporous who lowered its price for CellForce in response to Daramic's pricing offer. (Benjamin, Tr. 3516-3517).

Response to Finding No. 497:

Complaint Counsel's Finding No. 497 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to Finding No. 495. In addition, this finding ignores evidence demonstrating that after Bulldog switched suppliers and began purchasing all of its .140 width separator requirements from Microporous, Daramic scrapped the calender roll it had been using to manufacturer .140 width separators. (RFOF 896; Benjamin, Tr. 3541). Thus, Daramic had no tooling to produce the .140 width separator for Bulldog. From the time Daramic scrapped the calender roll it had been using to manufacturer .140 width separators for Bulldog up through the present, Microporous (and now Daramic post-acquisition) was the only battery separator supplier in the world that had a calender roll capable of manufacturing a .140 width separator. (RFOF 897; Benjamin, Tr. 3542-43).

Additionally, this finding ignores evidence showing that Bulldog informed Microporous of the proposal it received from Daramic. (RFOF 903; Benjamin, Tr. 3546). At that time, Bulldog also informed Microporous that it had no intention of leaving Microporous and made it clear that Bulldog was not threatening Microporous with the Daramic proposal. (RFOF 904; Benjamin, Tr. 3546-47). In fact, Bulldog did not have any intention of switching its supplier of the .140 width separator from Microporous to Daramic. (RFOF 905; Benjamin, Tr. 3545). Bulldog did not use the Daramic proposal as an ultimatum to obtain price concessions from Microporous. (RFOF 906; Benjamin, Tr. 3547). In actuality, Bulldog informed Microporous of Daramic's proposal so that Microporous would be aware of Daramic's intentions in the marketplace. (RFOF 907; Benjamin, Tr. 3547). Microporous lowered the price of the .140 width battery separator to Bulldog as a thank-you for Bulldog informing Microporous of Daramic's activities in the marketplace. (RFOF 908; Benjamin, Tr. 3548). This price adjustment took effect January 2, 2007. (RFOF 909; Benjamin, Tr. 3547-48). Less than one year after Microporous lowered the price of the .140 width separator, Bulldog received a price increase on

the .140 width separator from Microporous consisting of a price increase and a rubber surcharge. (RFOF 910; Benjamin, Tr. 3548-49).

498. Because Daramic and Microporous competed so vigorously for motive battery manufactures, in 2006 Bulldog Battery was able to receive a 2.5% price decrease on all of its separator purchases from Microporous without using Daramic as a threat, but simply by stating Daramic had offered it a lower price. (Benjamin, Tr. 3545-3548). If Bulldog Battery wanted to switch its motive separators from Microporous's CellForce separators to Daramic's HD separators, it could do so. (Benjamin, Tr. 3518, 3555). Thus, if Microporous and Daramic were independent today, Bulldog Battery would have two sourcing options for its motive separator needs instead of only one today. (Benjamin, Tr. 3526, 3555).

Response to Finding No. 498:

Complaint Counsel's Finding No. 498 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to Finding Nos. 494, 495 and 497. Significantly, this finding omits evidence showing that less than one year after Microporous lowered the price of the .140 width separator, Bulldog received a price increase on the .140 width separator from Microporous consisting of a price increase and a rubber surcharge. (RFOF 910; Benjamin, Tr. 3548-49).

Despite Complaint Counsel's assertion that Bulldog could switch to HD, this evidence in this case demonstrates that Bulldog had absolutely no intention of leaving Microporous or switching to HD. (Benjamin, Tr. 3546-47). In fact, Bulldog has not qualified Daramic's HD separator product for use in its batteries. (Benjamin, Tr. 3564).

Moreover, Bulldog's historical actions demonstrate that it does not want "two sourcing options for its motive separator needs." Through 2002, Bulldog purchased all of its battery separators from Daramic. (RFOF 889; Benjamin, Tr. 3509). From 2003 until the acquisition, Bulldog purchased 95% of its separator needs (the .140 width separator) from Microporous. (Benjamin, Tr. 3518, 3534-35). Following the acquisition, Bulldog continues to use the

CellForce separator today for at least 95% of its battery separator requirements and continues to obtain the .140 width separator from one supplier. (Benjamin, Tr. 3504, 3518, 3535-36, 3549).

499. Prior to the acquisition, Microporous lowered its pricing for the CellForce separators sold to Bulldog Batteries after finding out that Daramic had offered Bulldog Batteries a lower price for its competing HD separators. (Benjamin, Tr. 3517-3518).

Response to Finding No. 499:

Complaint Counsel's Finding No. 499 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to Finding Nos. 495, 497 and 498.

500. Daramic was achieving 37.2% average gross margin for its PE industrial separators, but average of 28% for its HD separators. Daramic feared that a shift to PE/rubber separators for the motive market would lead to higher HD sales and that it could not charge a premium for HD due to competition from CellForce. (PX0319 at 013).

Response to Finding No. 500:

Complaint Counsel's Finding No. 500 is irrelevant, incomplete and misleading. First, PX0319 was prepared in August 2006. {

} (Roe, Tr. 1267, 1324-29,

1739-40, 1781-82, *in camera*). This finding is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" states of competition do not indicate the state of competition years later. Gross margin figures from 2006 have absolutely no correlation to Daramic's margins or the state of competition either pre- or post-acquisition.

This finding omits evidence demonstrating that {

} (RFOF 278; Riney, Tr. 4924-29, *in camera*). {

} (RFOF 278; Riney, Tr. 4927-28, *in camera*).

Additionally, this finding ignores the fact that {

} (Riney, Tr. 4925-27, *in*

camera). {

} (Riney,

Tr. 4926-27, *in camera*).

{

} (RFOF 279; Riney, Tr. 4929, *in camera*). {

} (RFOF 281; Riney, Tr. 4930, *in camera*).

D. MPLP was Daramic's only competitive constraint in UPS

501. Prior to the acquisition, Daramic and Microporous were the only suppliers of separators for reserve power for flooded high-end batteries to North American customers. (Gilchrist, Tr. 305-306; 343).

Response to Finding No. 501:

Complaint Counsel's Finding No. 501 is incomplete and misleading. This finding completely ignores evidence demonstrating that numerous separator manufacturers are poised to supply reserve power separators to North American customers. For example, {

} (RFOF 968; Weerts, Tr. 4489, *in camera*). {

} (RFOF 968; Weerts, Tr. 4522, *in camera*). {

} (RFOF

968; Weerts, Tr. 4522-23, *in camera*). {

} (RFOF 970; Gillespie, Tr. 3037, *in camera*).

{

} (RFOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*;
RX00026, *in camera*; RX00027, *in camera* {
}; RX00061, *in camera*; RX00062, *in camera*). {

} (RFOF
991; RX00061, *in camera*). {
} (RFOF 992; Axt, Tr. 2218, *in camera*).

Additionally, Daramic faces competition with NSG for both automotive and industrial separators, both directly in Asia, and indirectly throughout the world. For example, Asian companies, such as Leoch in China, export industrial batteries containing NSG separators to North America. (RFOF 1012; Thuet, Tr. 4348).

{

}
(RFOF 1024; Axt, Tr. 2219, *in camera*). {
}

(RFOF 1025; Axt, Tr. 2272-73, *in camera*). {
} (RFOF 1026; Axt, Tr. 2272-73, *in camera*).

502. {
} (Simpson, Tr. 3193, *in camera*; Gillespie, Tr. 3048).

Response to Finding No. 502:

Complaint Counsel's Finding No. 502 is inaccurate and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Second, the evidence in this case raises significant credibility questions about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded. This finding completely ignores evidence demonstrating that numerous separator manufacturers are poised to supply reserve power separators to North American customers. (*See* Response to Finding No. 501).

Moreover, Complaint Counsel's alleged "UPS" market is actually a secondary subset of batteries used for "reserve," "standby" or "stationary" power, which is, itself, a subset of "industrial" batteries. Complaint Counsel put forward no evidence that a "UPS" separator was any different in functionality, form, size, or material than any other subset of the stationary types of batteries. As a result, it is entirely unclear how "UPS" can be a category in and of itself. (Gilchrist, Tr. 306 ("UPS is a type of reserve power"); Roe, Tr. 1815 (Q. When you use the term "industrial," does that mean both motive and UPS? A. I typically, when I mention "industrial," then I have to segregate the application, either industrial motive power or industrial stationary, and when I say "stationary," then I have to differentiate between a UPS or telecom. Q. Does industrial then cover all of that? A. Yes. Basically two categories, automotive SLI and industrial."); Roe, Tr. 1736 (Couldn't tell if the demonstrative battery (PX3003) was UPS or telecom – both stationary)).

Complaint Counsel's blatant attempt to further confuse the issues related to their alleged "UPS" market should also be ignored. During the questioning of Mr. Gilchrist, Complaint Counsel asked him whether Microporous sold products for use in "any of the UPS-type product lines." (Gilchrist, Tr. 397). Mr. Gilchrist responded that yes, at the time of the acquisition

Microporous had been selling CellForce for “UPS” to C&D Dynasty for a year and a half. (Gilchrist, Tr. 397-98). What Complaint Counsel neglected to point out, but surely knew, as did Mr. Gilchrist, was that Microporous was supplying UPS separators to C&D for “gel” VRLA batteries – not the flooded lead acid batteries that are the basis of all of Complaint Counsel’s alleged product markets. (PX2110 at 006 (Microporous supplying separators for VRLA gel batteries to C&D); PX0922 (Roe, Dep. at 010-011), *in camera* {
}; Hauswald, Tr. 994-995 (gel batteries are not flooded lead acid batteries); PX2110 at 011).

As a further response to this finding, Respondent incorporates its replies to Finding Nos. 790-792, 795, 796, 799, 802, 806 and 807.

503. {
(Axt, Tr. 2216, *in camera*). {
} (Axt, Tr. 2216-2217, *in camera*). There is no one other than Daramic who makes UPS separators either in North America or worldwide. (Axt, Tr. 2102-2103).

Response to Finding No. 503:

Complaint Counsel’s Finding No. 503 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to Finding Nos. 501 and 502. Significantly, EnerSys has held discussions with BFR and Anpei concerning the supply of industrial separators, including separators for use in motive and UPS applications. (*See* Response to Finding No. 501). EnerSys intends to move forward with both BFR and Anpei with respect to obtaining industrial separators. (*See* Response to Finding No. 501).

Moreover, EnerSys witnesses’ testimony in this case is not credible, and their testimony on this issue should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

504. EnerSys planned to shift its separator purchases from a split between Daramic and MPLP to sole sourcing with MPLP. The only component of the plan that had not been achieved

was having a replacement for Daramic's Darak product. (McDonald, Tr. 3929-3930; PX0511).

Response to Finding No. 504:

Complaint Counsel's Finding No. 504 is incomplete and misleading. Furthermore, it is speculative and should be rejected. Complaint Counsel misrepresents McDonald's testimony on this issue. At trial, McDonald explained that if Microporous' Darak replacement product (LENO) and its white PE product were approved by EnerSys, it would have been a possibility that EnerSys would sole source from Microporous. (McDonald, Tr. 3929-30). As the evidence shows, however, {

} (RFOF 360; McDonald, Tr. 3864, *in camera*). Moreover,

{

}

(RFOF 364; McDonald, Tr. 3869, *in camera*).

505. Prior to the acquisition, Microporous had made some sales for over a "year and a half" to C&D and had already won a contract with EnerSys that would have given Microporous 40-50% of the North America UPS market. (Gilchrist, Tr. 398-399).

Response to Finding No. 505:

Complaint Counsel's Finding No. 505 is incomplete and misleading. Furthermore, it is speculative and should be rejected. For its response to this finding, Respondent incorporates its replies to Finding Nos. 501, 502 and 504. Significantly, during the questioning of Mr. Gilchrist, Complaint Counsel asked him whether Microporous sold products for use in "any of the UPS-type product lines." (Gilchrist, Tr. 397). Mr. Gilchrist responded that yes, at the time of the acquisition Microporous had been selling CellForce for "UPS" to C&D Dynasty for a year and a half. (Gilchrist, Tr. 397-98). What Complaint Counsel neglected to point out, but surely knew, as did Mr. Gilchrist, was that Microporous was supplying UPS separators to C&D for "gel" VRLA batteries – not the flooded lead acid batteries that are the basis of all of Complaint

Counsel's alleged product markets. (PX2110 at 006 (Microporous supplying separators for VRLA gel batteries to C&D); PX0922 (Roe, Dep. at 010-011), *in camera* {
}; Hauswald, Tr. 994-95 (gel batteries are not flooded lead acid batteries); PX2110 at 011).

Moreover, this finding ignores evidence showing that since the fall of 2008, the economy in United States and the economies throughout the rest of the world have been crippled by a severe economic recession. (RFOF 423; Gaugl, Tr. 4569; Riney, Tr. 4969-70, *in camera*; Thuet, Tr. 4328). For this reason, projections about market shares and competition are unreliable and cannot be considered as "fact." {

} (RFOF 298; Riney, Tr. 4961, *in camera*; RX00697 at 9, *in camera*). {

} (RFOF 298; Riney, Tr. 4961, *in camera*).

Additionally, the evidence raises significant credibility questions about Gilchrist's testimony in this proceeding (RFOF 396, 402, 403, 409, 581), and Gilchrist's testimony on this issue should be disregarded.

506. There is no other UPS separator technology available to UPS customers for a small but significant and non-transitory increase in price. {
} (Axt, Tr. 2220-2222, *in camera*).

Response to Finding No. 506:

Complaint Counsel's Finding No. 506 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to Finding Nos. 501, 502 and 503. Despite Complaint Counsel's assertion, there is no "UPS" market. (*See* Response to Finding No. 502).

Additionally, if there was a SSNIP on a separator used on a flooded UPS application, customers could move to a thicker or thinner PE separator, which can be used for the same UPS application. Battery separators used in stationary applications (which include UPS) have overall thicknesses ranging from 11 mils to 200+ mils, and backweb thicknesses ranging from 11 mils to 32 mils. (Whear, Tr. 4692, 4698; *see also* RX01662 for illustrative purposes). Battery separators used in SLI or automotive applications have overall thicknesses ranging from 7 mils to 75 mils, and backweb thicknesses ranging from 5 mils to 12 mils. (Whear, Tr. 4690-91, 4697; *see also* RX01662 for illustrative purposes). Battery separators used in motive power applications have overall thicknesses ranging from 60 mils to 140 mils, and backweb thicknesses ranging from 13 mils to 25 mils. (Whear, Tr. 4694-95, 4698; *see also* RX01662 for illustrative purposes). Accordingly, customers can choose to purchase different thicknesses for use in UPS applications. (RFOF 70).

Further evidence shows that various products made by Daramic are used across the spectrum of the FTC's alleged product categories. (RFOF 45-46, 64, 67, 69-78). For example, Daramic CL is used in the "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." (RFOF 89, 95, 127-128).

Moreover, EnerSys witnesses' testimony in this case is not credible, and their testimony on this issue should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

507. In its global search for UPS separators, {
} (Axt, Tr. 2216-17, *in camera*). As of today, other than Daramic, there is no one in the world that makes a separator that can be used in EnerSys's UPS batteries. (Axt, Tr. 2101).

Response to Finding No. 507:

Complaint Counsel's Finding No. 506 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to Finding Nos. 501, 502 and 503. Moreover, EnerSys witnesses' testimony in this case is not credible, and their testimony on this issue should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

1. MPLP was in the process of commercializing a UPS separator to address the black scum issue

508. Planning for project LENO began in late 2006 at the approval of the R&D steering committee which included Mike Gilchrist and Larry Travathan, as well as Steve McDonald and Matt Wilhjelm. (Brilmyer, Tr. 1836).

Response to Finding No. 508:

Complaint Counsel's finding number 508 is misleading and incorrect. Notwithstanding Mr. Brilmyer's testimony on direct, documents produced concurrently with the advent of the {

} (PX666

at 002, *in camera*; PX2013 at 001, *in camera*; Brilmyer, Tr. 1892-93, *in camera*; PX0670 at 003, *in camera*).

509. The LENO had a variety of people with different areas of expertise from development and sales to finance, in order to keep the R&D developers "based in reality." The finance and sales team members kept the team focused on the market for the new product and the costs associated with its development as well as the price the product could achieve in that market. (Brilmyer, Tr. 1837-1838).

Response to Finding No. 509:

Complaint Counsel's finding number 509 is incomplete. The LENO team consisted of the following people: {

}

(PX0665 at 002, *in camera*). Mr. Trevathan and Mr. Gilchrist were not part of the team. (PX0665 at 002, *in camera*; PX0668, *in camera*). The R&D Steering committee that Mr.

Trevathan and Mr. Gilchrist were members of met only once every 6 months, and thus met only once related to the LENO project. (Brilmyer, Tr. 1836). Mr. Trevathan testified that he {

} (PX0910 (Trevathan Dep. at 132), *in camera*). {

}

(PX0910 (Trevathan Dep. at 132), *in camera*).

510. The LENO team met regularly once a month, specifically the second Tuesday of the month in order to “ke[ep] the project moving” and to “ke[ep] everybody on track.” (Brilmyer, Tr. 1838).

Response to Finding No. 510:

Respondent has no specific response other than to clarify that the LENO team met once a month {

} (PX0668, *in camera*). See also, Respondent’s Response to

CCFOF 508-509.

511. The minutes from the LENO team meetings were recoded by Dr. Brilmyer and copies were distributed to the steering committee every month. (Brilmyer, Tr. 1838-1839).

Response to Finding No. 511:

Respondent has no specific response. See also, Respondent’s Response to CCFOF 508-510.

512. White PE was another name for the LENO project. Part of the LENO project goal was to find a solution to the black scum problem inherent in UPS batteries that used PE separators. White PE was a variation on the low ER no oil theme originally intended to become a replacement- for Daramic's Darak product commonly used in gelled batteries. (Brilmyer, Tr. 1837, 1839-1840).

Response to Finding No. 512:

Complaint Counsel's finding number 512 is not complete and is misleading. {

} (PX0663 at 002,

in camera; RFOF 355-365). Additionally, black scum is not "inherent" in all UPS batteries, and Daramic has for many years worked to solve the problems associated with black scum. (Whear, Tr. 4709-4715, 4718-4720; Whear, Tr. 4716-4717, *in camera*) (black scum was a problem in the "early 1990s"); PX1253). In fact, Mr. Gillespie of Exide testified that {

} (Gillespie, Tr. 3136, *in camera*).

513. MPLP's {

} (Whear, Tr. 4821, *in camera*).

Response to Finding No. 513:

Complaint Counsel's finding number 513 is incomplete and misleading. Enersys received samples of the LENO project product for testing in Hays, Kansas facility after the acquisition. (Gagge, Tr. 2516, *in camera* (samples provided "last August" in 2008); Brilmyer, Tr. 1857 ("when I left Polypore we had only just -- I left in August, and we had only delivered the first roll to the UPS guys in Hayes, Kansas in July.")). EnerSys, the only customer with which MPLP was working on the LENO project, has not approved the product, or requested supply. (FOF 355-365, 663, 722; Brilmyer, Tr. 1901-02; PX0909 (McDonald Dep. at 74), *in camera*; PX0913 (Whear Depo. at 227), *in camera*). Mr. Gagge testified at trial that {

} (Gagge, Tr. 2516, *in camera*).

514. The LENO project was initiated at the request of a customer, EnerSys, who had interests in a competing separator product for their gel batteries (Darak) and also for a separator that would address the "black scum problem they were having in their UPS batteries." (Brilmyer, Tr. 1839).

Response to Finding No. 514:

Complaint Counsel's finding number 514 is misleading. First, {

} (PX0913 (Whear Dep.

222-223), *in camera*). As Complaint Counsel's market is limited to separators for flooded lead acid batteries in North America to the extent this project sought a "competing product for their gel batteries (Darak)" it has no implication whatsoever to Complaint Counsel's case. (RX1572 at 2; Brilmyer, Tr. 1842, 1847, 1856 ("the Darak replacement was specifically directed at a gel product."); Gillespie, Tr. 3036, *in camera*). Further Darak is not made of PE, doesn't work the same way as PE, is not "comparable" to PE, is 2 to 2 ½ times more expensive than PE separators and is a "one of a kind" product. (Brilmyer, Tr. 1911-12; Qureshi, Tr. 2014; Burkert, Tr. 2323; Gaugl, Tr. 4572; CCFOF 145). Additionally, a May 2007 document contradicts Mr. Brilmyer's testimony related to the focus of the LENO project separators. (PX0663). Specifically, that document states that any product developed from the LENO project was intended to be used in "Stationary batteries in Europe (20 year life) . . . [and] Gel batteries in the US and Europe for UPS and wheelchair." (PX0663 at 002, *in camera*; PX0140, *in camera*; PX0490 at 001, *in camera* ("applications . . . is [sic] in stationary (20 year) and gel . . ."); RFOF 355-365). As noted above, gel batteries are not flooded-lead acid batteries, are not part of Complaint Counsel's product market and thus have no import here. (FOF 24, 103; Godber, Tr. 147-49; Gilchrist, Tr. 429-30). Further, Mr. McDonald's testimony confirmed that the results MPLP and Daramic had received related to testing of the LENO project samples were that "[t]he results of the 20-year battery is that it didn't meet the expectations of the Darak separator, and so EnerSys would not purchase the LENO type of a separator. For the gel application, that is still under testing, and I believe we should learn something in the July time frame of this year." (McDonald, Tr. 3864, *in camera*). Mr. McDonald has also testified that the LENO project was intended for Europe and "stayed in Europe." (PX0909 (McDonald Dep. at 48-49), *in camera*).

515. The UPS batteries that EnerSys was experiencing the black scum problem with were flooded lead acid batteries produced in its Hays, Kansas facility. (Brilmyer, Tr. 1841).

Response to Finding No. 515:

Complaint Counsel's finding number 515 is misleading and inaccurate. Dr. Brilmyer's cited testimony simply identifies one of the demonstrative batteries (PX3002) as a flooded lead acid battery and then states that the Hays facility makes the same types of batteries as PX3002. No where in Dr. Brilmyer's testimony does he state that the LENO project was for the production of a new separator for flooded lead acid batteries. (Brilmyer, Tr. 1841-42).

516. The LENO team at Microporous was eventually successful in discovering the root cause and a solution to the black scum problem. (Brilmyer, Tr. 1855).

Response to Finding No. 516:

Complaint Counsel's finding number 516 is false and unsupported by their evidence. First, as Mr. Brilmyer himself testified, when he left Polypore they had "only just" delivered the first rolls of LENO product to the Hays, Kansas facility and he did not know the status of the tests. (Brilmyer, Tr. 1857, 1901). It is axiomatic that Mr. Brilmyer could not know whether the project was "successful" prior to knowing the results of the customer tests. Further, as of February 13, 2008, only 15 days before the acquisition, Mr. Brilmyer's LENO Development Team Meeting Summary states that they were still performing "experiments" to "study the effect of eliminating stearate." (PX0665 at 002, *in camera*). Further, Mr. Brilmyer notes in that document that "More work will be done in our lab to establish the optimal formulation for our 'White PE' and to understand the mechanism of scum formation. . . . We plan to continue scum testing are various levels of stearate and rubber dust. Once the formulation is optimized final scum tests will be conducted in batteries." (PX0665 at 003, *in camera*, emphasis added). Thus, taking the timing of the first shipment of roll material to EnerSys for testing, along with the fact that the MPLP LENO team was still performing "experiments" in mid-February 2008, if any root cause or solution was discovered then it must have been done after the acquisition. (Brilmyer, Tr. 1857, 1901-1903, 1907 ("we hadn't perfected the process yet [as of February 13, 2008]")). Tellingly, Mr. Gilchrist testified that black scum was caused by carbon black, showing that even

the former CEO of Microporous and a member of the R&D Steering committee had no idea what the true basis for the black scum problem was. (Gilchrist, Tr. 353; PX0662 at 001, *in camera*). Finally, it is clear that EnerSys actually told Dr. Brilmyer and his team in July 2007 that black scum was caused by “the use of oil and/or sterate” in the separator, so it was not a “discovery” of MPLP’s. (PX0140, *in camera*).

517. Microporous had sent separators to EnerSys at its Hays, Kansas facility for battery builds and testing prior to the merger with Daramic. (Brilmyer, Tr. 1924-1925; PX0665 at 002, *in camera*).

Response to Finding No. 517:

Complaint Counsel’s finding number 517 is patently false and misrepresents the testimony and the documentary evidence. Mr. Brilmyer testified that while he was at Microporous they only sent “small pieces” of LENO samples to EnerSys at its Hays, Kansas facility and it was “more just to look at.” (Brilmyer, Tr. 1901; PX0665 at 002, *in camera* (“a roll will need to be cut for them.”). Further, he testified that he understood that EnerSys in Hays was not planning to build the batteries to test until August or September of 2008.” (Brilmyer, Tr. 1902-03; PX2178 at 001). Additionally, Mr. McDonald testified that the pilot line extractor needed to make LENO samples for EnerSys was not built at Piney Flats until June 2008 (McDonald, Tr. 3868, *in camera*), and Mr. Brilmyer confirmed that he went back to Piney Flats to produce the sample material for EnerSys after the acquisition. (Brilmyer, Tr. 1919).

518. The testing that the LENO project team had conducted was progressing very well before the merger. (Brilmyer, Tr. 1856-1857). Life-testing takes two years to complete for UPS batteries. (Brilmyer, Tr. 1902).

Response to Finding No. 518:

Complaint Counsel’s finding number 518 is incomplete, vague, irrelevant and misleading. First, as noted above LENO was being tested for 20 year stationary batteries in Europe to replace Darak, and in UPS gel applications. (Respondent’s Responses to CCFOF 512-517). Although Dr. Brilmyer testified that with respect to the testing in Europe the tests had

been ongoing for one year and were “going very well” he also testified that there was still approximately “one year left.” (Brilmyer, Tr. 1856-57). Furthermore, this testimony is irrelevant to the competitive landscape for flooded lead-acid battery separators in the North American market as these tests were for the sale of a product to Europe only. (Brilmyer, Tr. 1856-57; PX0909 (McDonald Dep. at 48-49), *in camera*; See also Respondent’s Response to CCFOF 514). Additionally, with respect to the UPS gel product Dr. Brilmyer specifically testified that beyond a few “pieces” samples had not been sent to EnerSys for testing until July 2008 and that he did not anticipate that EnerSys would build batteries for testing the White PE material until August or September of 2008 – after he had left Polypore, thus Complaint Counsel has no basis for a finding that testing of the White PE material was progressing well, or at all, based on Dr. Brilmyer’s testimony. (Brilmyer, Tr. 1901; PX0665 at 002, *in camera*; PX2178 at 001; RX01296, *in camera*; RX01297, *in camera*). Finally, testing time is relative and, in fact, documents related to the LENO project showed that testing could be completed on several of the applications in { } (PX0135 at 002, *in camera* { }

519. { } { } (PX0490, *in camera*; Brilmyer, Tr. 1868, *in camera*).

Response to Finding No. 519:

Complaint Counsel’s finding number 519 is misleading, irrelevant and inaccurate. As noted above, { } (PX0490, *in camera*). This is further confirmed by {

} (PX0663 at 001, *in camera*). In that document {

} however, Complaint Counsel has misleadingly failed to note that {

} (PX0663 at 002, *in camera* {

}; Brilmyer, Tr. 1843-44). Thus, the success, failure or even existence of the LENO project is entirely irrelevant to the flooded lead-acid battery market in North America that Complaint Counsel claims. (RX1572 at 2).

i) MPLP expected sales in late 2008 or 2009-07-08

520. Due to the strong customer demand for the product and the technical success Microporous achieved, Microporous had already made capital expenditures in its European facility, and was planning on additional expenditures at its United States facility, in anticipation of separator sales from project LENO as early as late 2008 or early 2009. (Brilmyer, Tr. 1858; PX0664 at 002, *in camera*).

Response to Finding No. 520:

Complaint Counsel's finding number 520 is misleading, irrelevant and inaccurate. As noted above, the {

} (PX0490, *in camera*; PX0663 at 002, *in camera*; Respondent's Response to CCFOF 512-519). Thus, the success, failure or even existence of the LENO project is entirely irrelevant to the flooded lead-acid battery market in North America that Complaint Counsel claims. (RX1572 at 2). Further, PX-664 at 002, *in camera*, does not make any mention of any plan to make any additional capital expenditures related to this project in the United States. Additionally, Mr. Brilmyer's cited testimony is not only contradicted by his earlier deposition testimony, but by his own testimony at trial where he {

} (Brilmyer, Tr. 1887-88, *in camera*). In fact, without knowing what the results of the {

} (Brilmyer, Tr. 1887-88, *in camera*). And, since the {
} as of the date of the document used by Complaint Counsel
to support this finding, {
(Brilmyer, Tr. 1886-88, *in camera*; Respondent’s Response to CCFOF 512-519). In fact, Mr.
Brilmyer further testified that {
} (Brilmyer, Tr.
1887, *in camera*). Mr. McDonald, who remains employed by Daramic, also testified that the
most recent test results of the customer have been “bad.” (McDonald, Tr. 3930, 3964). Finally,
there is no evidence beyond Mr. Brilmyer’s totally unsupported statement that any {
} (PX0663 at 001, *in camera*), {
} (PX0043). Mr. Brilmyer’s testimony holds
no water and should be disregarded on this point.

2. Acquisition ended MPLP’s efforts to address black scum in UPS

521. Since the acquisition, {
(PX0579 at 3, *in camera*

}

Response to Finding No. 521:

Complaint Counsel’s finding number 521 is entirely false, and directly contradicted by
the record evidence. It is also irrelevant. The testimony of every witness – including Complaint
Counsel’s witnesses - with knowledge of the LENO project confirmed that the LENO project is
ongoing today, and, in fact, was moved forward significantly after the acquisition. (Gagge, Tr.
2516, *in camera*; Brilmyer, Tr. 1857, 1862, 1901-02; McDonald, Tr. 3867, *in camera*; PX909

(McDonald Dep. at 74), *in camera*; RFOF 355-365, 663, 722; PX0913 (Whear Dep. at 227), *in camera*; Hauswald, Tr. 1099; McDonald, Tr. 3864, *in camera*; Whear, Tr. 4731, 4736, *in camera*). The document reference here by Complaint Counsel in support of this finding states only that the project may be cancelled, but this is not a valid fact as there is substantial evidence showing that it has not been cancelled but is on hold “not for any other reason than waiting for the customer to test it.” (Brilmyer, Tr. 1862).

522. {
} (PX0913 (Whear, Dep. at 197, *in camera*); Whear, Tr. 4825, *in camera*)). As a final solution it offered the Darak product as an alternative to EnerSys. (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200, *in camera*)). Darak does not create black scum. (Axt, Tr. 2104).

Response to Finding No. 522:

Complaint Counsel’s finding number 522 is incomplete, out of context and misleading.

In 2004 and 2005, {

} (Whear, Tr. 4716-18, *in camera*). Following the testing,

{

} (Whear, Tr. 4716-18, *in camera*; PX0913 (Whear Dep. at 199-200), *in camera*). In

addition, {

} (PX0913 (Whear Dep. at 194-95), *in camera*). By

September 2006, EnerSys had no further complaints on the black scum problem, and no other customer complained. (PX0330; PX1738; Gillespie, Tr. 3136, *in camera* {

}

(RX01298; Whear, Tr. 4736, *in camera*).

523. There was little support for the LENO project among Daramic management since the goal of the project was to replace the costly, "very high-margin" Darak product with a less expensive, lower margin PE based separator. (Brilmyer, Tr. 1863-1864).

Response to Finding No. 523:

This finding is irrelevant, as it is based on Mr. Brilmyer's unsupported speculation, and is contradicted by empirical evidence in the record. The cited testimony relates to Mr. Brilmyer's "feeling" that management at Polypore was not behind the project and his "feeling" is flatly contradicted by the facts. (Brilmyer, Tr. 1863). Specifically, it is undisputed that Daramic continued working on the LENO project after the acquisition. (Gagge, Tr. 2516, *in camera*; Brilmyer, Tr. 1857, 1862, 1901-02; McDonald, Tr. 3867, *in camera*; PX909 (McDonald Dep. at 74), *in camera*; RFOF 355-365, 663, 722; PX0913 (Whear Dep. at 227), *in camera*; Hauswald, Tr. 1099; McDonald, Tr. 3864, *in camera*; Whear, Tr. 4731, 4736, *in camera*). Further, Daramic made capital expenditures of at least \$10,000 that MPLP was either unwilling or unable to make to further the project by building a pilot extruder line at Piney Flats for samples to be made for EnerSys. (Brilmyer, Tr. 1919; McDonald, Tr. 3867-68, *in camera*; Whear, Tr. 4736, *in camera*). The only reason that the LENO project continues to be on hold as of today is that Daramic is waiting for testing results from EnerSys. (Brilmyer, Tr. 1862 (project stalled "not for any other reason than waiting for the customer to test it.")). There is absolutely no evidence that Daramic does not support the project and would not continue to move it forward, as it has been since the acquisition, should EnerSys actually approve the product and place orders for it going forward. (Gagge, Tr. 2516, *in camera*; Brilmyer, Tr. 1857, 1862, 1901-02; McDonald, Tr. 3867, *in*

camera; PX909 (McDonald Dep. at 74), *in camera*; RFOF 355-365, 663, 722; PX0913 (Whear Dep. at 227), *in camera*; Hauswald, Tr. 1099; McDonald, Tr. 3864, *in camera*; Whear, Tr. 4731, 4736, *in camera*).

i) MPLP development team eliminated

524. After the acquisition, the {
} (Whear, Tr. 4820, *in camera*).

Response to Finding No. 524:

Complaint Counsel's finding number 524 is incomplete and misleading. {

} (PX0918 (Riney IHT at 116), *in camera*). The technical center in Owensboro is the premier technical facility of all Daramic plants and is consolidated to provide the most efficient testing and R&D procedures possible. (Thuet, Tr. 4337).

525. After the merger, Daramic moved Dr. Brilmyer from Piney Flats Tennessee to its Owensboro Kentucky facility and disbanded the R&D group of the former Microporous against the request of Dr. Brilmyer and Rick Wimberly who thought the projects that they were engaged in under an independent Microporous were worthy of a continued concerted focus. As a result, work on the LENO project slowed down. (Brilmyer, Tr. 1861-1862).

Response to Finding No. 525:

Complaint Counsel's finding number 525 is misleading, vague and incomplete. First, this finding is vague in that it is entirely unclear what "R&D" group is being referenced. Dr. Brilmyer testified that there was an "R&D Steering" group, but that group consisted of the management of Microporous (i.e.: Mr. Trevathan, Mr. Gilchrist, Mr. Wilhelm and Steve McDonald). (Brilmyer, Tr. 1836). That team met only once every six months. (Brilmyer, Tr. 1836). Mr. Trevathan testified that {

} (PX0910 (Trevathan Dep. at 132), *in camera*); Respondent's Response to CCFOF 510). Further, Mr. Brilmyer testified that

he didn't want to move to Owensboro "[p]artially for selfish reasons." (Brilmyer, Tr. 1861). His other reasons related to the fact that "Microporous Products, had unique products because every one of our products had rubber in them and we felt that technology was unique enough to require its own technical effort." (Brilmyer, Tr. 1861). As the LENO project was intended to replace PE and/or Darak separators in UPS gel and long-life stationary applications there is no evidence whatsoever that the technical center in Owensboro would not have been a more appropriate location for testing particularly in light of the extensive experience Daramic already had in dealing with the black scum issues and Darak. (Respondent's Response to CCFOF _____). Any statement by Dr. Brilmyer related to the feelings of Mr. Wimberley is pure hearsay and there is no basis for any fact that Mr. Wimberley (who was on Complaint Counsel's witness list, but was not called by them) thought that any MPLP projects should remain independent. Finally, as noted above, Mr. Brilmyer's statement that the LENO project slowed is contradicted by a myriad of testimony in the record. (Respondent's Response to CCFOF 523).

E. MPLP was a Competitive Constraint in SLI

526. In 2003, Mr. Roe was negotiating with JCI for a contract extension. (Roe, Tr. 1237). During the course of these negotiations, Mr. Roe came to understand that MPLP was bidding on a portion of JCI's SLI business in both the US and Europe. (Roe, Tr. 1237; PX0693). Mr. Roe understood that JCI was reviewing a proposal for the establishment of a new battery separator manufacturing facility in Europe, and Mr. Roe assumed that this would be a new MPLP manufacturing facility. (Roe, Tr. 1240; PX0693).

Response to Finding No. 526:

Complaint Counsel's proposed finding 526 is flawed, irrelevant and incomplete because all information that Mr. Roe either testified to, or transmitted at the time, was based on information provided to him from JCI and thus is hearsay. Further, looking at the true facts at the time, rather than what JCI was telling Mr. Roe, it is clear that: (1) JCI was not engaged in ongoing discussions with MPLP at the time as the MPLP SLI material had failed JCI testing and JCI had concerns about the quality of MPLP products (Hall, Tr. 2695-2696; Gilchrist, Tr. 466, *in*

camera; RX00071 at 03; RFOF 486; PX0905 (Gaugl, Dep. at 176-77), *in camera*; (2) the new battery separator manufacturing facility in Europe was actually for a company called Alpha. (RX00041, *in camera*; RX00066 at 002-003, *in camera*; RX00070 at 05-06, *in camera*; Hall, Tr. 2670; RFOF 446); and (3) the prices proposed by MPLP to JCI prior to the failure of the qualification tests were nowhere near what JCI was telling Daramic – in other words – they were blatantly lying. (PX0890 at 016, *in camera* {

} It is also telling, that in the document cited by Complaint Counsel Mr. Roe specifically notes that he did not feel MPLP was “our legitimate competitor.” (PX0693). Any issues related to the sale of products in Europe is wholly outside of the geographic market proposed by Complaint Counsel and thus is also irrelevant. (RX1572 at 3).

527. After learning about MPLP’s attempt to gain a share of JCI’s SLI business, Daramic grew very concerned about the potential threat to Daramic from MPLP’s possible entrance into the SLI market. (PX0244). Just two weeks after Daramic forced JCI into a contract extension, Mr. Roe informed Daramic’s worldwide sales team that MPLP had been qualified for use in automotive products at JCI and might soon be pursuing automotive opportunities. (PX0244; Roe Tr. 1249-1250). Mr. Roe told the Daramic sales team that it had “become critical that we assess the true sales situation of [MPLP’s] CellForce [sic] product.” (PX0244; Roe Tr. 1248). Daramic understood that at that time, MPLP’s CellForce line was running at full capacity and that MPLP was planning a second PE line for their Piney Flats facility. (PX0244; Roe, Tr. 1251-1253). Mr. Roe requested that his sales team estimate where MPLP might be supplying customers, and informed the sales team that this was a “critical exercise in order to understand the potential threat of this competitor.” (PX0244; Roe, Tr. 1251).

Response to Finding No. 527:

Complaint Counsel’s proposed finding number 527 is misleading, out of context and incomplete. First, there is no valid proof that Daramic forced JCI into a contract extension. (RFOF 447-457). The two companies negotiated for over 14 months over a contract and Daramic ultimately simply told JCI that if an agreement couldn’t be reached they would begin supplying JCI on a spot price basis for their European products. (RFOF 451-454). As there was

an agreement for the Americas it is wholly irrelevant what negotiations and contracts were signed between JCI and Daramic in Europe, which is outside Complaint Counsel's claimed geographic market. (RX1572 at 3; RFOF 451-54; Roe, Tr. 1255-56). Further, notwithstanding Mr. Roe's request to his sales force to elicit and discover market information in 2004, which is a vital part of all salespeople's jobs, he did not feel MPLP was a "legitimate competitor" and the document cited by Complaint Counsel bears that out, showing that the only response estimated a volume of 15,000 sqm/year sold by MPLP to a Daramic customer. (PX0244). To put this in perspective, it is only 0.14 percent of MPLP's available 11 million square meters of CellForce production capacity at that time, and is infinitesimal compared to Daramic's capacity. (Gaugl, Tr. 4546; PX0406 at 003, *in camera*; RX1500 at 020, *in camera*; RX00178 at 011, *in camera* (JCI document putting MPLP's share of the worldwide separator capacity at {

} Further, Mr. Roe testified that he simply wanted his sales force to go out and gather the market information to determine if the information planted by JCI was real. (Roe, Tr. 1250).

528. Dr. Kahwaty's assertion that Microporous was a high-cost firm is belied by Microporous's position in the deep-cycle and motive markets. { (Simpson, Tr. 3438, *in camera*).

Response to Finding No. 528:

Complaint Counsel's finding number 528 is a complete misrepresentation of the evidence and contains an incorrect assumption regarding the high market share of Microporous in the deep-cycle market. The evidence is replete that, regardless of rumors and inaccuracies presented by Daramic's customers, Microporous was a high-cost firm. (PX00442, *in camera*; RFOF 239, 273-276, 314, 339, 442, 537, 541, 545, 547, 569, 734, 1298, 1339; PX0489; RX00677, *in camera*; Wallace, Tr. 1972; Qureshi, Tr. 2064;). The reason Microporous had a high market share in the sale of separators for use in deep-cycle applications was because it was the only firm

in the world making rubber battery separators, which are the “gold standard” for use in batteries for deep-cycle applications. (Whear, Tr. 4683; PX0433 at 001; Gilchrist, Tr. 535-536; Godber, Tr. 271; PX1060). MPLP’s high market share pre-acquisition was for the sale of a product which cost 25-82% more than the product Complaint Counsel alleges competed with it. (RFOF 239, 273-276, 314, 339, 442, 537, 541, 545, 547, 569, 734, 1298, 1339; PX0489; RX00677, *in camera*; Wallace, Tr. 1972; Qureshi, Tr. 2064). Complaint Counsel has not and cannot provide a single instance where any Flex-Sil separator was ever sold to any customer for less than an HD or PE separator. (PX0442). The evidence is undisputed that in the FTC’s so-called “deep-cycle” market Microporous was the “high cost” firm. (RFOF 239, 273-276, 314, 339, 442, 537, 541, 545, 547, 569, 734, 1298, 1339; PX0489; RX00677, *in camera*; Wallace, Tr. 1972; Qureshi, Tr. 2064;). Moreover, there is no serious question that {

} (RFOF 273-76, 430-37, 1308, 1315, 1384-85, 1466-68;

Kahwaty, Tr. 5215-18, *in camera*). Additionally, Dr. Simpson’s testimony is not a “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded.

529. Dr. Simpson noted that even if { } did have higher cost than { } in the manufacture of { } these higher costs did not prevent Microporous from competing. (Simpson, Tr. 3463, *in camera*). Significantly, Daramic offered lower prices for SLI battery separators in response to competition from { }. (PX0258).

Response to Finding No. 529:

Complaint Counsel’s proposed finding number 529 is irrelevant, incorrect and misleading. First, Dr. Simpson’s testimony is not a “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded. Second, Dr. Simpson’s testimony on this issues was supported by no explanation whatsoever – he simply states that, {

} (Simpson, Tr. 3463, *in camera*). He offers no fact, or

empirical evidence, to support this statement and it should be disregarded as having no basis whatsoever. (Simpson, Tr. 3463, *in camera*). Finally, the document cited to by Complaint Counsel for this proposition does not, in any manner, support this finding. (PX0258). In fact, the document, which has no date, and no identifying information related to who wrote it and for what purpose, asks only “what do we want to achieve” and in the context of what can be offered to customers in this hypothetical of what “we” want to achieve, mentions a possible price increase (“announce 4% end at 2%”) and discusses MPLP and pricing only in Europe – a wholly irrelevant geographic market according to Complaint Counsel. (RX1572 at 3; PX0258). Complaint Counsel has offered no proof whatsoever in support of this finding that Daramic did, or has, lowered SLI pricing to customers in response to competition from MPLP.

F. The acquisition will facilitate coordination in the SLI market

530. Dr. Simpson concluded {
} (Simpson, Tr. 3201-3202, *in camera*).

Response to Finding No. 530:

Complaint Counsel’s proposed finding number 530 is irrelevant, incorrect and misleading. First, Dr. Simpson’s testimony is not a “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded. Additionally, Dr. Simpson’s bases for concluding that the acquisition would facilitate coordinated interaction are unsupported by any empirical evidence. (RX00259, *in camera*). Not only have Complaint Counsel failed to prove that battery separator manufacturers could reach terms of coordination, but there is no evidence they would be able to detect or punish deviations. (RFOF 1240-41, 1369, 1436). The evidence at trial that {

} of Daramic’s business, {

} is replete and soundly defeats any conclusion by Dr. Simpson that coordinated interaction will occur. (RFOF 306-09, 946-57). Simpson admitted that there is no evidence that

{

(Simpson, Tr. 3398, *in camera*). Further, Dr. Simpson's actual testimony on this point was peppered with inaccuracies. He notes that the acquisition {

} (RX01037 at 002, *in camera*; Simpson, Tr. 3348-50, *in camera*; RX01133, *in camera*; RX00259 at 007, *in camera*). Further, Dr. Simpson states that he regards MPLP as a "maverick" because, he claims, {

} Simpson, Tr. 3202, *in camera*).

These "beliefs" by Dr. Simpson are directly contradicted by the facts which show that {

} (PX1503 at 002, *in camera* {

} (2) the correction of an age-old problem for which Daramic had discovered the same "cause" as MPLP – only at least four years earlier (LENO – black scum; RFOF 355-365; Respondent's Response to CCFOF 512-525); and (3) for products that didn't work in regular PE batteries {

} (RFOF 364); CellForce for SLI – { } (RFOF 366-68; RX00024, *in camera*). These are hardly "maverick" innovations. {

} (Hall, Tr. 2666; RFOF 206, 445, 927).

531. Coordinated interaction refers to anticompetitive effects that can only occur when the merged firm acts in concert with some of its rivals. (Simpson, Tr. 3199-3200, *in camera*; Merger Guidelines §2.1). While outright collusion is an example of coordinated interaction, Dr. Simpson noted: "firms that repeatedly interact can learn over time that they make more profits if they don't compete too aggressively, so just that over time firms through repeated interaction begin to behave in a way that's less competitive . . . and recognize that by behaving not as aggressively they earn more profits." (Simpson, Tr. 3200, *in camera*). The terms of coordination need not be overly elaborate - such terms could be as simple as a division of markets or the assignment of customers. (Simpson, Tr. 3200, *in camera*).

Response to Finding No. 531:

Complaint Counsel's proposed finding of fact number 531 is irrelevant and inaccurate. First, Dr. Simpson's testimony is not a "fact" and Complaint Counsel's use of his testimony as a finding of "fact" is improper and should be disregarded. Second, the merger guidelines and the law make clear what coordinated interaction is, and Dr. Simpson's view of what constitutes coordinated interaction is irrelevant to the Court's findings and is inappropriately included in these proposed findings of fact. Further, Dr. Simpson conceded that {

}

(Simpson, Tr. 3389, *in camera*). Yet, Dr. Simpson was unable to {

}

(Simpson, Tr. 3391, *in camera*; Kahwaty, Tr. 5182, *in camera*).

532. "While sellers sometimes explicitly coordinate their behavior, sellers often simply learn to cooperate through repeated interaction." (PX0033 at 020-021, *in camera*).

Response to Finding No. 532:

Complaint Counsel's proposed finding of fact number 532 is irrelevant and inaccurate. First, Complaint Counsel here cites to Dr. Simpson's Expert Report which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (PX33 at 020-21; Pretrial Hearing Tr. at 20). Dr. Simpson's report is not a "fact" and Complaint Counsel's use of his testimony as a finding of "fact" is improper and should be disregarded.

533. "Economic theory suggests that successful coordination becomes easier as the number of sellers involved declines." (PX0033 at 021, *in camera*). "This is confirmed by studies of actual cartels which find that cartels generally have only a small number of participants." (PX0033 at 021, *in camera*).

Response to Finding No. 533:

The proposed finding is irrelevant and inaccurate for the reasons articulated in Respondent's Response to Finding No. 530-32. Further, it merely sets forth the view of Dr.

Simpson who this Court does not credit. There is no evidence that the assessment identified in Finding No. 533 is accurate.

534. Dr. Simpson noted that for coordinated interaction to occur, firms need to reach terms of coordination, monitor those terms, and enforce those terms. (Simpson, Tr. 3201, *in camera*). Dr. Simpson testified that the following factors would make coordinated interaction more likely: repeated interaction among firms; a small number of firms; and information being readily available in the marketplace about what other firms are doing. (Simpson, Tr. 3201, *in camera*).

Response to Finding No. 534:

The proposed finding is irrelevant and inaccurate for the reasons articulated in Respondent's Response to Finding No. 530-32. Further, it merely sets forth the view of Dr. Simpson. There is no evidence that the assessment identified in Finding No. 534 is accurate or supports that the { } (Kahwaty, Tr. 5072, 5179, *in camera*).

535. { } (PX0904 (Seibert, Dep. 142, *in camera*)). { } (PX0904 (Seibert, Dep. 142-143, *in camera*)).

Response to Finding No. 535:

Complaint Counsel's proposed finding number 535 is irrelevant, incomplete and misleading. The proposed finding is irrelevant because even if Daramic knew against whom it was competing that does not support any finding of coordinated interaction. Additionally, Mr. Seibert's testimony at his deposition was that the {

} (PX0904 (Seibert, Dep. at 142-43, *in camera*)). There is no proof that such information was valid or accurate and, in fact, there is proof that it was often inaccurate. (PX0097; Weerts, Tr. 4513-14, *in camera*).

536. { } (Simpson, Tr. 3201-3202, *in camera*). {
}(Simpson, Tr. 3201-3202, *in camera*).

Response to Finding No. 536:

The proposed finding is irrelevant and inaccurate for the reasons articulated in Respondent's Response to Finding No. 530-32. Further, it merely sets forth the view of Dr. Simpson. There is no evidence that the assessment identified in Finding No. 536 is accurate nor evidence that what business conducted is accurately communicated or known.

537. { } (Hauswald, Tr. 834,
in camera). {
} (Hauswald, Tr. 835-37,
in camera).

Response to Finding No. 537:

Complaint Counsel's proposed finding number 537 is inaccurate, incomplete and misleading. First, Mr. Hauswald's own testimony regarding the information Daramic gathered about {

} (Hauswald, Tr. 835, *in camera*). Further, it is clear from the evidence that, in fact, information gathered is often incorrect. (See, e.g., PX0097 ("We got confirmation that Amerace plans to build a line in Tschechoslovakia, inside the building from an EnerSys facility")). Moreover, information about a strike or a plant closing for a significant length of time is hardly information that is not known in all industries. (See, e.g., Douglas, Tr. 4068-69, *in camera* {
}).

538. In 2006, { } learned and wrote in his personal notebook { } sales information relating to the customers to whom { } was selling and the quantities they sold. (PX0093 at 046, *in camera*). { } gets such information

from its work force regarding what customers are buying. (Hauswald, Tr. 840, *in camera*; PX0093 at 046, *in camera*).

Response to Finding No. 538:

Complaint Counsel's proposed finding number 538 is inaccurate, incomplete and misleading. Mr. Hauswald testified that {

} (Hauswald, Tr. 840-46, *in camera*). Further, evidence at trial made it clear that the information was inaccurate: not only had MPLP not sold product to Douglas in 2006, as Mr. Hauswald's notes seem to indicate they had, but MPLP had not even approached Douglas since 2004. (Douglas, Tr. 4062-63). Thus, there is no evidence that this document is accurate, or that the author's recitation of this information was accurate.

539. {

} (PX0093 at 046, *in camera*; Hauswald, Tr. 841, *in camera*). {

} (PX0093 at

046, *in camera*; Hauswald, Tr. 843, *in camera*).

Response to Finding No. 539:

The proposed finding is misleading and inaccurate for the reasons articulated in Respondent's Response to Finding No. 538.

540. A Polypore document indicates that this effect is indeed present in these markets. The CFO of Polypore advised a subordinate to address barriers to entry when discussing Polypore's business, including Daramic, with Standard and Poor's: "The reason why we don't worry too much about 'backlog' in the traditional sense is that with the SUBSTANTIAL technical ability, capital investment, lengthy qualification requirement, market share, and other 'barriers to entry,' the likelihood of our base business leaving us without our advance (in some cases significant advance) knowledge is very very low." (PX0829 at 001 (emphasis in original)). The subordinate, advised Standard and Poor's of the barriers to entry as instructed. (PX0828 at 001; PX2251 at 009, *in camera*).

Response to Finding No. 540:

Complaint Counsel's proposed finding 540 is misleading and misrepresents the documents and testimony and is misleading, inaccurate and unsupported by the evidence. (RFOF 1061-1122). First, Complaint Counsel here cites to Dr. Simpson's Rebuttal Expert Report which is not evidence. (See Respondent's Response to CCFOF 532-34; PX2251, *in camera*). Further, it is misleading because it cites a document and attributes it, as Complaint Counsel also did in their opening statement, to "Daramic." (Robertson, Tr. 43). This is false. This is not a document from Daramic – it is a document from Polypore. (PX0828; PX0829). At trial Complaint Counsel also tried to blur the lines between the two companies. (Toth, Tr. 1455). Yet the documents themselves seek information related to "Membrana...Daramic... CELGARD...Liqui-Cel [and] . . .Industrial Filtration Membranes" not specifically about Daramic. (PX0828; PX0829). Further, as Mr. Graff testified that {

} (Graff, Tr. 4895-97, *in camera*

{

}

541. {

} (Simpson, Tr. 3201-3202, *in camera*). {

} (Simpson, Tr. 3202, *in camera*). {

} (Simpson, Tr. 3201-02, *in camera*).

Response to Finding No. 541:

Complaint Counsel's proposed finding number 541 is irrelevant, incorrect and misleading for the reasons set forth in Respondent's Response to CCFOF 530. (See also RX00259 at 007, *in camera*; RX01037 at 002, *in camera*; RX01133, *in camera*; RFOF 306-09, 355-368; 946-57, 1240-41, 1369, 1436; Hall, Tr. 2666; RFOF 206, 445, 927).

542. JCI's PE SLI separator suppliers from 2004 through 2007 were Daramic and Entek. (Hall, Tr. 2687-2688). In this timeframe, JCI purchased between 110 and 120 million square meters of PE separators on an annual basis from Entek without a contract. (Hall, Tr. 2690).

Response to Finding No. 542:

Complaint Counsel's finding number 542 is irrelevant because it is not representative of current market conditions. {

} (RFOF 474-481, 491-

502). What JCI did between 2004 and 2007 is entirely irrelevant to whether it is *reasonably probable* that the acquisition of Microporous by Polypore will lead to *substantially* lessened competition in the future. (RFOF 474-481, 491-502; Section 7 of the Clayton Act, 15 U.S.C. § 18).

543. JCI believes that Daramic and Entek were not competing for JCI's business. (Hall, Tr. 2692). In 2004, JCI described the separator supply base { } (PX1505 at 002, *in camera*).

Response to Finding No. 543:

{

} There is no evidence that the assessment identified in

Finding No. 543 was accurate. In fact, there is significant evidence that {

} (RFOF 474-510; RX00115, *in camera*;

RX00123, *in camera*; RX00124, *in camera*; RX00259, *in camera*; RX00355, *in camera*;

PX1832, *in camera*; Weerts, Tr. 4471-72, 4495, *in camera*). This finding is additionally

irrelevant in that MPLP had neither the capacity, nor the technical expertise to win any of JCI's

business in 2004. (Hall, Tr. 2695-96; Gilchrist, Tr. 466, *in camera*; RX00071 at 03; RFOF 486).

544. One reason that JCI felt that Daramic and Entek were not competing for its business was that JCI continued to see price increase during this time period despite double digit growth in its separator purchases, whereas JCI got lower prices from suppliers of other commodities as JCI's business grew. (Hall, Tr. 2692).

Response to Finding No. 544:

For the reasons set forth in RFOF 474-481, 491-502, in addition to Respondent's Responses to CCFOF 542-43, this proposed finding is irrelevant and speculative. There is no evidence that the assessment identified in Finding No. 544 was accurate. {

}

545. While JCI investigated moving some supply away from Entek, JCI had no other supplier outside of Daramic that JCI could use as a source of separator supply. (Hall, Tr. 2802-2803). During this time period, JCI's separator strategy continued to have a goal of bringing new separator entrants into the marketplace in order to get more competition. (Hall, Tr. 2691, 2693). JCI's goal was to {
} (PX1509 at 009, *in camera*).

Response to Finding No. 545:

For the reasons set forth in RFOF 474-481, 491-502, in addition to Respondent's Responses to CCFOF 542-43, this proposed finding is irrelevant, vague and misleading. This finding is vague and misleading in that it does not reference a time period. Mr. Hall testified that {

} (PX1509, *in camera*). Further, in light of the fact that {

}, thereby

reducing the amount of competition available to it, its actions belie Mr. Hall's stated testimony. (RFOF 474-481, 491-502). {

} (RFOF 469-473). These are not the actions of a customer looking for "more competition."

546. {

Toth Tr. 1604-1605, *in camera*). { (PX0471, *in camera*;

} (Simpson, Tr. 3390-3391, *in camera*).

Response to Finding No. 546:

The proposed finding is irrelevant and inaccurate for the reasons articulated in Respondent's Response to Complaint Counsel RFOF 530-32. Additionally, neither the document reference by Complaint Counsel, nor the testimony of Mr. Toth supports the proposition that {

} (Toth, Tr. 1604-05, *in camera*). The evidence is overwhelming that Daramic suffered from that loss. (Toth, Tr. 1535-36 ("it was devastating. We had to shut down our Potenza, Italy facility, and, unfortunately, in a region there where there aren't any jobs put 125-plus people out of work. We had to restructure in Owensboro and shut down some lines in Owensboro and had to address about 60 people there . . .") Interestingly, if Complaint Counsel are correct and {

} falls flat on its face. (Roe, Tr. 1375, *in camera*; PX0823, *in camera*). {

} (RFOF 306-09, 946-57, 1240-41, 1369, 1436).

1. SLI market has only two competitors today

547. Prior to the acquisition, Daramic, Microporous, and Entek were the only suppliers of separators for SLI or automotive batteries to North American customers. (Gilchrist, Tr. 307-308, 342). The SLI market is the largest separator market. (PX0131 at 032).

Response to Finding No. 547:

Complaint Counsel's proposed finding number 547 is misleading and incorrect. Prior to the acquisition MPLP did not supply separators for SLI or automotive separators to North American customers. (FOF 360, 385, 391, 409, 723, 1222; RPT Brief at 32) In fact, prior to the acquisition MPLP had made only one sale – of sample material – to Voltmaster in 2005, with no intention at that time of ever attempting to back into the SLI market. (McDonald, Tr. 3796-98; PX0921 (McDonald IHT 34-37), *in camera*; (PX0905 (Gaugl, Dep. at 73-74), *in camera* (MPLP had not produced automotive separators commercially, but did some trials)).

5 that direction. Further, prior to the acquisition the MPLP board had issued a mandate limiting the expansion of MPLP and had no contracts for the production of SLI separators for any customer. (RFOF 318, 383-384, 387-408; Gilchrist, Tr. 557; (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*).

548. Daramic views itself as the “market leader” when it comes to pricing. (PX0235). Daramic was the first in the industry to announce a price increase for 2006. Soon after Daramic's announcement, Entek “followed our lead” and increased prices. (PX0235). Daramic was “excited” because Entek “had again shown that Daramic is the market leader.” (PX0235). Daramic's VP of worldwide sales informed his sales team to “NOT BE AFRAID TO FORCE THE INCREASE.” (PX0235, emphasis in original).

Response to Finding No. 548:

Complaint Counsel's proposed finding number 548 is misleading and incomplete. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an “old” states of competition do not indicate the state of competition years later. Additionally, Complaint Counsel takes the document upon which it relies completely out of context. Specifically, the document notes that Daramic “ha[s] no choice. Our costs continue to climb. Our DMCs will continue to increase...” (PX0235). Further, it states that Daramic has “looked at all of our contracts. Almost everyone has a clause that allows an adjustment after one year...We are living in an extraordinary period of rising costs. Most contracts allow for unforeseen, significant increases in costs..” (PX0235). This is the context in which the memo

goes on to tell the salespersons not to be afraid to force the increase – because the contracts negotiated by sophisticated customers allow such an increase. (PX0235). There is nothing suspect or improper with seeking an increase permitted under contract.

2. Respondent documents state that competition is not strong in SLI

549. { } (PX0265 at 004, *in camera*). {

} (PX0265 at 004, 008, *in camera*). In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: AI would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek,@ which implies that Microporous=s entry prompted the increased rivalry. (PX0482 at 002). Finally, a Microporous document titled “Overview of Battery Separator Industry, September 2007” states: “Microporous Products, at the invitation of these [battery] manufacturers seeks to become a supplier to the domestic U.S. automotive industry and help the above manufacturers create a more competitive environment.” (PX0088 at 001-002).

Response to Finding No. 549:

Complaint Counsel’s proposed finding number 549 is misleading and draws an unsupported and improper conclusion. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an “old” states of competition do not indicate the state of competition years later. There is ample evidence that for many years the major battery manufacturers (of which there really only two – Exide and JCI (PX0088)) were under contract with { } (RX0988, *in camera*; PX2112 at 014, *in camera* { } The current state of competition, which existed prior to the acquisition and remains today, is fierce, with, as noted repeatedly above and in Respondent’s Proposed Findings, { } of Daramic’s business, { } (RFOF 306-09, 946-57, 1240-41, 1369, 1436). There is no “implication” that MPLP created rivalry: its size, open

capacity and product availability was not sufficient to force aggressive rivalry (RFOF 338-41, 1366). The MPLP document to which Complaint Counsel cites is telling on its face in that it disingenuously states that MPLP seeks to become a supplier to JCI, Exide and East Penn at their “invitation.” (PX0088). However, at the time this document was written, {

} (RX000666 at 004; RX00047; RX00072); knew that the discussions with Exide were stalled and going nowhere fast (RFOF 416-19, 575-80); and had a maximum of one conversation with East Penn (RFOF 382, 780-82; PX0141) – all this notwithstanding the fact that MPLP knew it had put the “line in a box” on hold in May 2007, and had no reinitiated orders or even determined where it would go. (RFOF 1147; Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615). MPLP had, in fact, “sought” to become an SLI separator supplier to the battery manufacturers in North America since at least 2003, yet in 2007 it was still no closer than it had been then. (RFOF 486, 582).

G. MPLP was expanding in SLI at customers’ request

550. Dr. Simpson opined that {

} (Simpson, Tr. 3461-3462, *in camera*; (PX0258; PX0254 at 001, *in camera*)). {
} (Kahwaty, Tr. 5413-5414, *in camera*). In addition, Daramic documents generally reference {
} (PX0276 at 009, *in camera*);
PX0174 at 003, *in camera*).

Response to Finding No. 550:

Complaint Counsel’s proposed finding number 550 completely misrepresents the testimony and the documentary evidence leading to a totally misleading statement. Dr. Simpson’s opinion that {

} is not supported by the evidence. (Simpson, Tr. 3461-63, *in camera*). The basis for Dr. Simpson’s opinion are apparently the same documents cited by Complaint Counsel in this finding – all of which refute not only the finding, but also Dr.

Simpson's incorrect opinion. For instance, none of the documents cited by Complaint Counsel here show that {

} PX0254 shows {

} (PX0254, *in camera*; RFOF 383, 780-782).

Likewise, PX0258 does not show a single lower price to any customer, but, instead talks of increasing prices ("announce 4%, end at 2% with 0% in year 2..."). Further, MPLP is mentioned only with respect to "competitive prices" for industrial product sold in Europe. (PX0258, *in camera*). Finally, Daramic's own documents flatly refute Complaint Counsel's statement that {

} (PX0276 at

009, *in camera*; PX0174 at 003, *in camera*). PX0276 discusses {

} and PX0174 discusses {

} (PX0174, *in camera* {

}

551. Prior to the acquisition, at its Piney Flats plant, Microporous manufactured extensive samples and some commercial-use separators for SLI batteries for Johnson Controls, Exide, Voltmaster and several battery manufacturers in the European Union. Several truckloads of material were shipped to Johnson Control's Tampa plant. (Gilchrist, Tr. 312-13, 417-18). {
- } (McDonald, Tr. 3879-3880 *in camera*).

Response to Finding No. 551:

Complaint Counsel's proposed finding 551 is incomplete, vague and misleading. Complaint Counsel's vague "prior to the acquisition" language cannot overcome the fact that MPLP had never produced a single commercial run of SLI separators in its history. (RFOF 336; McDonald, Tr. 3796-98; PX0921 (McDonald, IHT at 34-39), *in camera*). {

} and is irrelevant. (PX0080 at 009, *in camera*; PX0853 at 002, *in camera*). It is also telling that Mr. Gilchrist did not appear to know this or perhaps “forgot” when he was testifying about the alleged “commercial” sale made by MPLP to Voltmaster. (Gilchrist, Tr. 416-417 (“they’re a small company . . .in Iowa”). The one sale MPLP made of SLI material to Voltmaster in 2005 was actually a large sample run made for JCI, but when JCI refused the material because it didn’t pass the runnability tests at JCI, MPLP was able to offer the sample roll to Voltmaster for sale. This does not a “commercial” run make. (RFOF 336; McDonald, Tr. 3796-98; PX0921 (McDonald, IHT at 34-39), *in camera*). Additionally, as noted above, MPLP’s discussions with East Penn “fizzled” and their SLI product was never qualified by East Penn. (RFOF 781-82). Further, the testimony to which Complaint Counsel cites merely says that Mr. McDonald talked to East Penn about an SLI product “at one time;” later testimony revealed that MPLP was never in a position to supply SLI material to East Penn. (McDonald, Tr. 3880, 3892, *in camera*; RFOF 781-82).

552. { }
} (Weerts, Tr. 4517, *in camera*). { }
 (Weerts, Tr. 4517, *in camera*). { }
} (PX1832 at 026-027, *in camera*).

Response to Finding No. 552:

Complaint Counsel’s proposed finding 552 is irrelevant and misleading. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an “old” states of competition do not indicate the state of competition years later. Futher, Mr. Weerts’ testimony regarding his belief that { }

Beyond that date { } and

thus Mr. Weerts' belief is irrelevant to {
} (RFOF 474-485, 491-510).

Similarly, the document reference by Complaint Counsel is not only dated in { }, but is also portrayed out of context and misleadingly. (PX1832 at 026-27, *in camera*). The pages referenced identify only {

} (PX1832 at 026-027, *in camera*).

1. Worked with customers to qualify in SLI

i) Work with JCI in 2003 to bring competition to SLI market

553. Johnson Controls ("JCI") is the largest manufacturer of flooded lead acid batteries in the world. (Hall, Tr. 2662-2663). In the United States, JCI is one of "only three major automotive battery manufacturers." (PX0088 at 001)

Response to Finding No. 553:

Respondent has no specific response to this finding.

554. {
} (PX2112, *in camera*). The company viewed MPLP as one of three
{
(PX2112 at 006-019, *in camera*) ({
} (PX2112 at 019)).

Response to Finding No. 554:

Complaint Counsel's finding number 554 is irrelevant, misleading and incomplete. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" states of competition do not indicate the state of competition years later. Further, this finding is misleading and incomplete in that it suggests that MPLP was a valid third separator source for JCI in 2003, yet significant evidence in the record shows that, despite JCI's desire to develop MPLP, it was unable to do so for reasons that were entirely unconnected to Daramic including that MPLP's material did not qualify for use at JCI. (Hall, Tr. 2696;

Gilchrist, Tr. 466, *in camera*; RX00071 at 03). Further, it is clear from the face of the document cited that {

} (PX2112 at 007, *in camera*). At that time { } that MPLP did, and { } (PX2112 at 007, *in camera*). More telling, the document states that {

} (PX2112 at 019, *in camera*).

{

} (RFOF 486).

555. As part of JCI's separator sourcing strategy, JCI engaged in discussions with MPLP prior to 2003 in an effort to develop MPLP as a new entrant into the SLI separator business. (Hall, Tr. 2670).

Response to Finding No. 555:

Complaint Counsel's finding number 554 is irrelevant, misleading and incomplete. First, it is irrelevant because the relevant question is competition going forward. Old documents reflecting an "old" states of competition do not indicate the state of competition years later. Further, it is misleading in that despite discussions with JCI, MPLP was unable to qualify its separators for use by JCI thus any effort to develop MPLP as a "new supplier" was a failure strictly because MPLP was unable to produce a viable, quality SLI separator for JCI at that time. (RFOF 486).

556. JCI tested a sample PE SLI separator manufactured by MPLP in 2003. (Hall, Tr. 2696). The MPLP sample SLI separator was produced off of a production line in MPLP's Tennessee facility that was not set up to run the process; instead MPLP's production line was modified to try to create the requisite SLI sample for JCI. (Hall, Tr. 2696). {

} (Hall, Tr. 2696, 2811, *in camera*; PX0672 at 006, *in camera*).

Response to Finding No. 559:

Respondent has no specific response to this finding.

560. Soon after becoming Global VP for Procurement at JCI in 2002, Rodger Hall sought better separator pricing for the company. (Hall, Tr. 2666). It did not appear to Mr. Hall that JCI and Daramic were aggressively competing for JCI's business. (Hall, Tr. 2666-2267). For example, JCI requested a quote on U.S. business from Daramic and after a delay on Daramic's part of several months, the quote received from suggested to JCI that Daramic was not aggressive about getting into JCI's U.S. business. (Hall, Tr. 2668). Mr. Hall reasoned that, as JCI's overall production volumes increased, it should have been able to obtain better pricing from its separator suppliers. (Hall, Tr. 2666).

Response to Finding No. 560:

Complaint Counsel's proposed finding number 560 is incomplete, misleading and irrelevant. {

} (RX0988, *in camera*; PX2112 at 014, *in*

camera {

}

(Hall, Tr. 2666-69). {

} (Hall, Tr. 2667). There is nothing anti-competitive about specializing in specific types of products, and these statements were true of Microporous as well – it specialized in rubber separators (Hall, Tr. 2696). In fact, documents specifically show that at the time in question Daramic was not even qualified to provide the thinner backweb products to JCI, further evidencing the misleading manipulation of the evidence by Complaint Counsel here. (PX1786 at 026 (JCI “carried out a quick technology shift to thinner backweb products, where we have not

been qualified.”). Further, it is misleading and incomplete to suggest that MPLP was a valid third separator source for JCI in 2002-2003 as significant evidence in the record shows that MPLP’s material did not qualify for use at JCI. (Hall, Tr. 2696; Gilchrist, Tr. 466, *in camera*; RX00071 at 03).

561. { } (RX0039 at 016, *in camera*). In order to get a competitive price, JCI’s strategy was to develop new entrants for competition. (Hall, Tr. 2670).

Response to Finding No. 561:

For the reasons set forth in RFOF 474-502, in addition to Respondent’s Responses to CCFOF 542-43 and 545, this proposed finding is irrelevant, vague and misleading.

562. However, JCI struggled to bring on new competitors due to Daramic’s negotiating tactics. JCI felt that Daramic and Entek were { } (PX1505 at 002, *in camera*).

Response to Finding No. 562:

Complaint Counsel’s proposed finding 562 is irrelevant, misleading and incomplete. Complaint Counsel fails to provide support for their first sentence. The evidence actually shows that JCI struggled to bring on a new competitor in North America because MPLP was unable to qualify its product for JCI’s use and for no other reason. (Hall, Tr. 2696; Gilchrist, Tr. 466, *in camera*; RX00071 at 03). The document cited by Complaint Counsel specifically notes that the contract signed with Daramic was for “40%” of JCI’s supply – this left 60% of JCI’s supply available to MPLP if it had been able to qualify its product for use at JCI. (PX1505 at 002, *in camera*).

563. { } (PX1503, *in camera*). { } (PX1503 at 003, *in camera*).

Response to Finding No. 563:

Complaint Counsel’s finding number 563 is irrelevant, misleading and incomplete. It is irrelevant because the relevant question is competition going forward, and, if Complaint Counsel’s product markets are to be believed, in North America. (RX1572 at 3). Further, it is clear from the document cited by Complaint Counsel that it was JCI that was pressing Daramic to negotiate a new global supply contract. (PX1503, *in camera* {
}

564. Internally, Daramic viewed its negotiations with JCI in 2003 as {
} (PX0243 at 001, *in camera*). Mr. Roe told his boss, Frank Nasisi, that he believed the JCI negotiation would help
} (PX0243 at 001, *in camera*).

Response to Finding No. 564:

Complaint Counsel’s proposed finding 564 is misleading, irrelevant and a total misrepresentation of the document cited. The document in question notes that Mr. Roe has looked at Daramic’s 26 “major customers.” (PX0243 at 001-2, *in camera*). Further, it is clear from the context of the document, and the fact that it notes specifically {
} (PX0243 at 002, *in camera*), that the {
} (PX0243 at 001, *in camera* (quoting prices in Euro)). Finally, the final “quote” used by Complaint Counsel to suggest that the {

} (PX0243 at 001, *in camera*). Negotiations in Europe over European pricing and contracts is irrelevant to the competitive environment in North America, and become even more wholly irrelevant when taken in the context of negotiations in April 2003 – five years before the acquisition in question. (PX0243 at 001, *in camera*). Complaint Counsel’s reliance on this document for the finding it makes here is inappropriate when taken in context.

565. Mr. Hall of JCI, on the other hand, wanted to reduce the mandatory minimum volumes committed to Entek and Daramic so that space could be created for new competition. (Hall, Tr. 2670-2674).

Response to Finding No. 565:

For the reasons stated by Respondent in its responses to Complaint Counsel's proposed findings number 554 and 562, in addition to RFOF 486, this proposed finding is irrelevant, misleading and incomplete.

566. Negotiations continued during 2003 and Daramic continued to supply JCI's facilities in Europe and elsewhere outside the United States at previously invoiced prices. (Hall, Tr. 2672, 2780). As of November 2003, Daramic considered its "negotiations for a global contract [with JCI] . . . are still pending." (PX1786 at 027).

Response to Finding No. 566:

Complaint Counsel's proposed finding 566 is misleading, irrelevant and the information cited does not support the finding. In addition to negotiations in 2003 being irrelevant to the state of competition today and in response to the acquisition of MPLP, the cited testimony of Mr. Hall does not support Complaint Counsel's statement that Daramic continued to supply JCI's facilities at previously invoiced prices. (Hall, Tr. 2672, 2780). Mr. Hall's cited testimony simply notes that JCI and Daramic were operating under a contract in the United States, and were not operating under a contract in Europe, there is nothing about invoiced prices – or any prices. (Hall, Tr. 2672, 2780). Further, the page to which Complaint Counsel cites with respect to pending negotiations is titled "Sales and Marketing Europe/Middle East/Africa" – locations which clearly have no bearing whatsoever to the state of competition five years later in North America. This information is irrelevant to the questions before this Court.

567. {
} (PX0928 at 001; Hall, Tr. 2873-2874, *in camera*). Mr. Hall thought the competitive market was "unhealthy." (Hall, Tr. 2873-2874). JCI felt that Daramic and Entek "were not aggressively competing against each other for business." (Hall, Tr. 2667, 2692). {
} (PX1505 at 002, *in camera*; PX2112 at 017, *in camera* {
})).

Response to Finding No. 567:

For the reasons stated by Respondent in its responses to Complaint Counsel's proposed findings number 549, 554-558 and 560, in addition to RFOF 486, this proposed finding is irrelevant, misleading and incomplete.

568. At a meeting in June 2003 at JCI headquarters, Mr. Gilchrist and an official from Kelso (then-owner of MPLP) discussed the potential for MPLP to supply "as high as 50,000,000 square meters on a worldwide basis" of JCI's polyethylene separator needs for the SLI market. (PX0928 at 001). Mr Hall explained that Daramic had been "arrogant" and difficult to deal with and unwilling to lower its prices to JCI during "the last six or seven years" while JCI's purchasing volume had grown. (PX0928 at 001-002).

Response to Finding No. 568:

For the reasons stated by Respondent in its responses to Complaint Counsel's proposed findings number 549, 554-558 and 560, in addition to RFOF 486, this proposed finding is irrelevant, misleading and incomplete.

569. { } (PX0758 at 017, *in camera*).

Response to Finding No. 569:

Complaint Counsel's proposed finding 569 is irrelevant, misleading and not supported by any valid evidence. The "quote" referred to here by Complaint Counsel comes from a 2006 Daramic document, repeated a summary of the JCI/Daramic relationship and actually states that "Mid-2003, JCI commicated that Amerace was planning to put a plant in Europe, with a 5 years contract, and reducing prices continuously during these 5 years to reach the \$0.50 sqm at the end" – a recitation of "history" three years later that was completely false is hardly a valid basis for a finding of "fact." (PX0758 at 017, *in camera*). The facts are that regardless of what JCI was telling Daramic there is not one shred of evidence to support the idea that in 2003 MPLP had any intention of putting in a plant in Europe, or that it was in any position to sign a 5 year contract with JCI in light of the fact that it was entirely unable to qualify its product for JCI at this time. (See, e.g., Complaint Counsel's proposed findings number 549, 554-558 and 560;

RFOF 486, and supporting evidence cited therein). This is a perfect example of Complaint Counsel's attempts to manipulate and misrepresent evidence to serve its purpose rather than legitimately show the Cour what the facts are that show that today in 2009 competition has been harmed by the aquision of MPLP by Polypore.

570. In addition to considering MPLP, JCI also considered a start-up company in Europe named Alpha as a potential new supplier. (Hall, Tr. 2683-2686). However, JCI considered there to be high risks associated with Alpha because it was not yet in existence. (Hall Tr. 2686, 2872; PX1505 at 002, *in camera*). Mr. Hall was not sure what the outcome of JCI's work with Alpha would be. (Hall, Tr. 2872, *in camera*). Mr. Hall did not view Alpha as being on equal footing with MPLP, because MPLP was producing separators with a proven technology, thus JCI was "much more comfortable with the capability of [MPLP] to develop SLI separator production capability." (Hall, Tr. 2872-2873, *in camera*).

Response to Finding No. 570:

For the reasons stated by Respondent in its responses to Complaint Counsel's proposed findings number 549, 554-558, 560 and 569, in addition to RFOF 486, this proposed finding is irrelevant, misleading and incomplete. Further, {

} (PX1505 at 002, *in camera*; RFOF

445).

571. Meanwhile, Daramic began to get frustrated at its failure to persuade JCI to accept its previous proposal. (Roe, Tr. 1674-1676). On December 2, 2003, Mr. Roe informed Laura Pierri of JCI that Daramic was withdrawing all earlier proposals. (PX1504 at 001). If JCI did not sign Daramic's proposed contract by the end of the month, then "all purchases for product in Europe will be priced on a spot purchase price that will be significantly higher than those previously quoted." (PX1504 at 001).

Response to Finding No. 571:

Complaint Counsel's proposed finding 571 is completely irrelevant to the case at issue here, and, additionally is misleading and incorrect. Nothing in Mr. Roe's testimony states that Daramic was "frustrated." (Roe, Tr. 1674-76). The testimony cited simply documents the back and forth between the two parties pursuant to ongoing negotiations. (Roe, Tr. 1674-76). Further,

the sale of Daramic's product from its European facilities to JCI's European facilities – regardless of whether the price was a “spot” price or not has no bearing on any issue in this case. (PX1504 at 001). Finally, as usual, Complaint Counsel has again misrepresented the document to which they cite. PX1504 in fact was a cover letter that was submitted to JCI along with a new proposal with additional terms and incentives for JCI in order to try and wrap up the negotiations by “year's end.” (PX1504 at 001). Complaint Counsel's statement suggests that Daramic simply withdrew all offers and gave JCI some form of “ultimatum” however, the document bears out, that, in fact, Daramic was simply submitting a new updated and revised contract draft with new and additional terms, and simply making clear that this new draft should replace all previous proposals and drafts. (PX1504 at 001-02).

572. Negotiations deteriorated. { } (PX0965 at 013, *in camera*). Daramic was unwilling to submit a proposal for JCI's European business only. (Roe, Tr. 1680-1681).

Response to Finding No. 572:

Complaint Counsel's proposed finding 572 is irrelevant and misleading. The negotiations between Daramic and JCI relating to a contract in Europe in 2003/2004 are entirely unrelated and thus irrelevant to the issues before the Court in this matter. (See also, Respondent's Response to CCFOF 571).

573. In late 2003, Daramic believed that MPLP was offering to supply JCI under a five year contract with continuous price reductions passed along to JCI. (Roe, Tr. 1237-1238; PX0693; PX0758 at 017, *in camera*). JCI had requested a similar price reduction clause from Daramic, which Daramic “totally rejected.” (PX0693).

Response to Finding No. 573:

For the reasons stated by Respondent in its responses to Complaint Counsel's proposed findings number 569, in addition to RFOF 486, this proposed finding is irrelevant, misleading and incomplete.

574. During the course of negotiations with JCI, Daramic took a position that they would only negotiate for a worldwide contract, and was unwilling to submit a proposal for JCI's European business only. (Roe, Tr. 1680-1681).

Response to Finding No. 574:

Complaint Counsel's finding 574 is irrelevant, misleading and incomplete. First, it is misleading to suggest that during the "course of negotiations" Daramic took the position that it would only negotiate for a worldwide contract. The evidence clearly shows that {

} (PX2112 at 016, *in camera*). In fact, {

}

(PX2112, *in camera*; RX0988, *in camera*). Finally, it is totally irrelevant to Complaint Counsel's case what contract negotiations for supply in Europe were going 5 years ago at a time when MPLP was not able to qualify, and did not have capacity or ability to supply SLI separators in Europe to JCI. (See, e.g., Respondent's Response to CCFOF 569).

575. Soon after learning of MPLP's bid for JCI's SLI business, Daramic threatened to cut off supply to JCI in Europe if JCI did not sign a long term contract. (PX0758 at 017, *in camera*; Roe, Tr. 1676).

Response to Finding No. 575:

Complaint Counsel's finding number 575 is irrelevant, misleading and false. First, Complaint Counsel relies on testimony that they objected to as hearsay for the truth of this matter, which is improper and should be ignored. Further, the document cited to by Complaint Counsel contradicts Complaint Counsel's statement in that it notes that in "mid-2003" JCI communicated that MPLP was planning to put a plant in Europe, yet no discussion of Daramic seeking other customers in Europe happened until at least early 2004. (PX0758 at 017, *in*

camera). This finding is also misleading and irrelevant for the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572 and 574).

576. JCI did not consider the negotiations finalized with Daramic over the contract on the table in the beginning of 2004. JCI was still negotiating pricing and was unhappy with the minimum volume requirements. (Hall, Tr. 2674). Additionally, JCI was not satisfied with the length of the contract and wished to have a shorter-term contract. (Hall, Tr. 2684). JCI informed Daramic that it was not through negotiating the contract. (Hall, Tr. 2675).

Response to Finding No. 576:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, this finding is wholly irrelevant and misleading. Additionally, this finding is incomplete in that {

} (PX0758 at 017, *in camera*; RFOF 447-458).

{

} (PX0758 at 017, *in camera*;

RFOF 447-458). Further, {

(RX01188, *in camera*; PX1503, *in camera*), it was {

} (PX2112 at 017, *in camera* {

} PX2113 at 004, (offering 7 year agreement to

MPLP)).

577. By early January, the back-and-forth discussions between Daramic and JCI had "escalated," so Mr. Hall became directly involved. (Hall, Tr. 2676-2677). Frank Nasisi, the general manager of Daramic at the time, called Mr. Hall and told him the contract "negotiations weren't moving forward at a pace that [Nasisi] considered appropriate and that [an 85%] price increase was going to occur" on a date certain in the immediate future. (Hall, Tr. 2676-2677). {

(Hall, Tr. 2866-2867, *in camera*).

Response to Finding No. 577:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading. Additionally, the alleged "85%" increase was simply a transition from "contract" terms to "spot" pricing – indicating strongly that JCI was getting extremely favorable pricing. Documents show JCI said it would take the "spot pricing" if necessary. (PX0693).

578. Mr. Hall responded that the parties should have a five day "cooling-off period" and then resume discussions about the contract(s). (Hall, Tr. 2677-2678). The parties then agreed to get back to each other after five days. (Hall, Tr. 2677-2678). Meanwhile, {
} (Hall, Tr. 2865-2866, *in camera*).

Response to Finding No. 578:

Respondent has no specific response to this finding.

579. Before five days had passed, {
} (Hall, Tr. 2677-2678; PX0965 at 013, *in camera*). Mr. Nasisi informed Mr. Hall that if the contract was not signed Daramic intended on closing down Daramics's main supply plant to JCI located in Potenza, Italy. (Hall, Tr. 2678).

Response to Finding No. 579:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago.

580. Mr. Nasisi said he would supply JCI with separators it had in inventory (about a nine-day supply), and when those ran out, JCI would no longer be a Daramic customer unless it signed the contract. (Hall, Tr. 2677-2678). He gave JCI only several days to sign the contract and send it back to Daramic as it was, without any changes. (Hall, Tr. 2678).

Response to Finding No. 580:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to

supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago.

581. Subsequently, JCI understood that Daramic's Potenza, Italy plant was actually shut down. (Hall, Tr. 2678-2680). { (PX0757 at 002, *in camera*). { } (Hall, Tr. 2868-2869, *in camera*).

Response to Finding No. 581:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago.

582. Mr. Hall understood that the impact of a shutdown of Daramic's Potenza plant on JCI in Europe would be dire; it would create "a very serious problem with supplying [the company's] customers." (Hall, Tr. 2679-2680). If Daramic stopped production at the Potenza plant, JCI would be forced to choose which of its battery customers to serve, and which it could no longer supply. (Hall, Tr. 2680-2681). ("Since we need separators to build batteries, we would not have been able to build batteries for some of our key customers.").

Response to Finding No. 582:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago.

583. JCI immediately reached out to Entek to find how much available capacity Entek could supply to JCI. However, Entek could not supply the "sizes and the volume that would be required to replace what [JCI] couldn't get from Daramic and the Potenza plant." (Hall, Tr. 2680). Even if JCI could obtain some separators from Entek, it still would have faced "a considerable shortfall" in meeting its needs in Europe at that time. (Hall, Tr. 2680).

Response to Finding No. 583:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago.

584. Daramic and Entek were the only suppliers qualified by JCI to supply separators to the company in Europe as of January 2004. (Hall, Tr. 2681). JCI had no other suppliers to turn to. (Hall, Tr. 2681).

Response to Finding No. 584:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574 and 575, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged market and relates to a contract negotiated over five years ago. Furthermore, JCI never approved MPLP SLI separators from any European facility and thus MPLP was not, and never has been, a valid supplier for JCI SLI separators in Europe. {

} (See RFOF 474-481, 491-502).

585. After searching for other supply options, Mr. Hall immediately went to Greg Sherrill, JCI's General Manager and explained the situation. At that point JCI decided it "had no choice but to sign the contract as it was." (Hall, Tr. 2681-2682). JCI did not wish to sign this contract with Daramic, but the company's management "felt we were being forced to sign this contract." (Hall, Tr. 2682).

Response to Finding No. 585:

For the reasons set forth in Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575 and 584, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel's alleged

market and relates to a contract negotiated over five years ago. This finding is also patently false in that JCI did not sign the agreement “as it was” – JCI revised and sent the contract draft back to Daramic and Daramic accepted JCI’s changes, a consignment clause was added, as was a very favorable pricing term. (RX00988, *in camera*; RX01197; RX01198; RFOF 456). Altogether, the {

} (RX00988, *in camera*). It is also telling that not once during the term of this agreement did JCI seek to have it recinded or rendered void for duress.

586. On January 12, 2004, JCI conceded that Daramic’s {
} (PX1505 at 002, *in camera*).

Response to Finding No. 586:

Complaint Counsel’s finding number 586 is misleading and taken out of context. The document referenced as supporting this fact, actually states on page 5 that {

} (PX1505 at 005, *in camera*). Thus, whether MPLP is independent had absolutely no bearing on JCI’s actions with respect to a European contract for European supply that was negotiated over five years ago. (See also, Respondent’s Response to CCFOF 564, 566, 569, 572, 574, 575 and 584, and RFOF 447-458).

587. {
} (Hall, Tr. 2869, *in camera*). Mr. Hall testified
that he { } (Hall, Tr. 2869, *in camera*).

Response to Finding No. 587:

For the reasons set forth in Respondent’s Response to CCFOF 564, 566, 569, 572, 574, 575, 584, and 586, and RFOF 447-458, this finding is wholly irrelevant and misleading as it relates only to supply in Europe in 2003 and thus is totally outside this Complaint Counsel’s alleged market and relates to a contract negotiated over five years ago.

588. Daramic believed that by forcing JCI into a long term contract, it had stopped MPLP's work with JCI on SLI supply. (PX0433 at 004). At the same time, Daramic recognized that the JCI contract did not entirely eliminate the future threat of MPLP in the SLI business. (PX0433 at 004). Daramic worried that JCI and MPLP might continue to work together during the course of the Daramic contract, with MPLP bringing on new capacity in the US and/or Europe to fulfill volume commitments that JCI could make for the end of the contractual period. (PX0433 at 004; Roe, Tr. 1274-1275).

Response to Finding No. 588:

Complaint Counsel's finding 588 is a total misrepresentation of the document it cites, is misleading and, for the reasons noted above at Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575, 584, and 586, and RFOF 447-458, it is totally irrelevant. PX0433 contains three full pages of reasons why the acquisition of MPLP by Daramic in 2005 would be a market extension moving Daramic into the "niche" markets that MPLP controlled. (PX0433 at 001-003). Mr. Roe's statement about "stopping" progress with the contract between Daramic and JCI is taken totally out of context. As noted above, MPLP was not in a position to provide any supply to JCI in 2003/2004, either in the US or in Europe, and thus Daramic did nothing to "stop" MPLP's progress with JCI – JCI stopped the progress because MPLP could not meet the quality standards that JCI expected. (PX1505 at 005, *in camera*). The simple fact of the contract's existence, as in any business, would stop a competitor from getting business during the term of the contract, and Complaint Counsel's suggestion otherwise is misplaced particularly in light of the fact that JCI did negotiate with MPLP again in 2007 and still determined, without regard to Daramic's role in the marketplace, not to proceed with MPLP. (Respondent's Response to CCFOF 542, 549; RFOF 474-481, 491-502).

589. In a series of emails, Daramic's executives acknowledged "strong arming" JCI during 2003-04 contract negotiations. Daramic knew that its coercive negotiating engendered "bad blood" between JCI and Daramic. (PX0750 at 001).

Response to Finding No. 589:

Complaint Counsel's finding 589 is irrelevant for the reasons stated above at Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575, 584, and 586, and RFOF 447-

458). Further, it is misleading and incomplete as the statement referenced was exchanged between individuals who had no first hand knowledge whatsoever of the situation as neither had any connection at all to Polypore and Daramic in 2003/2004. (PX0915 (Graff Dep. 164-165), *in camera* { }; Toth, Tr. 1385 (came to work for Polypore in July 2005). {

} (PX0750).

590. { (PX0965 at 013, *in camera*). { }
} (PX1505 at 002, *in camera*).

Response to Finding No. 590:

Complaint Counsel's finding number 590 is irrelevant, misleading and taken out of context. The document referenced as supporting this fact, actually states on page 5 that {

} (PX1505 at 005, *in camera*).

Further, the contract with Daramic was for only 40% of JCI's business and thus JCI had every opportunity to continue to develop a third supplier. It made the decision not to do so for the reasons articulated above at Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575 and 584, and RFOF 447-458).

591. { (PX0908 (Amos, Dep. at 133, *in camera*)). In particular, { (PX0744 at 001; PX0908 (Amos, Dep. at 148, *in camera*)).

Response to Finding No. 591:

Complaint Counsel's finding 591 is irrelevant, misleading and incorrect. Nothing cited by Complaint Counsel here, nor anything in the record, would suggest or support the idea that the "purpose" of the JCI/Daramic contract was to prevent MPLP from becoming a supplier to JCI. (PX0908 (Amos Dep. at 148), *in camera*). {

} (PX1505 at 002, *in camera*). Further, even if no new contract encompassing European supply had been signed in 2004, JCI and Daramic were under contract for the North American volume that Daramic was supplying to JCI through 2006, thus, simply by virtue of the contract, MPLP had limited opportunity to supply JCI, which was (and is) the largest supplier of SLI batteries in the world. (PX2112; *in camera*). Finally, as noted repeatedly above {

} (PX1505 at 005, *in camera*)(See also Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575 and 584, and RFOF 447-458).

592. Daramic understood that if it could {
} (PX0751 at 001, *in camera*). Tucker Roe acknowledged that he knew "Varta [a JCI affiliate in Germany] has received and is reviewing a commitment proposal for a new PE separator facility to be built" in connection with what he viewed as "part of the [MPLP] proposal" to JCI. (PX0693).

Response to Finding No. 592:

Complaint Counsel's finding 592 is totally out of context and misleading, as well as irrelevant for all the reasons set forth above at Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575, 584, and 586, and RFOF 447-458). The documents to which Complaint Counsel cites are from two totally different time periods – one (PX0751) from 2006 and the other (PX0693) is from 2003 – they have nothing to do with each other. Additionally, as noted above at Respondent's Response to CCFOF 526, the information Mr. Roe had been given was entirely

incorrect and Complaint Counsel's own witnesses testified that {

} (PX0920 (Gilchrist, Dep. at 51), *in camera*; PX0910

(Trevathan, Dep. at 15-16), *in camera*).

593. The 2004 Daramic/JCI contract also affected Alpha, the other potential new supplier. The minimum volume requirements and the five-year contract length of the contract, forced JCI to end its work with a start-up company called Alpha. (Hall, Tr. 2683-2684). The minimum volume requirements in Europe did not leave JCI sufficient room to develop any additional supplier for PE separators. (Hall, Tr. 2684).

Response to Finding No. 593:

Complaint Counsel's finding 593 is irrelevant and unrelated to the issues before the Court here if Complaint Counsel's alleged geographic territory is to be accepted. (See Respondent's Response to CCFOF 564, 566, 569, 572, 574, 575, 584, and 586, and RFOF 447-458). Whether, JCI was able to develop a new supplier in Europe, for purely European supply, with no suggestion whatsoever that there would be any competitive effect in North America, because it agreed to (and never sought to terminate or rescind) a contract for supply in Europe with Daramic in 2004 has absolutely no bearing on this case and it is disingenuous for Complaint Counsel to include such a finding while at the same time arguing that this is a North American market for battery separators. Furthermore, Mr. Hall himself testified that {

} (Hall, Tr. 2872,

in camera; PX1505 at 002, *in camera*).

2. JCI renewed work with MPLP in 2005

594. Despite difficulties in 2003, Microporous continued to work towards entering the SLI market. JCI reengaged in discussions with MPLP in 2005 about possible supply of PE SLI separators from MPLP to JCI in the US and in Europe. (Hall, Tr. 2693-2694).

Response to Finding No. 594:

Complaint Counsel's proposed finding 594 is incomplete and misleading. The evidence does not support this statement as Complaint Counsel's own witness, the former CEO of MPLP

testified {

} (PX0920

(Gilchrist, Dep. at 51-52), *in camera*; PX0910 (Trevathan, Dep. at 15-16), *in camera*).

595. JCI informed MPLP that it wanted to bring them on as an additional SLI separator supplier because Daramic and Entek needed competition to improve their pricing and their performance as suppliers. (Hall, Tr. 2698-2699).

Response to Finding No. 595:

Complaint Counsel's proposed finding 595 is incomplete and misleading because it implies that, without MPLP, PE separator buyers were unable to negotiate low prices and better performance. However, the record is replete with evidence that JCI, and other power buyers, were repeatedly able to negotiate lower prices from Daramic without the presence of MPLP. (RFOF 440, 445, 447-450, 478-79, RX0988). {

} (Hall, Tr. 2698-

99). Further, as JCI did not "develop" MPLP as an additional supplier this situation did not change prior to the acquisition. (Hall, Tr. 2697).

596. In the context of discussions with MPLP, JCI was interested in local supply of separators, contemplating that MPLP's future European facility would supply separators to JCI's European manufacturing plants, and MPLP's Tennessee facility would supply separators to JCI's plants in Tampa and/or Winston-Salem. (Hall, Tr. 2695).

Response to Finding No. 596:

{

} (See RFOF

474-481, 491-502; Respondent's Response to CCFOF 542, 545). JCI's interest in a situation that never came to pass is immaterial to whether the acquisition had effected competition.

597. In 2005 MPLP was intending to expand into SLI for JCI and further expand into industrial with CellForce production for EnerSys. (Trevathan, Tr. 3718-3719).

Response to Finding No. 597:

Complaint Counsel's proposed finding 597 is misleading and irrelevant because MPLP's "plans" in 2005 have absolutely no bearing on whether the effects of the acquisition were more or less competitive. As Mr. Trevathan, Mr. Gilchrist, Mr. Heglie and Mr. Gaugl all testified, the "plans" for expansion changed repeatedly and, other than expansion for the two lines that were built in Austria, no other "plans" were ever finalized, implemented, or even approved. (PX0920 (Gilchrist, IHT at 53), *in camera* {

}); PX2300 (Heglie, IHT at 164-65 ("We contemplated over the course I'm guessing maybe not hundreds but many many iterations of expansion plans and their dynamics...")); PX2301 (Heglie, Dep. at 156 ("the Board had only approved purchasing for two machines and we subsequently found out that management had started buying for a third machine . . . And so we told them to stop.")); PX910 (Trevathan, Dep. at 44), *in camera* {

}); RX00247 ("Can't

build a line for less than half a line committed too...Signed contract...that was not approved."); Trevathan, Tr. 3720-21, 3764; Gaugl, Tr. 4559).(See also, RFOF 369-412).

598. The MPLP expansion was a strategic multiphase plan which encompassed both SLI and industrial customers in both North America and Europe. (Trevathan, Tr. 3721-3724).

Response to Finding No. 598:

The proposed finding is misleading, irrelevant and factually incorrect for the reasons articulated in Responent's Response to CCFOF 597. (See also RFOF 369-412).

599. Subsequent to JCI's 2005 discussions with MPLP, JCI tested MPLP's PE SLI separators a second time after MPLP had improved the manufacturing process. (Hall, Tr. 2696-2697). This time the problems that were encountered by JCI in its earlier testing of MPLP separators were fixed. (Hall, Tr. 2696-2697).

Response to Finding No. 599:

Respondent has no specific response to this finding.

600. JCI's technical representatives had discussions with MPLP personnel to make sure that MPLP understood the manufacturing process and understood the changes that were made from the previous failed attempt by MPLP, in order make sure that MPLP could successfully manufacture the separators on a repeated basis. (Hall, Tr. 2697). Following these discussions, JCI was comfortable that MPLP could produce an SLI separator that JCI could use. (Hall, Tr. 2697). {
} (PX0672 at 006, *in camera*).

Response to Finding No. 600:

{

} (RFOF 474-485, 491-510).

- i) JCI negotiations ended

601. Ultimately JCI and MPLP negotiations did not lead to a contract between the two parties. (Hall, Tr. 2697). JCI did not contract with MPLP because (a) uncertainty surrounding an arbitration that Daramic had filed against MPLP in Europe, and (b) reluctance on the part of MPLP's owners to grant JCI an assignment clause to prevent the sale of MPLP to a competitor. (Hall, Tr. 2697-2700; 2800).

Response to Finding No. 601:

Complaint Counsel's finding 601 is misleading and misrepresents the testimony and documents in evidence. When asked the direct question of "why" JCI did not enter a contract

with MPLP, Mr. Hall testified that JCI did not want MPLP sold to a competitor of MPLP's or, importantly, a competitor of JCI's. (Hall, Tr. 2698 ("we did not want an acquisition of that company to be one by one of their competitors or one of Johnson Controls' competitors...")). He did not mention the arbitration between Daramic and MPLP as a reason for not entering the contract until prompted by Complaint Counsel. (See also, PX0921 (McDonald, IHT 107), *in camera*; PX2300 (Heglie, IHT at 151) ("exclusion" provision one reason contract with JCI did not materialize, other reason "JCI demanded lower prices than we could produce and generate an acceptable profit."); PX0080 at 013, *in camera*).

602. JCI was concerned that Daramic's arbitration could delay MPLP's installation of capacity such that it would not have the requisite production capacity by the end of 2008. (Hall, Tr. 2700). JCI felt strongly that it needed new capacity in place in a timely manner to avoid being in the same situation it was in with Daramic in 2004. (Hall, Tr. 2699-2700). {
} (Hall, Tr. 2701, 2748-2749, *in camera*). JCI believed that with the arbitration Daramic had { } (PX1510 at 004, *in camera*).

Response to Finding No. 602:

For the reasons set forth in Respondent's Response to CCFOF 601, Complaint Counsel's finding 602 is misleading and misrepresents the testimony and documents in evidence. The testimony cited was self serving and unsupported by any fact in evidence. {

}

(PX0080 at 013, *in camera*; Hall, Tr. 2698; , PX0921 (McDonald, IHT 107), *in camera*; PX2300 (Heglie, IHT at 151)).

603. JCI felt the need for an assignment clause with MPLP because it was aware of Daramic's previous acquisitions of separator manufacturers. (Hall, Tr. 2701). JCI considered it a possibility that Daramic might acquire any new separator manufacturing entrant (including MPLP) and thereby undo JCI's strategy to add new competitors to the marketplace. (Hall, Tr. 2701).

Response to Finding No. 603:

For the reasons set forth in Respondent's Response to CCFOF 601 and 602, Complaint Counsel's finding 603 is misleading and misrepresents the testimony and documents in evidence. Mr. Hall himself testified that JCI "did not want an acquisition of that company [MPLP] to be one [sic] by one of their competitors or one of Johnson Controls' competitors..." (Hall, Tr. 2698, emphasis added).

- ii) MPLP worked with Exide to become supplier of SLI separators up until acquisition

604. In the summer of 2007, Exide issued an RFP to MPLP, Daramic, Entek, Nippon Sheet Glass (NSG), and Amer-Sil for requests for bids on Exide's global separator business starting in 2010. (Gillespie, Tr. 2962; 2965-2967; RX00013). The RFP covered Exide's needs for automotive, motive, stationary and golf cart batteries. (Gillespie, Tr. 2967). At that time, Daramic was the only separator manufacturer in the world that could supply all of Exide's PE separator needs. (Gillespie, Tr. 2978).

Response to Finding No. 604:

Respondent has no specific response to this finding.

605. Exide intended on using the RFP process to "go from a single source to a multi-source environment to mitigate the risk and exposure that Exide had from the single exposure." (Gillespie, Tr. 2966). Exide made all of the potential suppliers aware that Exide intended to pursue a multi-sourcing strategy. (Gillespie, Tr. 2966). Exide believed that the more competition there was in the marketplace, the better off Exide would be in the long run in obtaining lower costs, better quality and better service. (Gillespie, Tr. 2976-2978).

Response to Finding No. 605:

Complaint Counsel's finding 605 is misleading and incomplete. When it issued the RFP, Exide made clear to the companies that received the RFP that it was their "choice to quote on part or all or whatever they felt comfortable with..." (Gillespie, Tr. 2965). Exide "left it up to [the separator manufacturers] to decide what or any portion they wanted to quote on." (Gillespie, Tr. 2965).

606. NSG refused to quote on Exide's RFP. (Gillespie, Tr. 2963-2964; PX1079 at 001-003).

Response to Finding No. 606:

Complaint Counsel's finding 606 is misleading and incomplete. NSG did not submit a quote because it did not have capacity at its Japanese facility. (PX1079; Gillespie, Tr. 2953; RFOF 1014).

607. Daramic and MPLP were the only companies that bid on supply for Exide's golf cart batteries. (Gillespie, Tr. 2967).

Response to Finding No. 607:

Complaint Counsel's finding 606 is misleading and incomplete. {

} (PX1034 at 004, *in camera*). {

} (PX1047 at 002). Exide

purchased the majority of its separators for deep cycle applications in the form of Flex-Sil through the time of the acquisition (and beyond) and as Exide had not even consider testing CellForce at the time of the RFP, or at the time of the acquisition, this finding is disingenuous at best, and it is clear that whatever part of the RFP applied to golf cart batteries was only seeking supply (PX0679).

608. In response to the RFP, Amer-Sil submitted a bid for a portion of Exide's European motive power requirements. (Gillespie, Tr. 2967). Exide views Amer-Sil as a small player only capable of supplying limited applications in Europe. (Gillespie, Tr. 2968-2969). Amer-Sil did not bid on Exide's automotive requirements. (Gillespie, Tr. 2968).

Response to Finding No. 608:

Complaint Counsel's proposed finding 608 is misleading and mischaracterizes the testimony cited. Mr. Gillespie noted that Amer-Sil had "limited capacity" – he made no mention whatsoever about it being "capable" of only supplying limited applications, beyond its limited capacity. (Gillespie, Tr. 2967). Additionally, he does not say that Amer-Sil is a "small player" only that there were discussions that, in the context of Amer-Sil's limited capacity, Amer-Sil

“might be” only for small amounts of product in Europe. (Gillespie, Tr. 2967; RX01615 at 013, *in camera*). Further, Amer-Sil’s actual response to the RFP makes clear that {

} (RX01615 at 004, 013, *in camera*). Further, directly contrary to Mr. Gillespie’s testimony and Complaint Counsel’s proposed finding, Amer-Sil did discuss, and later submitted a bid for, industrial applications in the United States. (PX1096 at 001).

609. MPLP’s response to Exide’s RFP was in the form of a memorandum of understanding (MOU) signed by Exide and MPLP in 2007. (Gillespie, Tr. 2968-2969; PX1080). The signing of the MOU represented Exide’s commitment to go forward with supply from MPLP. (Gillespie, Tr. 3084). The MOU documented the discussions between Exide and MPLP to move forward with MPLP supplying 22 million square meters of PE automotive separators to Exide beginning in 2010. (Gillespie, Tr. 2968-2969; PX1080). This represented about one third of Exide’s PE separator business on a worldwide basis. (Gillespie, Tr. 2978-2979).

Response to Finding No. 609:

Complaint Counsel’s proposed finding 609 completely misrepresents the testimony and the documentary evidence cited herein, is misleading and false. First, Mr. Gillespie’s cited testimony nowhere states that MPLP’s response to the Exide RFP was in the form of an MOU. (Gillespie, Tr. 2968-69). In fact, Mr. Gillespie was never asked “how” MPLP responded to the RFP, only that a response was made. (Gillespie, Tr. 2968-69). Looking both at the RFP itself, which is very detailed in what it requests, and at the document prepared by Exide to summarize the various responses it received to the RFP, it is patently clear that the MOU was not a “response” to the RFP. (PX1047; PX1036, *in camera*; PX0056). {

} (PX1036 at 8-10, *in camera*; PX0056). Importantly, and in direct opposition to Mr. Gillespie’s biased and unsupported testimony, the MOU does not “document” discussions between Exide and MPLP

with respect to moving forward to supply SLI separators at all – in fact, the MOU states “Also to be agreed to by both parties is whether the individual lines ...will produce SLI separators or industrial separators.” (PX056 at 002-3). The MOU had expired by its terms prior to the Sept. 6, 2007, date of the “summary” and Mr. Gillespie had not even signed the MOU prior to that date. (PX1036, *in camera*; PX0056). When the MOU was “extended” on February 14, 2008, no changes were made to the terms of the MOU, and Exide never provided any comments to a draft supply agreement provided by MPLP in August 2007, so the documents confirm that the parties had not “agreed” whether the “possible” lines would produce SLI or industrial separators. (RFOF 578-582; RX00403; PX1052). It is disingenuous for Complaint Counsel to suggest that the MOU was Exide’s “commitment” to go forward with MPLP when absolutely nothing save Mr. Gillespie’s self-serving statement supports that notion – including Mr. Gillespie’s further testimony. (Gillespie, Tr. 3081-83; RFOF 578-582).

610. Mr. Gillespie was responsible at Exide for negotiating the MOU with MPLP. Mr. Gillespie’s counterpart at MPLP in negotiations over the MOU was Mr. Gilchrist. (Gillespie, Tr. 2970-2971).

Response to Finding No. 610:

Complaint Counsel’s proposed finding 610 is misleading and incomplete. While Mr. Gillespie testified that he and Mr. Gilchrist were responsible for negotiating the MOU with MPLP, contemporaneous documents belie his testimony entirely. In fact, the evidence is that the only involvement Mr. Gillespie apparently had was in signing the original MOU in September 2007. (RX0056). He did not sign the “extension” in February 2008, nor did he participate in a single meeting documented in testimony (Trevathan, Tr. 3640; McDonald, Tr. 3836; Gillespie, Tr. 3081; RX00403 (signed by Pradeed Menon); PX1018;). Further, there is not one single email or piece of correspondence in the record between Mr. Gillespie and Mr. Gilchrist

discussing the MOU or the alleged “negotiations.” (PX1052; RX00404, *in camera*; RX00010; PX0494; RX00661; RX00285; PX0628).

611. MPLP executed the MOU on July 20, 2007. (PX1080 at 007). Exide and MPLP agreed that their work together would remain confidential. (Gillespie, Tr. 2971-2972). Exide did not execute the MOU until September 2007 due to concerns at Exide over the potential for MPLP to have to disclose Exide’s name to Daramic in connection with Daramic’s lawsuit against MPLP. (Gillespie, Tr. 2971-2972; PX1080 at 007).

Response to Finding No. 611:

Respondent has no specific response to this finding other than to note that the MOU had expired by its terms by the time Mr. Gillespie signed it on behalf of Exide. (PX0056 at 006).

612. Mike Gilchrist was the point person in negotiations with Exide on the expansion for SLI in the U.S. (Trevathan, Tr. 3756).

Response to Finding No. 612:

Complaint Counsel’s finding is unsupported by any other testimony or document in the record. There is no document in the record beyond the MOU itself and the extension of the MOU where Mr. Gilchrist appears to be acting as the “point person” – that person appears to be Mr. McDonald. (PX1052; RX00404, *in camera*; RX00010; PX0494; RX00661; RX00285). Further, as noted above in Respondent’s Response to CCFOF 609, the MOU specifically does not state that any supply to Exide from MPLP would be SLI. (PX056 at 002-3 (“Also to be agreed to by both parties is whether the individual lines ...will produce SLI separators or industrial separators.”)).

613. MPLP signed an MOU with Exide for SLI volume for Exide’s US facilities. (Trevathan, Tr. 3732-3734).

Response to Finding No. 613:

Complaint Counsel’s proposed finding 613 misrepresents the testimony cited, as well as the documentary evidence in this case. Mr. Trevathan’s testimony on the pages cited does not support this proposed finding at all – he does not ever refer to “SLI” volume in that testimony. (Trevathan, Tr. 3732-35). In fact, all Mr. Trevathan directly testified to was that MPLP was

“attempting to finalize an agreement with Exide.” (Trevathan, Tr. 3735). He also testified that, although MPLP was “working toward” an agreement with Exide there were two reasons to believe that might not happen, specifically that Exide and MPLP might not have come to an agreement and that the MPLP board had not determined whether to pursue an expansion into automotive. (Trevathan, Tr. 3758-59). Additionally, as noted above, and directly apposite to this proposed finding, the MOU states “Also to be agreed to by both parties is whether the individual lines ...will produce SLI separators or industrial separators.” (PX056 at 002-3). Finally, the testimony on which Complaint Counsel relies here was, in part, related to a document the accuracy of which is suspect on its face as it notes that Exide had returned a “red-line draft” of the supply agreement (PX0392), but Mr. Trevathan’s testimony, as well as that of Mr. Gilchrist, Mr. Gillespie, Mr. McDonald and other contemporaneous documents directly contradicts that statement. (RFOF 578-582; RX00403; PX1052; McDonald, Tr. 3841-47; Gilchrist, Tr. 481-82, *in camera*). When the MOU was “extended” on February 14, 2008, no changes were made to the terms of the MOU, and as Exide had not even commented on, let alone agreed to, a supply agreement there is ample proof that this proposed finding is false. (RFOF 578-582; PX910 (Trevathan, Dep. at 66), *in camera*; RX00403; PX1052).

614. At the August 16, 2007 Microporous Board of Directors meeting, Microporous management reported that an MOU (Memorandum of Understanding) on the two-line SLI expansion had been signed, and that Microporous had given Exide a draft supply agreement. (PX1106 at 031).

Response to Finding No. 614:

For the reasons set forth in Respondent’s Response to CCFOF 609-610, 612 and 613, Complaint Counsel’s finding 614 misrepresents the majority of testimony and documents in evidence related to this issue. The MOU did not specify a “two-line” expansion in “SLI” at all, and this may simply be one more indication of the reason that the MPLP board questioned Mr. Gilchrist’s credibility. (PX2301 (Heglie Dep. at 164); PX056 at 002-3)).

615. Exide believed that the MOU would eventually lead to Exide's purchasing of PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976). In furtherance of that belief, Exide and MPLP continued to work towards the goals of the MOU in the months preceding Daramic's acquisition of MPLP. (Gillespie, Tr. 2974-2976, 3088-3089). After negotiating the MOU, Exide went forward with testing of MPLP's separator samples and developing specific pricing for the separators. (Gillespie, Tr. 2974).

Response to Finding No. 615:

Complaint Counsel's proposed finding 615 is incomplete and misleading. Notwithstanding Mr. Gillespie's prompted and self-serving testimony, Exide did almost nothing save sign the original MOU a month after it expired, to support its "belief" that it would purchase separators from MPLP in 2010. (RFOF 413-420; 574-580). Further, at the time the original MOU was drafted it was Exide that made it a "non-binding" document. (Trevathan, Tr. 3611). Exide's own document shows that it signed the MOU extension primarily to "keep the [price] increase [MPLP had announced] off the table" and ensure its shipments of separators from MPLP continued after Mr. Gilchirst and Mr. McDonald threatened to cut off supply. (RX00010; RX00661 at 001, *in camera*). Further, although MPLP provided schedules, quotations, and a draft of a contract to Exide, MPLP got no response and Mr. Gillespie himself admitted that Exide had missed the schedule deadlines for progression of any expansion. (RX00009; RX00399; Gillespie, Tr. 3075-76, 3081; RX00403). Mr. Gillespie, supposedly the "man in charge" of negotiating this relationship with MPLP, did not bother attending a single one of the meetings with MPLP's personnel to work toward their alleged "goal." (PX1018 at 002-3; PX1096; McDonald, Tr. 3836-3838; Gilchrist, Tr. 400, 486-87, *in camera*). Furthermore, only weeks before the acquisition at time the MPLP and Exide were, according to Mr. Gillespie, working toward this goal, Exide and Microporous exchanged emails related to price increases where Exide told MPLP that there would be an "adverse effect" on any plans the companies had to expand together, and MPLP told Exide it would not be able to "do the other things [it] was discussing with Exide as if it didn't pay the price increase – Exide never paid the increase and, in

fact, short paid MPLP. (PX0396; RX1034). The man who was truly “negotiating” a possible agreement, Steve McDonald, did not believe that Exide was committed to having a business relationship with Microporous for the purchase of SLI separators, and Mr. Trevathan noted that it was a strong bet that MPLP “will not expand for Exide and East Penn in the U.S. (McDonald, Tr. 3843, 3846-47; RX00283). Even Mr. Gilchrist testified that {

} (Gilchrist,

Tr. 445, *in camera*). See also PX1766 (“I know we are talking a lot about getting into the PE business for SLI, but today of it is just that, talk.”).

616. Exide personnel also met with MPLP personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. (Gillespie, Tr. 2975). For example, member’s of Exide’s procurement team met with MPLP in Paris in January 2008 to discuss MPLP’s capabilities and testing of MPLP separators. (PX1023 at 001, 100). Additionally, Exide was working throughout this period of time to get internal buy-in for the strategy to move forward with MPLP, including working on a red-lined draft of a supply contract. (Gillespie, Tr. 3075, 3077).

Response to Finding No. 616:

For the reasons articulated in Respondent’s Response to CCFOF 615, Complaint Counsel’s finding 616 is misleading, incorrect and misrepresentative of the majority of testimony and documents in evidence related to this issue. (See also RFOF 413-420; 574-580). Additionally, it is telling that Mr. Gillespie testified that Exide was still seeking “internal buy-in” for the strategy to move forward with Exide – it is difficult to see how the Exide/MPLP relationship would have become reality when neither Exide, nor MPLP had “internal” buy-in for the project. (Gillespie, Tr. 3075-3077; Trevathan, Tr. 3758-59; PX0056 at 005 (MOU conditioned on approval of MPLP and Exide boards, as well as MPLP’s ability to attract debt and equity financing for the project – none of these conditions had been fulfilled as of February 29, 2008).

617. Exide received and tested PE SLI separators from MPLP. (Gillespie, Tr. 2973). Exide’s initial bench testing of MPLP’s PE SLI separators looked good and Exide then produced

batteries in the US and Europe for testing using MPLP separators. (Gillespie, Tr. 2973-2974; PX1024; PX1095). Exide felt that Exide and MPLP were going through a lot of hurdles very easily with the product.” (Gillespie, Tr. 2975-2976).

Response to Finding No. 617:

Complaint Counsel’s finding is incomplete and misleading in that it fails to note that Exide did not test any MPLP SLI separator until after the issuance of the RFP or that the MOU itself was additionally conditioned on and subject to (beyond the decisions that needed to be made as to where the two lines would be built and whether they would be for SLI or Industrial (PX0056 at 02-03)) the qualification of the MPLP products. (Gillespie, Tr. 3083-83; PX0056 at 002-03).

618. The original MOU between Exide and MPLP expired in 2007. (PX1080). In February 2008, Exide and MPLP extended their MOU. (Gillespie, Tr. 2976). At that point in time, Exide had every intention that they would be purchasing PE SLI separators from MPLP in 2010. (Gillespie, Tr. 2976).

Response to Finding No. 618:

For the reasons articulated in Respondent’s Response to CCFOF 615 and 617, Complaint Counsel’s finding 618 is misleading, incorrect and misrepresentative of the majority of testimony and documents in evidence related to the “intentions” of Exide related to the purchase of SLI separators from MPLP. (See also RFOF 413-420; 574-580).

619. {

} (Gilchrist, Tr. 445-447, *in camera*).

Response to Finding No. 619:

Complaint Counsel’s proposed finding 619 is misleading and the testimony cited is directly contradicted by contemporaneous documents and other testimony. Specifically, documents authored immediately prior to the acquisition, during the time that Mr. Gilchrist was allegedly expecting a response in “short order” indicate strongly that no such counter-offer or revised draft would be forthcoming from Exide, and that, as it had repeatedly, Exide was simply

making empty promises that it would not follow through with. (RX00285 (“what [Exide] said two weeks ago that he would work on it and get it back to us ASAP was a lie.”); RX00263 at 002 (“Promise to review and return [agreement] to you by month’s end”); PX0494 (“we need to receive a redline of the contract we submitted back in August. It is important that we receive these documents next week to prepare for our meetings.”); RX01033 (“[MPLP] will provide a ‘stay of execution’ [of price increase] in return for . . . an updated MOU by Feb 14!! . . . A redline of the original contract proposal by Feb 14th [and] ... A commitment (contract) ready at the meeting on the 27’ granting MPLP a minimum of 3,000,000 square meters of industrial motive power business in Europe to start no later than April 1, 2008....Should Exide not want to pursue these alternatives and commensurately not pay total amounts due on outstanding invoices, the preceding actions will risk jeopardizing future shipments.”); PX1052 (“I’m following up on our conversation, email below and your conversation with our CFO. We have not received either the MOU or the red-lined supply agreement.”); PX1118 (“We’re still working on getting a marked up contract”).

620. Mr. Gilchrist was concerned until the last minute that the acquisition might fall through and carried on developing Microporous’s business until the merger agreement was signed. This is why Microporous renewed its Memorandum of Understanding with Exide on February 14, 2008 during a period when acquisition negotiations with Daramic were in “stop-start” mode. (Gilchrist, Tr. 448-449, *in camera*; RX00403).

Response to Finding No. 620:

Complaint Counsel’s proposed finding 620 is contradicted by Mr. Gilchrist’s own testimony. Mr. Gilchrist testified that part of the reason he wanted the MOU extended was to put it in the “black box” to build up the value of MPLP to Daramic. (Gilchrist, Tr. 476, *in camera*; Gilchrist, Tr. 582).

621. One day before the Daramic purchase, MPLP executives including Mr. Trevathan and Mr. Gilchrist traveled to Atlanta just two days before the acquisition to meet with Exide in order to “finalize an agreement” between MPLP and Exide for the PE line expansion at Piney Flats. (Trevathan, Tr. 3734; Gilchrist, Tr. 447-449, *in camera*; PX0392). MPLP

was working in good faith to finalize the agreement. (Gilchrist, Tr. 447-449). At the Atlanta meeting, Exide reiterated its desire to move forward with the expansion process. (Gilchrist, Tr. 447-449)

Response to Finding No. 621:

Complaint Counsel's is incomplete, misleading and contradicted by testimony and documentation. Notwithstanding Mr. Gilchrist's biased and self-serving statement, a contemporaneous Exide document directly contradicts Mr. Gilchrist's convenient trial testimony. (RX00011). Specifically, this document outlines the meeting agenda for the February 27, 2008 meeting between MPLP and Mr. Perez in Alpharetta. (RX00011). The handwritten notes on that document state specifically that "Larry expressed his dissatisfaction"... "Steve & Roger also expressed dissatisfaction with Exide not providing commitment" and, perhaps most tellingly in light of his trial testimony, "Mike was also unhappy with no formal commitment". (RX00011 at 003). The meeting in Alpharetta started late, was "off track" and occurred in a "back room" with a gentleman who had become employed by Exide only weeks before. (RX00011 at 003; RFOF 417-419; McDonald, Tr. 3846-47; Trevathan, Tr. 3640).

622. The purpose of the February 2008 meeting between Exide and MPLP was in part to reassure Exide that MPLP was still interested in building a line for them. (McDonald, Tr. 3939).

Response to Finding No. 622:

Complaint Counsel's proposed finding 622 misrepresents the testimony, is misleading and incomplete. Mr. McDonald testified that the meeting was to find out what the intent of Exide was going forward. (McDonald, Tr. 3939, 3846-47; Trevathan, Tr. 3640; RX00011 at 003). According to the "agenda" the meeting was supposed to last 3 hours, instead it lasted less than an hour. (McDonald, Tr. 3846-47). Even if MPLP was "interested" in building a line for Exide, there were, as Mr. Gilchrist admitted, "a lot of moving parts to get nailed down" and MPLP had neither the permission from its board, nor the capital it needed to go forward with any expansion for Exide. (Gilchrist, Tr. 447, *in camera*; Trevathan, Tr. 3613-14, 3758-59; PX0056).

623. Right up to the date of the deal, MPLP had no assurance that the deal would be consummated with Daramic. (Trevathan, Tr. 3753). And had the deal fallen through, MPLP would have continued with its expansion plans including those with Exide. (Trevathan, Tr. 3753-3754). Mr. Trevathan thought that MPLP was on its way to further improve profitability in the event that the merger with Daramic fell through. (Trevathan, Tr. 3750).

Response to Finding No. 623:

Complaint Counsel's proposed finding 623 is misleading, misrepresentative of the testimony and evidence and incomplete. First, all Mr. Trevathan testified that if the deal with Daramic had fallen through MPLP would have continued negotiating with Exide "if the board was agreeable to that." (Trevathan, Tr. 3753). Further, there is significant testimony that the MPLP board was not agreeable to an expansion at that time, in fact, it was a "strong bet" that there would be no expansion for Exide or East Penn in the US. (RX00253, *in camera*; RFOF 386-419).

iii) MPLP also held discussions with East Penn regarding SLI separator supply

624. Following an initial phone conversation between Mr. Leister of East Penn and Roger Berger of MPLP, Mr. Berger visited East Penn's Pennsylvania manufacturing plant to conduct further discussions with Mr. Leister regarding the possible supply of PE SLI separators to East Penn. (Leister, Tr. 4009). During this face to face meeting, East Penn indicated to Mr. Berger that East Penn was interested in seeing MPLP enter the SLI market. (Leister, Tr. 4010).

Response to Finding No. 624:

Complaint Counsel's proposed finding 624 is incomplete, misleading and irrelevant. Mr. Leister testified that in mid-2007 East Penn had initial discussions with MPLP to see "what their capabilities were." (Leister, Tr. 3990). The "face to face" meeting referenced by Complaint Counsel here was in October 2007. (RX00082). What East Penn discovered in the discussions and meetings was that MPLP "really couldn't hit that capacity [that East Penn needed]. They didn't have the tooling. They didn't have the machinery to do what we were asking them to do. And they wanted us to commit to an MOU for -- I think it was by the end of 2007 for them to

begin to add a building and put a piece of machinery in.” (Leister, Tr. 3991). Mr. Leister went on to testify that East Penn didn’t want to develop an MOU with MPLP, that MPLP was never qualified as an alternative supplier for PE to East Penn and that the discussions “sort of fizzled” and “went away.” (Leister, Tr. 4019). Thus, regardless of what East Penn’s original “interest” was, MPLP was not capable of meeting that interest in a myriad of ways. (Leister, Tr. 3991; PX0393). (See also RFOF 777-783).

625. East Penn’s conversations with MPLP about possible supply of PE SLI separators continued with a visit by East Penn representatives to MPLP’s Piney Flats facility in October 2007. (Leister, Tr. 4011-4012) (PX0082). Accompanying Mr. Leister, East Penn’s Director of Procurement Strategy and Supplier Development, on this trip to Piney Flats was Roger Barr, and Davis Knauer. (Leister, Tr. 3971-3976; 4011). As VP of Automotive Manufacturing And Purchasing, Mr. Barr is involved in the purchasing of SLI separators, while Mr. Knauer as VP of Automotive Engineering is involved in the testing and qualifying of SLI products. (Leister, Tr. 4011).

Response to Finding No. 625:

Respondent has no specific response to this proposed finding.

626. During East Penn’s visit to Piney Flats in October 2007, as a signal of East Penn’s seriousness about working with MPLP, the East Penn representatives indicated that East Penn might be willing to enter a long term contract with MPLP for the supply of PE SLI separators. (Leister, Tr. 4016-4017).

Response to Finding No. 626:

Complaint Counsel’s proposed finding 626 is misleading, incomplete and irrelevant for the reasons articulated in Respondent’s Response to CCFOF 624. {

}

(PX0082 at 002; Leister, Tr. 3991).

627. Following East Penn's visit to Piney Flats, Mr. Leister requested a price quote on 11 million square meters of PE SLI product from MPLP. (Leister, Tr. 4018). MPLP provided a price quote soon thereafter. (Leister, Tr. 4018).

Response to Finding No. 627:

Complaint Counsel's proposed finding 627 is misleading and inaccurately references Mr. Leister's testimony. In fact, Mr. Leister testified that he "believed" East Penn asked for a quotation on 11 million square meters of supply, and that he "believed" that MPLP have East Penn "some pricing" but that he didn't recall what it was. (Leister, Tr. 4018). There is no documentary evidence from either MPLP or East Penn to support this finding, and, in fact, the documentation shows that in October 2007, MPLP gave Mr. Leister prices for only "three sizes" that were "a bit high" and no "proposal" from Mr. Gilchrist to East Penn appears anywhere in the record, indicating strongly that MPLP did not follow through. (PX0389 at 003).

628. Based on the discussions and tour of the facility, East Penn felt that MPLP had the requisite knowledge to make SLI separators for East Penn. (Leister, Tr. 4013). In late 2007, East Penn saw MPLP as a viable supplier for SLI separators. (Leister, Tr. 4018-4019). Up to the time of Daramic's acquisition of MPLP, East Penn had not ruled out the possibility of buying SLI separators from MPLP. (Leister, Tr. 4019).

Response to Finding No. 628:

Complaint Counsel's proposed finding 628 is misleading, incomplete and irrelevant for the reasons articulated in Respondent's Response to CCFOF 624-627. Specifically, Mr. Leister's response to Complaint Counsel's question "At the time of the acquisition of Microporous by Daramic ... East Penn hadn't ruled out the possibility of buying SLI separators from Microporous in the future?" was "I wouldn't say that was a topic that really came up. We never as a company developed an MOU with them. We didn't want to do that, so it just sort of fizzled. It went away." (Leister, Tr. 4019). The fact that East Penn had not "ruled it out" has absolutely no bearing on this matter, as Mr. Leister made it clear that East Penn "didn't want" to develop an agreement with MPLP. (Leister, Tr. 4019). {

} (PX0082 at 001 {

}; RX01519, *in camera*). Any

failure of MPLP to capitalize on that possibility is totally unrelated to its acquisition by Daramic, as former MPLP witnesses confirmed that discussions with East Penn never went beyond preliminary stages. (Trevathan, Tr. 3623; Gilchrist, Tr. 503, *in camera*). (See also, RFOF 383,777-782).

629. MPLP believed that it would have been producing SLI separators for East Penn, but for the acquisition. (Trevathan, Tr. 3722-3723 (Phase III for East Penn was “discontinued because of the acquisition of Microporous by Daramic.”)).

Response to Finding No. 629:

Complaint Counsel’s finding 629 misrepresents entirely Mr. Trevathan’s cited testimony, and is contradicted by testimony of the East Penn representative at trial. Mr. Leister testified, and the documents in the record confirm, that East Penn did not continue its discussions with MPLP and that it “fizzled” and “went away” well prior to the acquisition. (Leister, 4019). Mr. Trevathan’s cited testimony says absolutely nothing about MPLP’s alleged “belief” that it would have been producing separators for East Penn but for the acquisition. (Trevathan, Tr. 3722-23). Mr. Trevathan’s testimony was, in fact, simply that that work on adding an SLI line in Tennessee was discontinued because of the acquisition. (Trevathan, Tr. 3722-23). The inartfully crafted question by Complaint Counsel is unclear and is certainly not sufficient to support a finding that is contradicted by testimony and documents. (Trevathan, Tr. 3732-33; PX0392 (“Phase III for Exide”); PX0058 at 029 (Phase III does not mention East Penn or Exide); PX0059 at 008, *in camera* {

}; PX0080, *in camera*

{

}; PX0129, *in camera* {

}; PX0942 at 002, *in camera* {

}.}

630. In the event that the lawsuit brought by Daramic against MPLP was successful, the contingency plan within MPLP was to produce SLI on the two lines in Tennessee and produce CellForce on the two lines in Austria. (Trevathan, Tr. 3705; PX0090).

Response to Finding No. 630:

Complaint Counsel's proposed finding 630 is taken entirely out of context, and is misleading and inaccurate. First, Mr. Trevathan's testimony at trial was, in fact, that it was not MPLP's plan to produce SLI separators on two lines in Tennessee." (Trevathan, Tr. 3074-75 ("Q: And isn't it also true that in the fall of 2006, during the middle of this arbitration, that your plan was, if Daramic were successful in that case, your plan was to produce SLI -- that's automotive separators -- on the two lines in Tennessee; isn't that correct? It's yes or no, sir, either it is or it isn't. A. No.")). The document to which Complaint Counsel cites to support this finding is from { } when MPLP had even been given permission to proceed with any expansion plan. (PX0910 (Trevathan, Dep. at 15-16), *in camera*). Further, this was during a time when discussions with JCI were ongoing. (PX0090). There is abundant evidence in the record that the expansion "plans" changed repeatedly, and that, in fact, the plan to install a "third" line in Piney Flats was stopped in May-June 2007 when the JCI negotiations fell apart. (Trevathan, Tr. 3764; PX2300 (Heglie, IHT at 164-65 ("We contemplated over the course I'm guessing maybe not hundreds but many many iterations of expansion plans and their dynamics...")); PX2301 (Heglie, Dep. at 156 ("the Board had only approved purchasing for two machines and we subsequently found out that management had started buying for a third machine . . . And so we told them to stop.)); PX910 (Trevathan, Dep. at 44), *in camera* {

}

- iv) MPLP planned to sell SLI separators to European customers as well

631. Microporous was planning on selling SLI separators from the Feistritz facility prior to its acquisition by Daramic, and would have pursued selling SLI separators from the Feistritz had it not been acquired by Daramic. (Gaugl, Tr. 4626).

Response to Finding No. 631:

Complaint Counsel's proposed finding 631 is incomplete, misleading and irrelevant. MPLP's "plans" related to sales of a product in Austria have nothing to do with Complaint Counsel's claimed North American geographic market, and do not make the effects of the acquisition any more or less competitive in that market. Further, Mr. Gaugl's cited testimony states that MPLP would have attempted to sell SLI separators in Europe, but the question would have been whether they could get orders for SLI. (Gaugl, Tr. 4626). In fact, there is substantial evidence in testimony and documents that, notwithstanding MPLP's "plans" for selling SLI separators in Europe, there were no contracts, agreements, or even MOUs with any customers to which this "plan" was a reality. (Gaugl, Tr. 4643); PX0115 ("they [Fiamm] feel very secure with Daramic and consequently will stick with them. They have a new multi-year agreement with Daramic, which for the moment is unsigned, but which they intend to honor in any case. . ."); PX0119 ("No real surprise in hearing that our prices are too high" for Banner).

632. At the Feistritz plant facility, Microporous built two production lines both of which could produce CellForce separators or plain polyethylene separators for SLI batteries. (Gilchrist, Tr. 332).

Response to Finding No. 632:

Respondent has no specific response to this proposed finding.

H. SLI separator market reverts to a duopoly as a result of acquisition which eliminated a global new entrant

633. The acquisition enabled Daramic to increase price unilaterally. (Simpson, Tr. 3192-3194, *in camera*).

Response to Finding No. 633:

Complaint Counsel's proposed finding is identical to its proposed finding 324. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Further, for the reasons stated in Respondent's Response to CCFOF 324, this proposed finding 633 is vague, inaccurate and a misrepresentation of the evidence.

634. Daramic's acquisition of Microporous had two harmful unilateral effects in the SLI market, the first concerned sales to Exide. (Simpson, Tr. 3194, *in camera*). Although Microporous would not initially be in a position to supply all of the needs of Exide, Exide wanted to have Microporous as an independent supplier because they believed that they could obtain better pricing with an additional supplier competing for their business. (Simpson, Tr. 3194, *in camera*).

Response to Finding No. 634:

Complaint Counsel's finding number 634 is misleading, irrelevant and incorrect. First, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of it as such is improper and should be disregarded. Second, Complaint Counsel presupposes an "SLI market" which is not supported by the weight of evidence on the record. (RFOF 69, 70, 74; *see also* Response to Finding No. 301). Complaint Counsel attempt to assert as a finding of fact statements and opinions that are not a part of the record evidence, and further attempt to rely on Dr. Simpson's opinion of what Exide "wanted" or "believed" as fact, without relying on a single piece of empirical evidence. Complaint Counsel has not cited to testimony from any individual from Exide that this is what Exide 'wanted' or 'believed.' Additionally, a unilateral effect on one specific firm is not cognizable. The question before the Court is not the impact on any specific firm or firms individually, but the effect on competition. The Guidelines and case law impose several preconditions for application of the unilateral effects concept which Dr. Simpson ignored. E.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). See also RPT Brief at 24-27. Finally, this proposed finding is flatly contradicted by the evidence. (FOF

306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489).

635. The second concerned sales to smaller battery manufacturers. {

} (Simpson, Tr. 3194-3195, *in camera*). In fact, Daramic had already lowered prices to some smaller battery manufacturers in response to Microporous's expansion of capacity. (PX0258).

Response to Finding No. 635:

For the reasons articulated in Respondent's Response to CCFOF 634, this proposed finding is misleading, irrelevant and incorrect. (See also FOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489). Further, there is no evidence that MPLP would be the "second best" supplier. In fact, the record is replete with evidence that MPLP would have been the high cost supplier had it entered the SLI, which it had not done in North America at the time of the acquisition. (PX0442 at 004, *in camera*; PX1076, *in camera*; Gillespie, Tr. 3084-85; PX0113). Finally, the document cited to by Complaint Counsel for this proposition does not, in any manner, support this finding. (PX0258). In fact, the document, which has no date, and no identifying information related to who wrote it and for what purpose, asks only "what do we want to achieve" and mentions a possible price increase ("announce 4% end at 2%") and discusses MPLP and pricing only in Europe – a wholly irrelevant geographic market according to Complaint Counsel. (RX1572 at 3; PX0258).

636. {

} (Hall, Tr. 2747, *in camera*).
Subsequent to the completion of the long term contract, {
} (Hall, Tr. 2747, *in camera*). {
} (Hall, Tr. 2748, *in camera*).

Response to Finding No. 636:

Respondent has no specific response to this finding.

637. { (Hall,
Tr. 2762-2763, *in camera*). {
} (Hall, Tr. 2762-2763, *in camera*). {
} (Hall, Tr. 2763-2764, *in camera*). {
} (Hall, Tr. 2823-2824, *in camera*).

Response to Finding No. 637:

Respondent has no specific response to this finding.

638. Entek will not constrain Daramic’s post-acquisition pricing. Dr. Simpson noted that, although Entek currently has some excess capacity, that excess capacity was created by the ongoing recession. (Simpson, Tr. 3195, *in camera*). Dr. Simpson then noted that when the economy recovers, demand will increase and that excess capacity will decrease. (Simpson, Tr. 3195, *in camera*). Dr. Simpson further noted {
} so excess capacity does not
motivate a firm necessarily to be fiercely competitive and cut price and try to gain market share.” (Simpson, Tr. 3196-3197, *in camera*).

Response to Finding No. 638:

Complaint Counsel’s finding number 638 is misleading and incorrect. Dr. Simpson’s testimony is not “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded. Complaint Counsel’s further attempt to rely on Dr. Simpson’s opinion of “when the economy recovers.” This Court is charged with determining the effects of the acquisition today in light of the economic reality in which the Daramic and its customers and competitors operate now, not at an entirely unknown time in the future. It could be years before the economy “recovers” and Dr. Simpson has provided no analysis, or evidence, supporting his view of {
} In fact, the evidence shows that
{

} (RX00114 at 006-07, *in camera*). In fact, {

} (Weerts Tr.
4458-59, *in camera*). {

} (Weerts, Tr. 4459-60, *in camera*; Gaugl, Tr. 4546;
342

PX0406 at 003, *in camera*). {

} (Riney, Tr. 4949, *in camera*;

Seibert, Tr. 4191-4193, *in camera*; RX00927 at 5-16, *in camera*; RX00542, *in camera*). (See also, PX1097 at 002, *in camera* {

}

639. Dr. Simpson testified that {
} (Simpson, Tr. 3197, *in camera*) {

} (Simpson, Tr. 3197, *in camera*).

Response to Finding No. 639:

Complaint Counsel's finding 639 has no basis in fact or evidence, and is pure speculation. Complaint Counsel has not, and cannot, produce any evidence supporting this claim. {

}

(Weerts, Tr. 4495-96, *in camera*; Weerts, Tr. 4522-23, *in camera*; RX00133, *in camera*; Weerts, Tr. 4483, *in camera*; Godber, Tr. 278; Seibert, Tr. 4176-77). {

} (Hall, Tr. 2825-26, *in camera*). Finally, as noted repeatedly above, Dr.

Simpson's testimony is not "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

640. Dr. Simpson concluded that { } segments the industry by aligning those two suppliers with { } and making them less effective substitutes for other battery manufacturers. (Simpson, Tr. 3442, *in camera*). Dr. Simpson explained: {

} (Simpson, Tr. 3441, *in camera*). {

} (Simpson, Tr. 3442, *in camera*).

Response to Finding No. 640:

For the reasons articulated in Respondent’s Response to CCFOF 638-639, this proposed finding is misleading, irrelevant and incorrect. (See also RFOF 474-485, 491-502, 948-973).

{

} (Hall, Tr. 2763, *in camera*).

641. Dr. Simpson also noted that {
(Simpson, Tr. 3197, *in camera*). As a matter of economic theory, most-favored nation clauses tend to make firms less competitive by preventing them from making selective price cuts. (Simpson, Tr. 3197-3198, *in camera*).

Response to Finding No. 641:

Complaint Counsel’s proposed finding 641, and Dr. Simpson’s opinion, is non-sensical when viewed in conjunction with its proposed finding 640, as well as the evidence in the record.

{

} (RX00133, *in camera*).

Importantly, the MOU between Exide and MPLP included a “most favored nation” clause – thus, if Dr. Simpson’s theory on MFN clauses is correct, then MPLP would have made been “less competitive” if Exide had ever followed through with the MOU. (PX0056 at 004). Further,

{

} (Hall, Tr. 2763, *in camera* {

} {

} (Kahwaty, Tr. 5090, *in camera*). Finally, as noted repeatedly above, Dr. Simpson's testimony is not "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

642. Dr. Simpson testified that a useful way to see {
} (Simpson, Tr. 3198-3199, *in camera*). Microporous was building a new factory in Austria and had plans to add an additional line at its Tennessee plant. (Gaugl, Tr. 4576). The additional capacity at the Austria plant would have freed up capacity at its Tennessee plant which previously had supplied European customers. (PX2301 (Heglie, Dep. at 38-39)). Daramic responded to {
} Now that
{
} (Simpson, Tr. 3195, 3223-24, *in camera*, see generally 3209-3224, *in camera*).

Response to Finding No. 642:

Complaint Counsel's proposed finding 642 is incomplete, incorrect and misrepresents the testimony and documentary evidence. First, considerable evidence makes clear that, in fact, although MPLP may at one time, many months prior to the acquisition, have had a plan to build an additional line in Tennessee, that plan was scrapped in May or June 2007, and was never rekindled, or approved by MPLP's board. (RFOF 318, 383-384, 387-408; Gilchrist, Tr. 557; (McDonald, Tr. 3857, *in camera*; RX01120, *in camera*; PX0920 (Gilchrist, IHT at 53), *in camera*; PX2300 (Heglie, IHT at 164-65); PX2301 (Heglie, Dep. at 156); RX00247; Trevathan, Tr. 3720-21, 3764; Gaugl, Tr. 4559). Any price increases sought, or obtained, by Daramic post acquisition, were for the sole purpose of 'surviving' unprecedented increases in costs and pursuant to contract. (Riney, Tr. 4949, *in camera*; Seibert, Tr. 4191-4193, *in camera*; RX00927 at 5-16, *in camera*; RX00542, *in camera*). (See also, PX1097 at 002, *in camera*).

643. {
} (PX1823 at 001, *in camera*).
{

(PX1823 at 001, *in camera*).

Response to Finding No. 643:

{

}

644. {

3022, *in camera*). {

} (Gillespie, Tr.

} (Gillespie, Tr. 3022, *in camera*).

Response to Finding No. 644:

Complaint Counsel's proposed finding 644 is misleading and incomplete. {

}

(Gillespie, Tr. 3022, *in camera* {

}; Weerts, Tr. 4486; Weerts, Tr. 4521-23, *in camera*). Further, {

}

(PX1823, *in camera*; Gillespie, Tr. 3021, *in camera*; 3126, *in camera*; 3129-30, *in camera*).

Combining this with the fact that Exide has been {

} increases the

irrelevance of this proposed finding to insignificance. (RX00303 at 002, *in camera*; RX00304;

tooling and equipment for their products. (PX2012 at 002; PX2009 at 002). Mr. Balcerzak, the director of purchasing at Crown, testified that Crown did not even consider any other possible separator suppliers when it negotiated its contract with Daramic. (Balcerzak, Tr. 4106, *in camera*).

I. Daramic acquired MPLP to eliminate a competitive threat

646. As early as July 2003, Daramic's head of sales, Tucker Roe, sent a memo to the President of Daramic summarizing the rationale for acquiring Microporous, thus: "The only reason for acquisition would be purely defensive to secure our market share of the traction market and terminate the continued price erosion." (PX0935 at 001; PX0433 at 004 ("The main disadvantage I see if we do not acquire Amerace is that Amerace may continue their plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins."))).

Response to Finding No. 646:

Although Complaint Counsel's proposed finding number 646 accurately quotes from PX0935 and PX0433, the finding is incomplete and misleading. In July 2003, Tucker Roe recommended to Frank Nasisi, the President of Daramic at that time, that Microporous should not be acquired. (PX0935 at 001 ("Today, I see no real advantage to acquire this company.")). This recommendation was based on Daramic's beliefs about Microporous' business prospects in 2003, including Microporous' rubber-based technology. (PX0935 at 001). Moreover, although citing to PX0433 (a document which was created in 2005, not 2003), Complaint Counsel ignores the numerous advantages of a potential acquisition of Microporous listed in that exhibit: to diversify its product line, gain access to Microporous' rubber technology, and enter the niche rubber market. (RFOF 262).

647. In 2003, the President of Daramic put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic simply as "Eliminate price competition." (PX0932).

Response to Finding No. 647:

Complaint Counsel's finding number 647 is inaccurate and misleading. There is no such position as "President" of Daramic. There is absolutely no evidence that in 2003, an acquisition

of Microporous was “at the top of [Daramic’s] list of possible acquisitions.” In addition, this proposed finding ignores evidence concerning Daramic’s true rationale for a potential acquisition of Microporous, including diversification of its product line, gaining access to Microporous’ rubber technology and entering the niche rubber market. (RFOF 262). Moreover, it ignores the fact that Polypore changed presidents in 2005. (RFOF 228).

648. The effects of price competition eventually led Daramic in 2005 to consider an outright acquisition of MPLP. (PX0433). Daramic understood that the benefit of an acquisition of MPLP would be the elimination of their low price competitor. (PX0433 at 003). On the other hand, Daramic also believed that if MPLP remained independent and was “allowed to add additional capacity” it would “further reduce the overall market pricing.” (PX0433 at 003-004; Roe, Tr. 1270-1271; PX0919 (Riney, IHT at 294-295, *in camera*)).

Response to Finding No. 648:

Complaint Counsel’s finding number 648 is inaccurate and misleading. Daramic’s consideration was limited in that Polypore was in no position to consider an acquisition in 2005. (Toth, Tr. 1503). To the extent there was consideration in 2005, it occurred because it would allow Daramic to diversify its product line, gain access to Microporous’ rubber technology and enter the niche rubber market. (RFOF 262). Toth repeatedly emphasized to his management team that defensive acquisitions are never profitable, and that the only acquisitions that should be considered are those that add value to the company’s existing business units. (RFOF 266). In addition, {

} (RFOF 1315, 1366, 1384).

649. The main disadvantage that Daramic saw in 2005 in not acquiring MPLP was that MPLP might continue their expansion plans resulting in either a loss of customers for Daramic, or a further reduction in Daramic’s market pricing. (PX0433 at 004; Roe, Tr. 1271-72).

Response to Finding No. 649:

Complaint Counsel’s finding number 649 is incomplete. PX0433 sets forth Tucker Roe’s opinion from a sales perspective of a potential acquisition of Microporous in 2005. (PX0433 at 001). Roe’s opinion in 2005 was based on market intelligence that Roe had at that time, which

turned out to be inaccurate. (Roe, Tr. 1271-72, 1766). In addition, this proposed finding ignores evidence concerning Daramic's true rationale for a potential acquisition of Microporous, including diversification of its product line, gaining access to Microporous' rubber technology and entering the niche rubber market. (RFOF 262). Furthermore, Toth repeatedly emphasized to his management team that defensive acquisitions are never profitable, and that the only acquisitions that should be considered are those that add value to the company's existing business units. (RFOF 266).

650. Bob Toth became CEO of Polypore in July 2005. (PX0901 (Toth, Dep. at 7), *in camera*). Upon becoming CEO, Mr. Hauswald provided Mr. Toth "a summary of several memos done by Tucker [Roe]" regarding Daramic's {

{ (PX2242 at 001, *in camera*). Mr. Hauswald stated that

{ (PX2242 at 001, *in camera*).

Response to Finding No. 650:

Although Complaint Counsel's finding number 650 accurately cites from PX2242, the finding is incomplete and misleading because it ignores evidence concerning Daramic's true rationale for a potential acquisition of Microporous, including diversification of its product line, gaining access to Microporous' rubber technology and entering the niche rubber market. (RFOF 262; PX2242 at 004 {

}). Furthermore, Toth repeatedly emphasized to his management team that defensive acquisitions are never profitable, and that the only acquisitions that should be considered are those that add value to the company's existing business units. (RFOF 266). Toth especially emphasized many of these basic principles with Hauswald. (RFOF 266). Moreover, despite the statements by Hauswald, the uncontroverted

evidence in this case demonstrates that Polypore was in no financial position to consider an acquisition of Microporous in 2005. (Toth, Tr. 1503).

651. In September 2005, Mr. Hauswald again advises Mr. Toth that Daramic should buy Amerace because it has taken EnerSys business from Daramic and threatens to take even more. (PX0168). Mr. Hauswald told Mr. Toth that “Amerace is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts will expire. I’m still recommending to buy Amerace, as a defensive action.” (PX0168 at 002).

Response to Finding No. 651:

Complaint Counsel’s finding number 651 is inaccurate and misleading. For its response to this finding, Respondent incorporates its reply to finding number 650. In addition, Hauswald testified at trial that he did not consider Amerace to be a threat to Daramic’s business. (Hauswald, Tr. 738-39). Moreover, despite the statements by Hauswald, the uncontroverted evidence in this case demonstrates that Polypore was in no financial position to consider an acquisition of Microporous in 2005. (Toth, Tr. 1503).

652. One month later in October 2005, Frank Nasisi, advised Mr. Toth that based on the information Daramic has received about Amerace building a plant in Europe for EnerSys, “[w]e must do everything possible to stop this process. . . . The bottom line is that Amerace can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth.” (PX0694 at 001). Mr. Hauswald felt that Daramic should “solve the [Microporous] case definitively.” (PX0694 at 001).

Response to Finding No. 652:

Complaint Counsel’s finding number 652 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 650 and 651.

653. Daramic understood that an acquisition of MPLP might not sit well with battery manufacturers. Daramic recognized that customers might view a Daramic acquisition of MPLP as an elimination of a potential PE supplier, thereby creating a situation where battery manufacturers would have even greater dependency on Daramic for supply of PE separators. (PX0433 at 04). Daramic further understood customers would not take well to a Daramic acquisition of MPLP in light of Daramic’s past history of acquisitions of other PE suppliers such as Evanite, PIL, and Jungfer. (PX0433 at 004; Roe, Tr. 1275-1276).

Response to Finding No. 653:

Complaint Counsel's finding number 653 is vague, incomplete and misleading. The first sentence of this finding is vague and should not be considered as a fact. With respect to the remaining portion of this finding, Tucker Roe stated in July 2005 that, from a sales perspective, only EnerSys and Johnson Controls, two customers with a great deal of market power, may view an acquisition of Microporous in a negative light. (PX0433 at 004). At that time, Roe believed that EnerSys would accept the acquisition if Daramic approached EnerSys "in a positive manner with some price assurances." (PX0433 at 004). Roe also believed in July 2005 that JCI, and only JCI, might view an acquisition as an attempt by Daramic to eliminate a *potential* PE supplier and force JCI's dependence on Daramic. (PX0433 at 004). However, at the time of the acquisition on February 29, 2008, {

} (RFOF 475). In addition, JCI entered into a three-way joint venture agreement with Rising and Fengfan in February 2007. (RFOF 491). Furthermore, this finding ignores evidence demonstrating that customers such as Douglas, Crown and East Penn viewed the acquisition in a positive manner. (RFOF 779, 782, 801, 814, 817-818, 832).

654. While Daramic decided not to acquire MPLP in 2005, the same factors were at play in 2008 when Daramic eventually acquired MPLP. (Roe, Tr. 1276-1277; PX0911 (Roe, Dep. at 221-222, *in camera*)).

Response to Finding No. 654:

Complaint Counsel's finding number 654 is vague and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 650 and 651. In addition, Michael Graff, the Chairman of Polypore's Board of Directors, explained that the rationale for the acquisition was to allow Daramic 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*). The Polypore Board determined that {

} (Graff, Tr.

4862-63, *in camera*). {

} (Graff, Tr.

4862-63, *in camera*). In fact, {

} (Graff, Tr. 4863,

in camera). {

} (Graff, Tr. 4862-63, *in camera*). {

}

(Graff, Tr. 4862-63, *in camera*).

655. In August of 2006, Daramic personnel including, Mr. Hauswald, Mr. Roe, Mr. Whear, and Mr. Riney, met to discuss the direction of the company. (PX0992 at 001, *in camera*; Hauswald, Tr. 826, *in camera*). Daramic at the time believed that {

} (Hauswald, Tr. 827-828, *in camera*; PX0992 at 004, *in camera*). Daramic also stated that {
} (PX0992 at 004, *in camera*).

Response to Finding No. 655:

Although Complaint Counsel's finding number 655 properly quotes PX0992, this finding is incomplete and misleading. {

} (Roe, Tr.

1267, 1324-29, 1739-40, 1781-82, *in camera*). Moreover, Hauswald testified at trial that

{

} (Hauswald, Tr. 828, *in*

camera).

656. On August 23, 2006, Mr. Frank Nasisi sent an e-mail to Pierre Hauswald on various issues at Daramic, because Mr. Nasisi's time at Daramic-Polypore was soon coming to an end. In his e-mail, Mr. Nasisi stated, "Amerace will be a problem for Daramic. They have acquired momentum and it will be very difficult to stop them unless the BOARD

will approve its purchase at any price (it will be more now than a year ago).” (PX0167; Hauswald, Tr. 649- 650).

Response to Finding No. 656:

Complaint Counsel’s finding number 656 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 650 and 651. In addition, when asked about Nasisi’s statements in PX0167, Hauswald testified that he does not know what Nasisi meant by his statements and that Hauswald’s only motivation for acquiring Microporous was to obtain Microporous’ rubber technology. (Hauswald, Tr. 651-52).

J. Daramic tried to stop MPLP from building a European plant by suing MPLP for using Jungfer technology in Europe

657. Polypore became aware in the spring of 2005 that it might be able to stop any future Microporous expansion in Europe, or better yet buy Microporous at a discount to other potential bidders. In May 2005, Frank Nasisi, the departing CEO of Polypore, notified Michael Graff by email that while looking through his files he had found the contract between Jungfer and Microporous relating to the PE production line that Jungfer installed for Microporous in 2001. (PX0747). In the email he stated:

The contract puts a restriction on Microporous Products to sell PE product for automotive application in Europe or Korea, places where at that time Jungfer was selling its product. This is certainly a big restriction of anyone who wants to expand the business by going into the automotive market

It certainly will reduce their value for anyone outside Daramic. Phillip [Bryson, Polypore GC,] will investigate it further and provide us with a clear picture of this new finding.

Response to Finding No. 657:

Although Complaint Counsel’s finding number 657 accurately cites from PX0747, this finding is incomplete and misleading. PX0747 makes no reference to a potential acquisition of Microporous by Polypore, so it is inaccurate to assert that “Polypore became aware in the spring of 2005” that it could “buy Microporous at a discount,” as Complaint Counsel has claimed. (PX0747). Moreover, this finding completely ignores the uncontroverted evidence in this case

which demonstrates that Polypore was in no financial position to consider an acquisition of Microporous in 2005. (Toth, Tr. 1503).

658. In June 2006, Michael Graff emailed Mr. Toth and Mr. Hauswald {
} (PX0751 at 001, *in camera*). In his email reply, Mr. Hauswald confirmed that indeed Mr. Bryson was “on it:”

{

} (PX0757 at 001, *in camera*).

Response to Finding No. 658:

Complaint Counsel’s finding number 658 is misleading. Daramic initiated an arbitration proceeding against Microporous to enforce a valid contractual provision which prohibited Microporous from manufacturing and selling PE SLI separators in Europe (PX2237; FOF 267). In fact, the Microporous Board of Directors was concerned that Microporous would lose the arbitration. (Trevathan, Tr. 3624, 3631).

659. Daramic not only took legal action to stop the Microporous expansion in Europe, it also took other initiatives as well. Pierre Hauswald {

} (PX0246, *in camera*). The email to the team

{

} (PX0246, *in camera*). {

} (PX2241, *in camera*).

Response to Finding No. 659:

For the reasons set forth in Respondent’s reply to finding number 658, this finding should be rejected.

K. Prior to the Acquisition MPLP was Expanding

660. Worldwide sales of CellForce in 2007 were approximately \$8 million. (Gilchrist, Tr. 555). At the time of the acquisition, Microporous anticipated that sales of CellForce would grow substantially. (Gilchrist, Tr. 345-346).

Response to Finding No. 660:

Complaint Counsel's finding number 660 is incomplete and misleading and is based on the biased testimony of Gilchrist. Prior to the acquisition, Microporous' financial viability was in question. (RFOF 422). {

} (RFOF 422). Furthermore, the

Microporous Board had become increasingly concerned about the viability of the expansion plans and Microporous' continuing financial viability, as demonstrated by the Board's Mandate and the December 3rd Memorandum. (RFOF 398). {

} (RFOF 296-99;

Trevathan, Tr. 3629-31; RX00283).

661. Microporous was owned by IGP. (PX2301 (Heglie, Dep. at 8)). In evaluating its investment in Microporous, IGP saw growth opportunities in golf cart, reserve power and motive power battery separator markets, and potential opportunity in the automotive market. (PX2300 (Heglie, IHT at 21-23)). Other attributes that IGP evaluated in making its investment in Microporous included a highly engineered product, strong profitability, a large component of the business was aftermarket, which tends to have a steady demand, and good cash flow characteristics. (PX2300 (Heglie, IHT at 22)).

Response to Finding No. 661:

Complaint Counsel's finding number 661 is inaccurate and misleading because it ignores evidence demonstrating that IGP became increasingly concerned about Microporous' financial viability. (RFOF 398). It also ignores evidence showing that IGP pulled back on Microporous' expansion plans, mandating that Microporous "avoid competition with larger, entrenched competitors with products that are not differentiated; this is particularly important when such strategies require large capital commitments." (RFOF 390). The complete evidence demonstrates that IGP questioned a pure-PE growth strategy and felt that it was "just not practical to grow in every market," (RFOF 406) and that the Board did not envision growth by

Microporous in every application. (RFOF 386-409). {

} (RFOF 391).

662. At the time of its acquisition of Microporous, IGP determined that Microporous had multiple growth strategies. (PX2301 (Heglie, Dep. at 22)). During the course of IGP's ownership of Microporous, the Microporous Board, which was comprised of mostly IGP employees or partners, wanted to grow Microporous's sales and profits. (PX2301 (Heglie, Dep. at 24)).

Response to Finding No. 662:

Respondent refers to its reply to finding number 661 for context.

663. Because Microporous was owned by private equity companies, starting in the 1990's it was imperative that the company develop growth strategies and expansion into the SLI market was the first place the company looked. (Gilchrist, Tr. 299).

Response to Finding No. 663:

Respondent refers to its reply to finding number 661 for context.

664. In May 2007, Microporous management presented the Microporous Board with the strategic plan, which included "**Protect golf car market**"; "**Protect position in European traction**"; "**Regain U.S. traction position**"; and "**Create position in SLI market.**" (PX1102 at 029 (emphasis in the original)). The board was generally supportive of the strategic plan. (PX2301 (Heglie, Dep. at 30)); PX2300 (Heglie, IHT at 159)). With regard to creating a position in SLI, Mr. Heglie testified that while there were debates between management and the board regarding the details and execution, "the core tenet of trying to create a position in that market, I think we agreed with." (PX2301 (Heglie, Dep. at 31)); PX2300 (Heglie, IHT at 160)).

Response to Finding No. 664:

For the reasons set forth in Respondent's reply to finding number 661, this finding should be rejected.

665. At the time Microporous was planning the Austrian expansion, it had contemplated expanding in the U.S. as well. (Gaugl, Tr. 4560). When it began ordering equipment for the expansion, it ordered equipment for three lines. (Gaugl, Tr. 4576). Two of those lines were to be built in Austria, and one was slated to be built in Piney Flats, Tennessee, (Gaugl, Tr. 4576).

Response to Finding No. 665:

Complaint Counsel's finding number 665 is incomplete and misleading. Various plans had been considered regarding the addition of production facilities in Europe and at Piney Flats by Microporous over the years. (RFOF 1147). Ultimately, one line of the facility at Feistritz was to be used to supply { } in Europe. (RFOF 395, 1147). Although Microporous began making purchases of "long-lead" equipment for three lines initially (two in Austria and one in Piney Flats), consideration of adding the "third" line in Piney Flats was based on conversations first with { } for the production of SLI material in the US. (RFOF 1147). Ultimately, however, { } terminated its interests in purchasing product from Microporous and entered into an agreement with { }, in May or June 2007, at which time the equipment purchase was put "on hold." (RX00047; RFOF 1147). Despite various discussions with { } the equipment orders were never resumed and no work was done by Microporous for any US expansion for { }. (RFOF 1147). The equipment that had already been purchased was put in boxes and, as of June 2009, it was still sitting in those boxes located in Feistritz and Piney Flats. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615; RFOF 1147; RPT Brief at 65-66). No decision was ever made regarding where a third line would be installed. (Gaugl, Tr. 4562-64).

1. MPLP was Adding Capacity

666. Microporous planned to add the fourth production line for polyethylene separators at the Piney Flats facility in May or June of 2008. (Gilchrist, Tr. 311, 374-375, 457, *in camera*; Gaugl, Tr. 4560; PX0078, *in camera*, RX00207, *in camera*).

Response to Finding No. 666:

For its response to Complaint Counsel's finding number 666, Respondent incorporates its reply to finding number 665.

667. Microporous ordered the long lead time items for a fourth PE line in December of 2006 with the equipment that was ordered for the lines that would eventually be installed in Feistritz Austria. Long lead time items for a PE line are those pieces of equipment that take from ten to twelve months to arrive. (Trevathan, Tr. 3600).

671. {
} (Axt, Tr. 2150, *in camera*).
{

} (Axt, Tr. 2151, *in camera*).

Response to Finding No. 671:

Complaint Counsel's finding number 671 is incomplete. According to its Mandate, Microporous' Board made it clear that "Microporous cannot enter into sales contracts that bind the company to capital commitments without Board approval." (RFOF 393). Despite the fact that capital would be required to execute the expansion required to fulfill this contract with EnerSys, Microporous did not obtain approval from its Board before entering into the Amendment. (RFOF 371).

672. {
} (RX00207 at 010, *in camera*; Axt, Tr. 2152, *in camera*). {
} (RX00207 at 010, *in camera*; Axt, Tr. 2156, *in camera*). According to Mr. Axt,
{
} (Axt, Tr. 2153, *in camera*).

Response to Finding No. 672:

Complaint Counsel's finding number 672 is incomplete and misleading. For its response to finding number 672, Respondent incorporates its reply to finding number 671. Additionally, at the time the amendment was signed, {

} (RFOF 371; Axt, Tr. 2153, *in camera*).

673. MPLP negotiated a contract with EnerSys for industrial CellForce volume related to the European facility as well as the expanded U.S. facility. (Trevathan, Tr. 3728). One of the commitments that Microporous made to EnerSys was to

} (RX00207 at 010, *in camera*). {

} (RX00207 at 009-010, *in camera*).

Response to Finding No. 673:

For the reasons set forth in Respondent's reply to finding number 672, this finding should be rejected.

674. {
(Heglie, IHT at 164-165)); PX1106 at 031). } (PX2300

Response to Finding No. 674:

Respondent has no specific response.

675. Mr. Heglie testified that while the contract amendment that committed Microporous to {

} PX2300 (Heglie, IHT at 138)).

Response to Finding No. 675:

For its response to Complaint Counsel's finding number 675, Respondent incorporates its reply to finding number 672.

676. The Microporous Board wanted to maintain its customer position with EnerSys. (PX2301 (Heglie, Dep. at 38)). Fulfilling commitments to EnerSys was important to the Board. (PX2301 (Heglie, Dep. at 38)).

Response to Finding No. 676:

Respondent has no specific response.

677. At no point did Microporous go back to EnerSys to say that it could not fulfill the contract. (PX2300 (Heglie, IHT at 164)). EnerSys was an important customer, as Mr. Heglie testified :

Again, our view was they were an important customer. We wanted to supply them. We wanted to continue to grow with them. We would have liked management for anything requiring capital to have discussed it with the Board first, but what's done was done and our view was we had to figure out a way to work with it.

(PX2300 (Heglie, IHT at 164)).

Response to Finding No. 677:

Respondent has no specific response.

ii) Backfill supply for North America

678. The “backfill” was describing how to refill idle or unutilized capacity in Microporous’s Piney Flats, TN plant that would become available when Microporous transferred a portion of its U.S. business to Austria. (PX2301 (Heglie, Dep. at 38-39)). {

3874-3876, *in camera*). { (McDonald, Tr.

3877, *in camera*). } (McDonald, Tr. 3876-

Response to Finding No. 678:

Complaint Counsel’s finding number 678 is inaccurate and misleading. Microporous has never had a long-term supply contract or a memorandum of understanding with { } for the purchase of separators. (RFOF 778; Leister, Tr. 3989, Gilchrist, Tr. 503, *in camera*). {

} (RFOF 779; Leister, Tr. 4003, *in camera*). East Penn did not want to enter into a memorandum of understanding with Microporous, therefore, the discussions between the two companies “fizzled out” prior to Daramic’s acquisition of Microporous. (RFOF 781; Leister, Tr. 4019).

Likewise, Microporous had no commitment from Crown with respect to backfilling the PE line at Piney Flats, and CellForce has not even been qualified by Crown for general commercial use in any application. (Gilchrist, Tr. 239, *in camera*; Balcerzak, Tr. 4119-20).

{ } (Gilchrist, Tr. 239, *in camera*).

Additionally, {

} (Gilchrist, Tr. 503, *in*

camera). In fact, Microporous had not contacted Douglas about a possible supply relationship or agreement since 2004. (Douglas, Tr. 4063).

679. By moving production of the EnerSys European volumes to Austria, Microporous planned to make capacity available at Piney Flats for North American customers. (Gilchrist, Tr. 402-403; Trevathan, Tr. 3763, 3774 (“[W]e would be able to go out to customers and bring in incremental volume to the company and backfill that open capacity in Piney Flats.”)).

Response to Finding No. 679:

For its response to Complaint Counsel’s finding number 679, Respondent incorporates its reply to finding number 678. In addition, potential supply relationships with JCI and Exide never materialized. (RFOF 377, 382-383).

a. MPLP was marketing backfill CellForce Capacity in competition with Daramic

680. Once the Austrian lines were operating at sufficient scale, Microporous could capitalize on further efficiencies and “economies in manufacturing” by converting some of its production at Piney Flats from Flex-Sil to CellForce. (Gilchrist, Tr. 373-374).

Response to Finding No. 680:

Complaint Counsel’s finding number 680 is purely speculative. The uncontroverted evidence shows that the Austrian plant was not in operation as of February 29, 2008. (RPT Brief at 63). In fact, the Feistritz Plant did not commence operation until March 2008 and did not become fully operational until June 2008. (RPT Brief at 63). Additional evidence at trial shows that at the time of the acquisition in February 2008, there were no contracts or MOUs in place on the second line in Feistritz, and that if the facility was operating alone, without production having been transferred by Daramic from Potenza, it would have a {

} (RPT Brief at 48). Complaint Counsel’s suggestion that Microporous could capitalize on efficiencies once the Austrian lines were “operating at sufficient scale,” when in fact neither line was even in operation at the time of the acquisition, is patently speculative.

681. { } was one of the customers that Microporous intended to supply with motive power separators in connection with its "backfill" strategy. (McDonald, Tr. 3874-3876, *in camera*).

Response to Finding No. 681:

For the reasons set forth in Respondent's reply to finding number 678, this finding should be rejected.

2. MPLP owners had funded and were willing to continue to fund MPLP expansion plans

682. In the fall and early winter of 2007, MPLP moved ahead with plans to expand. MPLP met several times with a building contractor, J.A. Street, and hired them to draw plans for additional PE capacity in their Piney Flats Facility. (Trevathan, Tr. 3725-3726, 3735-3736). MPLP also met with third party suppliers Matheson and Litzler, concerning equipment purchase and installation for the expansion lines just prior to the merger. (Trevathan, Tr. 3726-3727).

Response to Finding No. 682:

Complaint Counsel's finding number 682 is incomplete and misleading. This finding ignores evidence showing that plans of expansion began to slow in early 2007 as negotiations with JCI became shaky. (RFOF 376; Trevathan, Tr. 3601-02). Shortly after the February board meeting, the Microporous Board instructed Larry Trevathan to discontinue or slow down the orders wherever possible for the third line planned for the U.S. (RFOF 376; Trevathan, Tr. 3602-04, 3764; PX2300 (Heglie, IHT 185); PX0905 (Gaugl, Dep. at 94)). By May 2007, after negotiations ceased with JCI, and an Exide commitment had not materialized, the equipment purchase was put "on hold." The equipment that had already been purchased was put in boxes and, as of June 2009, it was sitting in those boxes located in Feistritz and Piney Flats. (RFOF 1147; Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615). Because of its failure to secure any further business, Microporous never resumed consideration of the third line in either the U.S. or Austria (RFOF 385; Trevathan, Tr. 3613-14).

683. By the summer of 2007, Daramic was well aware of MPLP's expansion plans and the two firms began discussions concerning a potential acquisition. In an August 9, 2007 email reporting on his conversation with Mr. Bryson about a possible acquisition of

MPLP, Mr. Heglie wrote that he “told him [Mr. Bryson] that we were in the early stages of our investment, had partnered with management and were not looking to divest, and are in the midst of executing on our own multi-pronged expansion plan for which we have plenty of capital and support.” (PX1105 at 002).

Response to Finding No. 683:

Respondent has no specific response.

i) Mandate had no impact on MPLP’s existing expansion plans

684. On November 14, 2007, three months after Microporous and Daramic began discussing a potential acquisition, and three months after Microporous and EnerSys signed the contract amendment committing Microporous to install a second PE line in Tennessee, the Microporous Board issued “strategic mandates” to Mr. Gilchrist to “make the Board’s long- and near-term objectives for the Company more clear . . . as well as assist in the 2008 strategic financial planning process.” (PX2301 (Heglie, Dep. at 64)).

Response to Finding No. 684:

Complaint Counsel’s finding number 684 is incomplete and misleading. The Mandate issued by the Microporous Board detailed the specific strategic direction for Microporous with specific instructions to Gilchrist as to what he could do, what he should be doing and what he could not do. (RFOF 387; RX00401 at 001). The Board set out specific long-term strategic goals emphasizing Microporous’ role as a “specialist player” in the battery separator industry (RFOF 388; RX00401 at 001-002) encouraging Management to “grow upon Microporous’ position as a *specialist* separator player, using FLEX-SIL® and CellForce as the foundation of growth.” (RFOF 388; RX00401 at 001 (emphasis in original)). The Board further clarified:

We continue to believe more long-term value will be created by focusing on growing through products that are materially differentiated from competing products. Clearly Microporous’ understanding and knowledge of rubber-based technologies, as well as the proven electrochemical benefits of rubber, are core strengths that create meaningful differentiation from competition, and should continue to be leveraged as much as possible.

(RX00401 at 001).

The Board directed Microporous to leverage its existing strengths, not just become another player in the crowded PE market. (RFOF 389; RX00401 at 001). Even more explicitly,

the Board demanded that Management “avoid competition with larger, entrenched competitors with products that are not differentiated; this is particularly important when such strategies require large capital commitments. (RFOF 390; RX00401 at 002). The Board was explicit that:

Other than filling the 2nd line in Austria, the Board does not endorse a pure PE growth strategy competing head-to-head with larger competitors (i.e., Daramic, Entek). Some exceptions may be made to this (particularly in instances where PE is a bridge to a longer-term CellForce/differentiated product solution and where economically attractive long-term contracts are available), but these and any other exceptions must be approved by the Board on a case by case basis.”

(RFOF 391; RX00401 at 002 (emphasis added)).

The Board also set forth several “near-term” mandates related to the Austrian expansion.

(RFOF 392; RX00401 at 002):

Management must “fill out Line 1 with CellForce and Line 2 with PE in 2008 in volumes and pricing levels that generate attractive profits for the company. The longer term objective in Austria should be to convert Line 2 to CellForce or other specialty separator products.”

Management must “prove out the financial viability of Lines 1 and 2 in Austria before further capital will be committed to the business in either Europe or the United States.” (RFOF 392; RX00401 at 002). (Emphasis added).

The Board made clear that “Microporous cannot enter into sales contracts that bind the company to capital commitments without Board approval.” (RFOF 393; RX00401 at 002).

{

} (RFOF 393; Gilchrist Tr. 494-95, 498-99, *in camera*). The Microporous Board was particularly concerned about further investments in the two lines to be built at Feistritz because of the company’s financial performance relative to projections, the doubt regarding management’s abilities to successfully execute the expansion plan, and particularly with respect to management’s ability to fill the new lines. (RFOF 394; Trevathan, Tr. 3630-31). Of further concern was the fact that Microporous had only a “partial commitment” from EnerSys for one of the two Feistritz lines, and with respect to the Feistritz SLI line, Feistritz had absolutely no commitment or signed contract for that line. (RFOF 395; Trevathan, Tr. 3631).

685. Mr. Heglie testified that the mandates were not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65)). Nor did the mandate mean the Microporous should stop the work that was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66)). There is nothing in the mandate that eliminated the possibility of Microporous moving forward in its desire to compete in the automotive separator market. (PX2301 (Heglie, Dep. at 67)). In fact, Mr. Heglie testified that he does not recall the Microporous Board ever communicating that Microporous could not compete in the automotive market. (PX2301 (Heglie, Dep. at 68)). Mr. Heglie further agreed that the mandate was not the last word on possible expansion for Microporous. (PX2301 (Heglie, Dep. at 69); RX00401 at 002; PX2300 (Heglie, IHT at 197)).

Response to Finding No. 685:

Complaint Counsel's finding number 685 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 684. {

} (RFOF 391; RX00401 at 002 (emphasis added)). Additionally, the Board felt that it was "just not practical to grow in every market." (RFOF 406; PX2300 (Heglie, IHT at 62)). Board members from IGP were hesitant about producing pure PE separators since pricing is very competitive and margins are typically thin. (RFOF 406; PX2300 (Heglie, IHT at 196)). The Board saw the possibility of supplying CellForce or other differentiated products for SLI end uses only as a possible long-term goal for Microporous and that a successful outcome on the investment could be achieved without this type of expansion. (RFOF 406; PX2300 (Heglie, IHT at 161-62, 196-98); PX2301 (Heglie, Dep. at 70)).

686. After the issuance of the "mandate" on November 14, 2007, the Microporous Board was still open to the possibility of moving into the . . . PE SLI market." (PX2301 (Heglie, Dep. at 71)). Moreover, the Board was "still open to the possibility of adding new lines in order to move into the PE SLI market." (PX2301 (Heglie, Dep. at 72)), ; *see also* PX2300 (Heglie, IHT at 183)), ("I think the Board's, my view, and I believe this is true of the IGP part of the Board's view, is the SLI automotive market wasn't as attractive as other market opportunities available for the company, but it was still a potential growth opportunity. It's something that we continually evaluated and considered investment in at different points.")).

Response to Finding No. 686:

Complaint Counsel's finding number 686 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 684 and 685.

687. According to Mr. Heglie, the mandate did not keep Microporous from moving forward in the PE SLI market where economically attractive long-term contracts were available. (PX2300 (Heglie, IHT at 197)). Had "Microporous management brought the Board a long-term contract that the Board viewed as economically viable for an expansion into the PE SLI market, the Board would have still contemplated expanding." (PX2301 (Heglie, Dep. at 72)).

Response to Finding No. 687:

Complaint Counsel's finding number 687 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 684 and 685.

688. At that time, Exide wanted "to move forward with an SLI project for two lines (one in U.S. and one in Europe) to begin supply January 1, 2010." (PX1102 at 024; PX2300 (Heglie, IHT at 153-154); Trevathan, Tr. 3757). Exide was "[a]lso interested in incremental industrial volumes in Europe." (PX1102 at 24; PX2300 (Heglie, IHT at 153-54)). {
} (Gilchrist, Tr. 454-455, *in camera*).

Response to Finding No. 688:

Complaint Counsel's finding number 688 is incomplete and misleading. The evidence demonstrates that after meetings in the late-spring and summer of 2007, Microporous sent an MOU and contract draft to Exide. (RFOF 382; Trevathan, Tr. 3611). By its own terms, the MOU expired on August 31, 2007. Exide did not sign and return the non-binding MOU to Microporous until late September of 2007, long after it had expired by its own terms on August 31, 2007. (RFOF 382; PX0056; Gilchrist, Tr. 474-76, *in camera*; RX00399). Exide never returned or commented on the contract draft sent by Microporous. (RFOF 382; McDonald, Tr. 3835; Trevathan, Tr. 3612, 3626, 3724). Through the fall 2007, no progress was made on an agreement with Exide. (RFOF 382; McDonald, Tr. 3834). Exide's behavior was consistent with its past conduct. {

} (RFOF 382; Gilchrist Tr. at 487-90; *in camera*; RX01331; RX00748). In fact, the Microporous Board questioned the viability of Exide as a customer as negotiations went nowhere. (RFOF 408; PX2301 (Heglie, Dep. 133); Trevathan, Tr. 3610).

As part of their ruse, Microporous Management became intent on securing a renewal of the expired MOU with Exide. (RFOF 414; McDonald, Tr. 3841-42; PX1052; Gilchrist, Tr. 448, *in camera*). Microporous was concerned that Daramic would see through Microporous' "smoke screen," and in a November 27, 2007 email, Trevathan stated "the greatest flaw we have right now in our ruse is that the Exide MOU has expired and we have no evidence of progress on a contract." (RFOF 414; RX00402 at 001). {

}

(RFOF 414; Gilchrist, Tr. 471-72, 476, *in camera*).

On February 14, 2008, only weeks before the sale of Microporous to Daramic and the date the most sensitive information was to be made available to Polypore, Exide finally signed a renewal letter for the MOU. (RFOF 415; Gilchrist, Tr. 448, 476, *in camera*; RX00403; RX01200 at 001). Aside from signing the non-binding renewal later, which only extended the MOU 45 days (RFOF 415; RX00403), Exide signed the MOU after Microporous told Exide that it would accept "an updated MOU by February 14th," "or redline of the original contract," and a commitment contract ready at the meeting on the 27th" in lieu of a price increase. (RFOF 415; RX01033). Exide made no other commitments to Microporous, and delegated negotiations to newcomer, Alberto Perez. (RFOF 415; McDonald, Tr. 3836-38, 3845-46; Trevathan, Tr. 3640).

Microporous Management became increasingly and appropriately wary of Exide. (RFOF 416; RX00285; Gilchrist, Tr. 515. *in camera*). In a February 15, 2008, email (RX00285 at 001), questioning Perez's truthfulness and Exide's sincerity, and in response to Perez's promise of

returning the MOU extension and red-line contract draft, McDonald wrote, "that and a \$1.50 will buy you a cup of coffee." (RFOF 416; RX00285 at 001). As shown by Exide's internal communications, the MOU was only signed to delay a price increase. (RFOF 416; RX00010).

Microporous and Exide had two insignificant meetings during early 2008. (RFOF 417; McDonald, Tr. 3835-3840, 3844). The first was a brief technical meeting in Paris, France, in January 2008. Steve McDonald, Roger Berger, Rick Wimberly, and George Brilmyer attended the meeting on behalf of Microporous. (RFOF 417; McDonald, Tr. 3840). Despite the significant expense and time commitment to attend the meeting, Exide did not even allow Microporous to finish its prepared presentation. (RFOF 417; McDonald, Tr. 3839). This meeting constituted little more than a technical overview for Exide personnel in Europe and a meet and greet for Alberto Perez. (RFOF 417; McDonald, Tr. 3837-38). Microporous was disappointed by the meeting. (RFOF 417; McDonald, Tr. 3839).

A second meeting took place at Exide's facilities in Alpharetta, Georgia on February 27, 2008, to discuss the intent of Exide going forward. (RFOF 418; McDonald, Tr. 3844, Trevathan, Tr. 3639). Mike Gilchrist, Larry Trevathan, Steve McDonald, and Roger Berger attended the meeting on behalf of Microporous. (RFOF 418; Trevathan, Tr. 3639). Only Alberto Perez attended on behalf of Exide despite expectations that Douglas Gillespie and Pradeep Menon, two key decision makers, would attend. (RFOF 418; McDonald, Tr. 3844-45; Trevathan, Tr. 3640). When Perez met the group from Microporous, he told them that he had actually forgotten all about the meeting and needed to find a room to meet in. (RFOF 418; McDonald, Tr. 3846). The parties met in an unheated, back room, and the meeting lasted less than an hour. (RFOF 418; Trevathan, Tr. 3640). The parties had little discussion about a future relationship between Microporous and Exide and no contract drafts were exchanged or discussed. (RFOF 418; Trevathan, Tr. 3640; McDonald, Tr. 3846-47).

Following the meeting, attendees from Microporous had little confidence in Exide's commitment to Microporous. (RFOF 419; McDonald, Tr. 3847). Steve McDonald questioned Exide's sincerity stating, "I had quite a few conversations with Exide, and it seemed like we never got anything accomplished." (RFOF 419; McDonald, Tr. 3847). He also questioned whether Exide was actually committed to Microporous or whether a supply agreement would ever be reached between Exide and Microporous. (RFOF 419; McDonald, Tr. 3847).

Exide's actions show that it had no intent to move forward with any business relationship with Microporous, and this finding should be rejected.

689. Nothing in the mandates would have prevented Microporous management from continuing to work with Exide on possible expansion for the PE SLI separator market. (PX2301 (Heglie, Dep. at 74)). In fact, the Microporous Board was supportive of management's activity with Exide, "[b]ecause it could generate a fair amount of capital, good return on the investment if it worked." (PX2300 (Heglie, IHT at 153)).

Response to Finding No. 689:

Complaint Counsel's finding number 689 is false and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 684, 685 and 688.

690. Microporous management was working in good faith with Exide and that at no point was it working in something other than good faith with Exide on potential expansion for PE SLI separators. (PX2301 (Heglie, Dep. at 75-76)).

Response to Finding No. 690:

Complaint Counsel's finding number 689 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 684, 685 and 688.

691. Mr. Heglie testified that growth opportunities as it relates to customer development would have continued to be a focus of IGP and Microporous absent the acquisition. (PX2300 (Heglie, IHT at 220-221)). In reaching that conclusion, Mr. Heglie had discussions with other Board members from IGP about where they saw Microporous going if there was not an acquisition by Daramic. (PX2300 (Heglie, IHT at 219)). With regard to those discussion, Mr. Heglie provided the following testimony:

[W]e were still moving forward on at least a broad view of the investment thesis in the strategic plan. . . . evaluating growth opportunities with the company, trying to grow the company,

trying to grow the cash flow, trying to improve the margins, trying to generate cash to pay down debt.

I'm sure we would have continued attempting to move forward on some of these customer opportunities that we had.

So I don't know that there was a major deviation from the original strategy. . . . But, again, it's really case-by-case, and we had plenty of opportunities on the radar screen, as we talked about.

(PX2300 (Heglie, IHT at 219-220)).

Response to Finding No. 691:

In addition to being incomplete and misleading, Complaint Counsel's finding number 691 is vague and full of speculation and hearsay. It should be rejected. Moreover, Heglie testified that the Board Mandate set forth IGP's most recent strategic view for Microporous prior to the acquisition. (PX2300 (Heglie, IHT at 219)). Heglie further explained that the growth of Microporous was not IGP's ultimate goal. (PX2300 (Heglie, IHT at 220)). Rather, the goal was "return on investment" to IGP. (PX2300 (Heglie, IHT at 220)).

For a further response to this finding, Respondent incorporates its replies to finding numbers 684, 685 and 688.

L. Competition between Daramic and MPLP increased in the months preceding the acquisition

692. In 2007, Daramic faced growing competition from MPLP at no fewer than five of its top ten customers. (Roe, Tr. 1307). This included renewed competition from MPLP in both motive and automotive markets. In the automotive market, Daramic understood that MPLP was competing with Daramic for business at JCI, Exide, East Penn and Fiamm. (Roe, Tr. 1303-1307). Daramic during this period viewed MPLP as a viable competitor for automotive separator supply. (Roe, Tr. 1307-1308; PX0922 (Roe, IHT 359-361)). At the same time, MPLP was competing with Daramic for motive business at EnerSys, Exide and East Penn. (Roe, Tr. 1303-1306). Daramic and Microporous continued to compete for { } as well. (PX0263 at 03-04; 08, *in camera*).

Response to Finding No. 692:

Complaint Counsel's finding number 692 is false and misleading. First, the evidence does not support the contention that Daramic faced "growing" competition from Microporous at

five of its top ten customers in 2007. Roe testified that Daramic faced competition from Microporous for business with some of its top ten customers. (Roe, Tr. 1303). Second, {

} (Roe, Tr. 1781-82, *in camera*). In

fact, following the acquisition, {

} (Roe, Tr. 1782-83, *in*

camera). Moreover, neither Microporous nor Daramic were competing for business at JCI after June 2007. (RFOF 475; RX00072, *in camera*; Hall, Tr. 2747, *in camera*). East Penn did not give serious consideration to Microporous. (RFOF 781; Leister, Tr. 4019 (explaining that discussions between East Penn and Microporous “fizzled out” prior to Daramic’s acquisition of Microporous)). Because this finding is based on inaccurate information, including some falsified information, it should be rejected as unreliable.

693. The threat of increased competition with MPLP was increasing in the months preceding Daramic’s acquisition of MPLP. In 2007, Daramic grew concerned about the possible loss of automotive business to MPLP at JCI. (PX2078). At that time, Daramic was supplying about 55 million square meters of separators to JCI on an annual basis. (Roe, Tr. 1296). Daramic also understood that it was JCI’s strategy to have multiple suppliers in each geographic region (the Americas, Europe and Asia) in order to exert pressure on PE suppliers. (Roe, Tr. 1296-1298; PX2078).

Response to Finding No. 693:

Complaint Counsel’s finding number 693 is misleading, unreliable and speculative. PX2078 sets forth Tucker Roe’s thoughts as of August 23, 2007 about potential future business with JCI. The opinions contained in PX2078 are highly speculative, as they are simply Roe’s thoughts about what might happen in the future. Moreover, {

} (Roe,

Tr. 1781-82, *in camera*). In fact, Daramic’s market intelligence was so inaccurate, Daramic had no idea that {

} (RFOF 475; RX00072,

in camera; Hall, Tr. 2747, *in camera*).

Clearly, JCI did not employ a strategy to have multiple suppliers in each geographic region, as the {

} (RFOF 475; Hall, Tr. 2747, *in camera*).

694. At that time, Daramic considered MPLP to be a competitive threat for JCI's automotive business. (Roe, Tr. 1307). In August 2007, Mr. Roe informed Mr. Hauswald that "one likely scenario" for JCI would include MPLP taking 20-25 million square meters of product in 2009 - product which to date was being supplied to JCI by Daramic. (PX2078; Roe, Tr. 1301). Mr. Roe further believed that MPLP might get an even larger share of JCI's separator business beginning in 2010. (PX2078; Roe, Tr. 1301).

Response to Finding No. 694:

Complaint Counsel's finding number 694 is misleading, unreliable and speculative. For its response to this finding, Respondent incorporates its replies to finding numbers 692 and 693.

695. The increased competition along with MPLP's expansion plans were of great concern to Daramic {
} without an acquisition of MPLP. (PX0276 at 007, *in camera*).

Response to Finding No. 695:

Complaint Counsel's finding number 695 is incomplete and misleading. As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (*See Responses to finding numbers 692 and 693*). Moreover, Respondent's CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

696. {
} (PX0238 at 001; PX0922 (Roe, IHT at 362-63), *in camera*). Mr. Roe responded by stating that "2008 will be the most challenging year ever faced by Daramic." (PX0238 at 001). Mr. Roe noted that Daramic was "finishing 2007 on a down-swing" and was "beginning to feel the real effects" of price competition and Daramic's past performance issues. (PX0238 at 001). Mr. Roe indicated that Daramic had to be the "price leader" and "continue to push/force price increases" even as the competition was lowering prices. (PX0238 at 001).

Response to Finding No. 696:

Complaint Counsel's finding number 696 is incomplete, misleading and unreliable. First, PX0238 sets forth Tucker Roe's thoughts as of November 12, 2007 about Daramic's possible business in 2008. The opinions contained in PX2078 are highly speculative, as they are simply Roe's thoughts about what might happen in the future. Second, {

} (PX0922

(Roe, IHT at 362-63), *in camera*). In fact, following the acquisition, {

} (Roe, Tr. 1782-83, *in camera*). Because this finding is based on inaccurate information, including some falsified information, it should be rejected as unreliable.

697. Mr. Roe also emphasized to Mr. Hauswald that 2008 would be a uniquely difficult year for Daramic because of MPLP's ongoing expansion project which was "an element we have not faced in many years." (PX0238 at 001). According to Mr. Roe, "unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes." (PX0238 at 001; PX0922 (Roe, IHT at 362-363), *in camera*; Roe, Tr. 1302-1303).

Response to Finding No. 697:

Complaint Counsel's finding number 697 is incomplete, misleading and unreliable. For its response to this finding, Respondent incorporates its reply to finding number 696.

M. The acquisition eliminated capacity expansion plans

698. The fourth PE line was never installed. (Gaugl, Tr. 4560). Some of the equipment for that line is sitting in boxes in Austria and Piney Flats. The extruder is at the supplier in a semifinished stage, and the pinhole detector is being used in Piney Flats. (Gaugl, Tr. 4565).

Response to Finding No. 698:

Complaint Counsel's finding number 698 is incomplete and misleading. Various plans had been considered regarding the addition of production facilities in Europe and at Piney Flats by Microporous over the years. (RFOF 1147). Although Microporous began making purchases of "long-lead" equipment for three lines initially (two in Austria and one in Piney Flats),

consideration of adding the “third” line in Piney Flats was based on conversations first with { } for the production of SLI material in the US. (RFOF 1147). Ultimately, however, { } terminated its interests in purchasing product from Microporous and entered into an agreement with { }, in May or June 2007, at which time the equipment purchase was put “on hold.” (RX00047; RFOF 1147). Despite various discussions with { } the equipment orders were never resumed and no work was done by Microporous for any US expansion for { }. (RFOF 1147). The equipment that had already been purchased was put in boxes and, as of June 2009, it was still sitting in those boxes located in Feistritz and Piney Flats. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615; RFOF 1147; RPT Brief at 65-66). No decision was ever made regarding where a third line would be installed. (Gaugl, Tr. 4562-64).

699. With the acquisition of MPLP by Daramic, “basically the carpet was pulled out from under us” with regard to Exide’s strategy of adding separator suppliers to the marketplace. (Gillespie, Tr. 2979). Following Daramic’s acquisition of MPLP, Exide’s leverage for its \$70 million of separator business has been lessened. (Gillespie, Tr. 2979). All of Exide’s investment of time and money into the development of MPLP as a supplier of PE SLI separators “was now up in smoke.” (Gillespie, Tr. 2980).

Response to Finding No. 699:

Complaint Counsel’s finding number 699 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 688. Additionally, the evidence in this case raises significant credibility questions about Exide’s intent and Gillespie’s testimony in this proceeding (RFOF 550, 601), and Gillespie’s testimony on this issue should be disregarded.

1. Discussions with Daramic impacted MPLP expansion plans

700. Mr. Heglie testified that although the mandate did not state that IGP would not invest capital in Microporous while it was talking to Daramic, he also stated that he “had a view that if we weren’t going to get paid by Daramic or get compensation for the capital investments, that we wouldn’t make them, and I believe Daramic understood that.” (PX2300 (Heglie, IHT at 206)).

Response to Finding No. 700:

Complaint Counsel's finding number 700 is vague, incomplete, misleading and speculative, and it should be rejected. For its response to this finding, Respondent refers to its replies to finding numbers 684, 685 and 688 for context. Additionally, Heglie's testimony concerning what Daramic "understood" constitutes hearsay and is inherently unreliable.

701. Mr. Heglie testified that the opportunity to do business with East Penn occurred around the time of discussions with Daramic. (PX2300 (Heglie, IHT at 188)). According to Mr. Heglie, Microporous may have put off discussions with East Penn: "[B]ased on the uncertainty with the Daramic transaction . . . IGP was unwilling to commit a bunch of capital to it without knowing if we're going to be compensated for it." (PX2300 (Heglie, IHT at 188)).

Response to Finding No. 701:

Complaint Counsel's finding number 701 is incomplete and misleading. The evidence in this case demonstrates that Microporous had brief discussions with East Penn regarding SLI separators in the U.S., which Microporous had not produced commercially. (RFOF 383; Trevathan, Tr. 3623; PX2300 (Heglie, IHT 186-87)). Discussions never went beyond preliminary stages and no MOUs, letters of interest, or contract drafts were exchanged. (RFOF 383; Trevathan, Tr. 3623; Gilchrist, Tr. 503, *in camera*; PX2300 (Heglie, IHT at 187)). Moreover, Heglie's memory about this issue is poor. He explained that he "may be confusing customers" while testifying about this topic. (PX2300 (Heglie, IHT at 188)). He further clarified that he does not remember if IGP or Microporous ever informed East Penn that discussions would need to be delayed. (PX2300 (Heglie, IHT at 188)).

702. Likewise, Mr. Heglie testified that he held the same view about spending capital to gain Exide's business: "I think similar to East Penn, we would, at least while those [Daramic/Microporous] discussions were moving forward, we would have been reluctant to invest additional capital." (PX2300 (Heglie, IHT at 190)).

Response to Finding No. 702:

Complaint Counsel's finding number 702 is incomplete and misleading. Respondent refers to its replies to finding numbers 684, 685 and 688 for context.

2. Acquisition eliminated the innovation competition between MPLP and Daramic

i) Innovation competition existed in deep-cycle

703. Daramic and Microporous competed with one another to innovate their deep-cycle battery separators. (Qureshi, Tr. 2050). Daramic improved the performance of its original deep-cycle separator, Daramic DC, { } (PX0949 at 019, *in camera*). The new improved product became known as Daramic HD. (PX0949 at 019, *in camera*).

Response to Finding No. 703:

Complaint Counsel's finding number 703 is incomplete and misleading. There is no evidentiary basis cited by Complaint Counsel to suggest that Daramic and Microporous were competing to innovate their deep cycle separators. The evidence shows that Daramic was never able to develop a separator to compete with Microporous' Flex-Sil separator. Daramic struggled for years to obtain more business with deep cycle applications, first with Daramic DC, then Daramic HD, with little success. (RFOF 262; Hauswald, Tr. 656-57, 744, 1196; Whear, Tr. 4777). In fact, Polypore acquired Microporous to diversify its product line, gain access to Microporous' rubber technology, and enter the niche rubber market. (Hauswald, Tr. 652; Hauswald, Tr. 896, *in camera*, 1057, 1060-61; Roe, Tr. 1735; RX01630; RX01097 at 003; *in camera*; PX0433 ("The addition of FLEX-SIL® and ACE-SIL® would broaden our portfolio of products into two niche markets we do not supply today.")).

704. With { }, Daramic became aware that the lack of stiffness of the separators slowed down the hand assembly of the cells at { } (PX1742 at 002, *in camera*). A November 2006 document discussing a visit to U.S. Battery stated that "[i]f we [Daramic] are to earn more sales, we need to improve stiffness." (PX1742 at 001, *in camera*). An April 4, 2007 Daramic Trip Report to U.S. Battery reiterates that "[a] lack of stiffness in leaf separators had been an impediment to further sales by Daramic." (PX0681 at 001). That trip report states that Daramic made a presentation to Mr. Qureshi on its { } project, a project to improve separator stiffness for better handling. (PX0681 at 001; PX0682 at 001, *in camera*). After the presentation, Mr. Qureshi indicated an interest in receiving separators { } for added stiffness to test. (PX0681 at 002).

Response to Finding No. 704:

Complaint Counsel's finding number 704 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 703. Significantly, although Daramic attempted to improve its HD product to secure additional deep cycle business, those efforts had little success over the years. (RFOF 262; Hauswald, Tr. 656-57, 744, 1196; Whear, Tr. 4777).

705. In April 2008, Daramic visited U.S. Battery and reviewed the results of the { } project and determined that { } affected the capacity of the battery. (PX0682 at 001, *in camera*; Qureshi, Tr. 2087-88). During the Daramic visit to U.S. Battery, Mr. Qureshi suggested that Daramic use { } to improve stiffness. (PX0682 at 001, *in camera*; Qureshi, Tr. 2087-88). While Daramic pursued a solution to U.S. Battery's stiffness problem prior to the merger, since the merger Daramic has not followed up on Mr. Qureshi's suggestions to improve stiffness. (Qureshi, Tr. 2051).

Response to Finding No. 705:

Complaint Counsel's finding number 705 is incomplete and misleading. Qureshi acknowledged that U.S. Battery found a 5-10% reduction in reserve capacity through the efforts to improve the stiffness of Daramic's product. (Qureshi, Tr. 2074-75). Additionally, Qureshi admitted that he has no firsthand knowledge about what actions Daramic is currently undertaking related to improving the stiffness. (Qureshi, Tr. 2074). There is no evidentiary basis to conclude that "Daramic has not followed up on Mr. Qureshi's suggestions to improve stiffness" since the acquisition. Therefore, this finding should be rejected.

ii) Innovation competition existed in UPS

706. MPLP had several technically innovative projects underway prior to merger, including, but not limited to, projects {

} (See generally Whear, Tr. 4730-4748, *in camera*).

Response to Finding No. 706:

Complaint Counsel's finding number 706 is incomplete and misleading. {

} (RFOF 355; McDonald, Tr. 3863, *in camera*). LENO stood for "low ER, no oil." (RFOF 355; Brilmyer, Tr. 1836). Project LENO was specifically directed at gel products. (RFOF 356; Brilmyer, Tr. 1856). This project started at Microporous in November or December of 2006. (RFOF 357; Brilmyer, Tr. 1836). {

} (RFOF 358; McDonald, Tr. 3863, *in camera*).

The evidence is clear that testing of those samples continued after the acquisition under the direction of Daramic. (RFOF 359; Brilmyer, Tr.1901; Whear, Tr. 4735). {

} (RFOF

360; McDonald, Tr. 3863, *in camera*). {

}

(RFOF 360; McDonald, Tr. 3864, *in camera*). {

} (RFOF

360; McDonald, Tr. 3864, *in camera*). {

}

(RFOF 361; Hauswald, Tr. 1099; Burkert Tr. 2407-08, *in camera*; RX01293, *in camera*; RX01296, *in camera*; Whear, Tr. 4736, *in camera*).

{

}

(RFOF 362; Brilmyer, Tr. at 1837; Whear, Tr. 4729, *in camera*; PX0663-0024, *in camera*; RX01299, *in camera*). {

} (RFOF 362; McDonald, Tr. 3865, *in camera*). {

} (RFOF 363; McDonald, Tr. 3866, *in camera*). {

} (RFOF 363; McDonald, Tr. 3866, *in*

camera). {

} (RFOF 363; McDonald, Tr. 3866, *in camera*).

{

} (FOF 363; McDonald, Tr. 3866-67, *in camera*). {

} (RFOF

363; McDonald, Tr. 3867, *in camera*). {

} (RFOF 363; McDonald, Tr. 3868-69, *in camera*; RX01297, *in camera*) and samples were delivered to EnerSys. (RFOF 363; RX01028; RX01299, *in camera*). {

} (RFOF 364; McDonald, Tr.

3869, *in camera*). The White PE project is ongoing today. (RFOF 365; Hauswald, Tr. 1099; Burkert Tr. 2407-08, *in camera*; RX01293, *in camera*; RX01296, *in camera*; Whear, Tr. 4736, *in camera*).

{

} (RFOF

354; McDonald, Tr. 3862, *in camera*). {

} (RFOF 354; Whear, Tr. 4735-37, *in camera*). {

} (RFOF 354;

McDonald, Tr. 3862, *in camera*). In fact, George Brilmyer, Director of Research and Development, was never ever asked by Complaint Counsel about Project Einstein during his testimony at the hearing. (*See* Brilmyer, Tr. 1825-1927).

{

}

(Whear, Tr. 4739-40, *in camera*).

{

} (Whear, Tr. 4741, *in camera*). {

} (Whear, Tr. 4741-42, *in camera*). {

} (Whear, Tr. 4744, *in camera*).

{

} (Whear, Tr. 4744-45, *in camera*). {

} (Whear, Tr. 4744-45, *in camera*).

{

} (Whear, Tr.

4744-46, *in camera*). {

} (Whear, Tr. 4745-46, *in camera*). {

} (Whear, Tr. 4746, *in camera*).

Prior to the Acquisition, Microporous had worked with JCI to do some testing on CellForce for use in a unique and specialized SLI application called a “start-stop” battery. (RFOF 366; PX2300 (Heglie, IHT at 123); Gaugl, Tr. 4558). {

} (RFOF 366; Whear, Tr. 4748-49, *in camera*). But it became clear as the project was underway that it “wasn’t a high priority for JCI, and that we weren’t working with the most important people at JCI. And in our [IGP’s] opinion is they were viewing it as a speculative

project, so they were dedicating minimal time and resources to it.” (RFOF 366; PX2300 (Heglie, IHT at 130)). Neither JCI nor any other battery manufacturer ever approved CellForce for these specialized start-stop SLI applications. (RFOF 366; Gaugl, Tr. 4558).

Results from the testing varied and Microporous “was getting some positive results out of the tests, and then at different points, they weren’t as positive.” (RFOF 367; PX2300 (Heglie, IHT at 125)). {

} (RFOF 367; Whear, Tr. 4750, *in camera*). {

} (RFOF 367; Whear, Tr. 4750, *in*

camera). Currently, {

}

(RFOF 367; Whear, Tr. 4753, *in camera*).

707. Daramic and Microporous were the only suppliers developing separators that eliminated the formation of black scum on the top of the acid in UPS batteries. This scum impeded the visual monitoring of the acid level and battery plates in UPS batteries. In batteries with automatic watering devices, the scum caused a valve to stick resulting in the overfilling of acid in the battery. (Brilmyer, Tr., 1852-54).

Response to Finding No. 707:

Complaint Counsel’s finding number 707 is incomplete and misleading. Brilmyer testified that in most instances, black scum has no effect on a UPS battery’s performance. (Brilmyer, Tr. 1852). Complaint Counsel provides no evidentiary basis for their assertion that Daramic and Microporous were the only suppliers developing separators which may eliminate black scum. Moreover, the evidence shows that all PE-based separators show some level of black scum. (Whear, Tr. 4709). Therefore, this finding should be rejected.

708. Dr. Brilmyer knows of no other separator manufacturer in North America selling separators for the flooded UPS application other than Daramic. (Brilmyer, Tr. 1850-51).

Response to Finding No. 708:

Complaint Counsel’s finding number 708 is incomplete and misleading. This finding completely ignores evidence demonstrating that numerous separator manufacturers are poised to

supply UPS separators to North American customers. For example, {

} (RFOF 968; Weerts, Tr. 4489, *in camera*). {

}

(RFOF 968; Weerts, Tr. 4522, *in camera*). {

} (RFOF 968; Weerts, Tr.

4522-23, *in camera*). {

} (RFOF 970; Gillespie, Tr. 3037, *in camera*).

{

} (RFOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*;

RX00026, *in camera*; RX00027, *in camera* {

}; RX00061, *in camera*; RX00062, *in camera*). {

} (RFOF

991; RX00061, *in camera*). {

} (RFOF 992; Axt, Tr. 2218, *in camera*).

Additionally, Daramic faces competition with NSG for both automotive and industrial separators, both directly in Asia, and indirectly throughout the world. For example, Asian companies, such as Leoch in China, export industrial batteries containing NSG separators to North America. (RFOF 1012; Thuet, Tr. 4348).

{

}

(RFOF 1024; Axt, Tr. 2219, *in camera*). {

}

(RFOF 1025; Axt, Tr. 2272-73, *in camera*). {

} (RFOF 1026; Axt, Tr. 2272-73, *in*

camera).

709. Black scum results from the mixture of oil, carbon black, lead oxide and some other chemicals in batteries. To address the black scum problem in batteries, Microporous began an R&D project called LENO, an acronym for “low ER [electrical resistance] no oil.” (Brilmyer, Tr. 1836).

Response to Finding No. 709:

Complaint Counsel’s finding number 709 is misleading. Black scum can result from the interaction of various chemicals and the oil component of a separator through a process of oxidation. (Hauswald, Tr. 1096-98; Brilmyer, Tr. 1834-35; Whear, Tr. 4707-08).

710. Planning for project LENO at Microporous began in late 2006 at the approval of the R&D steering committee which included Mike Gilchrist and Larry Travathan, as well as Steve McDonald and Matt Wilhjelm. (Brilmyer, Tr. 1836).

Response to Finding No. 710:

Respondent has no specific response.

711. At the end of 2006, EnerSys, a customer of Daramic’s gel battery separator, asked Microporous to develop a competing product so that there would be a second alternative supplier for a DARAK-type separator. (Brilmyer, Tr. 1839-40). DARAK was substantially more expensive than PE separators. (Brilmyer, Tr. 1843-44).

Response to Finding No. 711:

Complaint Counsel’s finding number 711 is incomplete and misleading. {

} (RFOF

358; McDonald, Tr. 3863, *in camera*). The evidence is clear that testing of those samples continued after the acquisition under the direction of Daramic. (RFOF 359; Brilmyer, Tr.1901; Whear, Tr. 4735, *in camera*). {

} (RFOF 360; McDonald, Tr. 3863, *in camera*). {

} (RFOF 360; McDonald, Tr. 3864, *in camera*). {

} (RFOF 360; McDonald, Tr. 3864, *in camera*). {

} (RFOF 361; Hauswald, Tr. 1099; Burkert Tr.

2407-08, *in camera*; RX01293, *in camera*; RX01296, *in camera*; Whear, Tr. 4736, *in camera*).

712. EnerSys committed to MPLP that as soon as EnerSys engineering approved their separator, EnerSys would move its UPS business to MPLP. (Axt, Tr. 2104; *Burkert*, Tr. 2326).

Response to Finding No. 712:

Complaint Counsel's finding number 712 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 711. {

}

(RFOF 360; McDonald, Tr. 3864, *in camera*).

Moreover, the EnerSys witnesses' testimony is not credible and should be disregarded.

(RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-002).

713. The LENO project additionally included the development of a gel battery separator that would compete with DARAK, Daramic's gel battery separator. Microporous planned to develop a gel battery separator that would compete with Daramic's DARAK product, as well as Daramic's PE separators that were used in industrial batteries, including UPS and telecommunications batteries. (Brilmyer, Tr. 1864). Because DARAK {
} developed by the LENO project team, Microporous planned to take a substantial portion, if not all, of Daramic's DARAK business after the new product was available in commercial quantities. (Brilmyer, Tr. 1865, 1878-79, 1917; Brilmyer, Tr. 1874, *in camera*).

Response to Finding No. 713:

Complaint Counsel's finding number 713 is incomplete, misleading, and entirely speculative. The finding sets forth plans by Microporous based on a product (LENO) which had

never been fully tested, approved by any customer, or ever produced on a commercial basis. Complaint Counsel's assertion that "Microporous planned to take a substantial portion, if not all, of Daramic's DARAK business after the new product was available in commercial quantities" is without any basis whatsoever. Through their own language in this finding, Complaint Counsel acknowledges that Microporous had not even developed such a separator.

The true facts in this case demonstrate {

}. (RFOF 360;

McDonald, Tr. 3864, *in camera*). Respondent refers to its reply to finding number 711 for additional context.

714. Salespeople from Microporous were optimistic that there was customer demand for its new gel battery separator in the U.S. and Europe, including at customers such as { } (Brilmyer, Tr. 1868, *in camera*). Generally, battery customers prefer having more than one plant as a source for their separators to ensure supply security and to obtain competitive pricing. Because { } at only one plant in Germany, customers were interested in another source for this type of battery. (Brilmyer, Tr. 1869, *in camera*).

Response to Finding No. 714:

Complaint Counsel's finding number 714 is incomplete, misleading, and speculative.

The evidence in this case demonstrates that {

}. (RFOF 360; McDonald, Tr. 3864,

in camera). Furthermore, Microporous never provided samples of LENO to any other potential customers. (PX0909 (McDonald, Dep. at 50), *in camera*).

Respondent refers to its reply to finding number 711 for additional context.

715. {

} (PX0490 at 001; Brilmyer, Tr. 1875, *in camera*).

{

} (Brilmyer, Tr. 1878-79, *in*

camera).

Response to Finding No. 715:

Complaint Counsel’s finding number 715 is false, misleading and contains hearsay. This finding is completely unreliable, and it should be rejected. There is no evidentiary support for Brilmyer’s statements. Furthermore, the evidence in this case demonstrates that {

} (RFOF 360;

McDonald, Tr. 3864, *in camera*).

Respondent refers to its reply to finding number 711 for additional context.

- 716. At the time of the acquisition, Microporous had made substantial progress on the LENO project. EnerSys had been extensively testing a gel battery separator prototype made by Microporous for over one year as part of a two year testing regime. To address the black scum problem, Microporous had developed PE separators that did not contain {
 - } In February 2008, just prior to the acquisition, Microporous had delivered samples of a newly designed PE separator to EnerSys that solved the black scum problem {
 - } (Brilmyer, Tr. 1856-57, 1922-24; PX0664 at 002, *in camera*).

Response to Finding No. 716:

Complaint Counsel’s finding number 716 is false. For its response to this finding, Respondent incorporates its replies to finding numbers 706 and 711. Significantly, {

} (RFOF 360; McDonald, Tr. 3864, *in camera*).

Additionally, {

}

(RFOF 364; McDonald, Tr. 3869, *in camera*). Thus, the evidence shows that Microporous’ product failed to “solve the black scum problem,” as claimed by Complaint Counsel.

- 717. The manager of the LENO project, Mr. Brilmyer, expected that the new products from the project would generate revenues from commercial sales by the end of 2008 or early 2009. Microporous projected revenues in this time frame for both the {
 - } PE separators and the new gel battery separator. (Brilmyer, Tr. 1857-58, 1881, *in camera*).

Response to Finding No. 717:

Complaint Counsel's finding number 717 is incomplete, misleading, and entirely speculative. The entire finding sets forth unrealistic plans by Microporous based on products (LENO and White PE) which had never been fully tested, approved by any customer, or ever produced on a commercial basis. The assertion that these yet-to-be-developed products "would generate revenues from commercial sales by the end of 2008 or early 2009" is pure conjecture.

The evidence in this case demonstrates that {

}. (RFOF 360; McDonald, Tr. 3864, *in camera*).

Moreover, {

} (RFOF 364;

McDonald, Tr. 3869, *in camera*). Based on these testing results, this finding is untenable and should be rejected.

718. Despite the bright prospects for the new gel battery separator from the LENO project, after the acquisition, Daramic's management was not interested in the further development of a product to replace DARAK, a very high-margin product for Daramic. (Brilmyer, Tr. 1863-64).

Response to Finding No. 718:

Complaint Counsel's finding number 718 is false. For its response to this finding, Respondent incorporates its replies to finding numbers 706, 711 and 717. Significantly, the evidence demonstrates that {

}. (RFOF 361, 363; Hauswald, Tr. 1099; Burkert Tr. 2407-08, *in camera*;

RX01293, *in camera*; RX01296, *in camera*; Whear, Tr. 4736, *in camera*; McDonald, Tr. 3868-69, *in camera*; RX01297, *in camera*).

719. Of the MPLP innovation projects, only project { } is still active in the flooded lead-acid battery arena after having come under Daramic's control. (Whear, Tr. 4736-4752, *in camera*).

Response to Finding No. 719:

Complaint Counsel's finding number 719 is false. For its response to this finding, Respondent incorporates its reply to finding number 706.

720. Project { } was patent protected by MPLP. (Whear, Tr. 4814, *in camera*).

Response to Finding No. 720:

Complaint Counsel's finding number 720 is misleading. Whear testified that {

} (Whear, Tr. 4814, *in camera*).

721. Project { } (Whear, Tr. 4822-23, *in camera*).

Response to Finding No. 721:

Complaint Counsel's finding number 721 is false and improperly cites Whear's testimony. {

} (Whear, Tr. 4822-23, *in camera*). Complaint Counsel's assertion that he did is improper, and this finding should be disregarded.

Moreover, the evidence in this case shows that {

} (Whear, Tr. 4739-40, *in camera*). Therefore, there was no reason for Daramic to pursue this project following the acquisition.

722. Prior to the merger Daramic had innovative projects ongoing that were halted after the merger. (Whear, Tr. 4752-4754, *in camera*). Included in the abandoned projects was project { } (PX0913 (Whear, Dep. at 251), *in camera*).

Response to Finding No. 722:

Complaint Counsel's finding number 722 is incomplete and misleading. {

} (Whear, Tr. 4752-53, *in camera*). {

} (Whear, Tr. 4752-53, *in camera*).

iii) Innovation competition existed in SLI

723. IGP believed CellForce had applicability in the automotive market because in testing, Microporous “thought that potentially using CellForce you could ultimately reduce the lead content in an automotive battery.” (PX2300 (Heglie, IHT at 121)). If CellForce were proven to allow for a reduced lead content in SLI batteries, it would be an attractive product to battery manufacturers: “Lead is a huge component of cost on a lead acid battery, so if you can eliminate some of that lead, you can take cost out of the battery which is very valuable to a battery manufacturer.” (PX2300 (Heglie, IHT at 121)). Mr. Heglie, as an IGP Board Member, continued to see value in CellForce for the automotive SLI market throughout IGP’s ownership of Microporous. (PX2301 (Heglie, Dep. at 170)).

Response to Finding No. 723:

Complaint Counsel’s finding number 723 is incomplete, misleading and full of speculation. The evidence demonstrates that prior to the Acquisition, Microporous had worked with JCI to do some testing on CellForce for use in a unique and specialized SLI application called a “start-stop” battery. (RFOF 366; PX2300 (Heglie, IHT at 123); Gaugl, Tr. 4558). {

} (RFOF 366; Whear, Tr. 4748-49, *in camera*). But it became clear as the project was underway that it “wasn’t a high priority for JCI, and that we weren’t working with the most important people at JCI. And in our [IGP’s] opinion is they were viewing it as a speculative project, so they were dedicating minimal time and resources to it.” (RFOF 366; PX2300 (Heglie, IHT at 130)). Neither JCI nor any other battery manufacturer ever approved CellForce for these specialized start-stop SLI applications. (RFOF 366; Gaugl, Tr. 4558).

Results from the testing varied and Microporous “was getting some positive results out of the tests, and then at different points, they weren’t as positive.” (RFOF 367; PX2300 (Heglie, IHT at 125)). {

} (RFOF 367; Whear, Tr. 4750, *in camera*). {

} (RFOF 367; Whear, Tr. 4750, *in*

camera). Currently, {

}

(RFOF 367; Whear, Tr. 4753, *in camera*).

724. At the time of the acquisition, Microporous was developing several new product ideas for SLI separators. One, called a “smart separator,” [i.e., Project Einstein] allowed for the {
Tr. 340). } (Gilchrist,

Response to Finding No. 724:

Complaint Counsel’s finding number 724 is false and misleading. {

} (RFOF 354; McDonald, Tr. 3862,

in camera). {

} (RFOF 354; Whear,

Tr. 4735-37, *in camera*). {

} (RFOF 354; McDonald, Tr. 3862, *in camera*).

N. Daramic Reaction to the MPLP Expansion – The MP Plan

725. In the fall of 2007, Daramic took active steps to respond to the MPLP threat to Daramic’s automotive and motive power business in the US and Europe. Mr. Roe and Mr. Hauswald put together a project known as the {

} (PX0258; PX0255, *in camera*; PX 0911 (Roe, Dep. 173-174), *in camera*). In North America, Daramic identified East Penn, Douglas and Crown as customers whose business Daramic believed was immediately at risk of loss to MPLP in 2008. (PX0258 at 002). At East Penn, Daramic was concerned about the potential loss of automotive and motive power business, while at Crown and Douglas the concern related to potential loss of motive power business. (PX0258 at 002; Roe, Tr. 1303-1304). These customers were

specifically identified because Daramic understood that MPLP had submitted proposals to win each of these customers business. (Roe, Tr. 1289-1290).

Response to Finding No. 725:

Complaint Counsel's finding number 725 is inaccurate and misleading. {

} (Roe, Tr. 1781-82, *in camera*). In fact,

following the acquisition, {

} (Roe, Tr. 1782-83, *in camera*).

Because this finding is based on inaccurate information, including some falsified information, it should be rejected as unreliable.

Additionally, Roe explained that the "MP Plan" was a budgeting exercise. (Roe, Tr. 1285-86). As part of the budgeting process, Daramic made estimates of volume loss based on Microporous' expansion plans. (Roe, Tr. 1285-86). Because the estimates were done as part of the budgeting process, the exercise was totally speculative.

Moreover, the uncontroverted evidence in this case demonstrates that competition from Microporous had no influence whatsoever on East Penn, Crown and Douglas in the decisions by those customers to enter into supply agreements with Daramic. {

} (RFOF 779;

Leister, Tr. 4002-03, *in camera*). In fact, Microporous has never been qualified by East Penn as an alternative supplier of PE separators. (RFOF 782).

Similarly, {

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*).

{

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*).

Douglas Battery { }.

(RFOF 828; Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*). Microporous has had no competitive influence on Douglas. In fact, Microporous has not even discussed the supply of separators with Douglas since 2004. (RFOF 832; Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*). {

} (RFOF 838; Douglas, Tr. 4068, *in camera*).

Furthermore, Complaint Counsel improperly cites Roe's testimony to support their claim about proposals submitted by Microporous to East Penn, Crown and Douglas. Contrary to Complaint Counsel's assertion, Roe testified that he does not know whether Microporous submitted actual proposals or quotations to any of these customers. (Roe, Tr. 1289-90). Complaint Counsel's assertion is improper, and this finding should be disregarded.

726. Understanding the threat that MPLP posed, Daramic developed the { } to offer beneficial terms to customers willing to enter into exclusive or near exclusive long term contracts with { } (Roe, Tr. 1285-1286; 1291; *see also* PX0258 at 001 ("What do we want to achieve? Secure select [Long term] agreements to fight the [MPLP] threat.")). Under the { } Daramic offered customers contracts that {

} (PX0255 at 001, *in camera*; Roe, Tr. 1292-1294, 1350-1354, *in camera*). Additionally, the terms offered to customers under the MP Plan further limited Daramic's {

} (PX0255 at 001, *in camera*).

Response to Finding No. 726:

Complaint Counsel's finding number 726 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 725. In addition, Complaint Counsel's suggestion that Daramic could implement a price increase in 2010 which includes costs other than those delineated by contract is false. {

} (RX00994, *in camera*). Any

assertion to the contrary is untrue.

727. With the MP Plan in pocket, Daramic went to certain customers offering beneficial contractual terms in order to secure their business and to prevent erosion of Daramic's customer base. (Roe, Tr. 1290-1291). In addition to beneficial pricing terms, Daramic offered those customers identified as at risk of loss to MPLP guaranteed delivery times, committed inventory stock, rebate schedules and consignment to secure the business with Daramic. (PX0258 at 01; Roe, Tr. 1292). Daramic entered long term contracts with { } as per the terms of the { } (Roe, Tr. 1352, *in camera*).

Response to Finding No. 727:

Complaint Counsel's finding number 727 is inaccurate and misleading. For its response to this finding, Respondent incorporates its reply to finding number 725.

728. Crown signed a { } (Balcerzak, Tr. 4104, *in camera*; RX00994, *in camera*).

Response to Finding No. 728:

Respondent has no specific response.

729. The length of the new supply contract is unusually long for Crown, and was entered into at the suggestion of Daramic. (Balcerzak, Tr. 4105, *in camera*). Prior to the most recent contract, the term for the agreement between Crown and Daramic extended only { } (Balcerzak, Tr. 4111, *in camera*).

Response to Finding No. 729:

Complaint Counsel's finding number 729 is incomplete and misleading. The evidence demonstrates that Daramic's initial contract proposal to Crown was for a term of three years. (Roe, Tr. 1722). In its response to Daramic's proposal, Crown asked for a term of five years.

(Roe, Tr. 1722). The prior supply agreement between Daramic and Crown lasted for a period of three years. (RX00995 at 001).

In addition, {

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*).

{

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*).

730. When Crown negotiated the contract with Daramic they did not considered other separator suppliers because other than MPLP, the only other {
} was Entek and it had been disqualified due to quality and logistical problems. (Balcerzak, Tr. 4106, *in camera*).

Response to Finding No. 730:

Complaint Counsel's finding number 730 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 729. {

} (RFOF 808;

Balcerzak, Tr. 4128-29). Complaint Counsel's assertion to the contrary is false.

731. {

} (Balcerzak, Tr. 4116, *in camera*; RX00994 at 009, *in camera*).

Response to Finding No. 731:

Complaint Counsel's finding number 731 is inaccurate and misleading. {

} (Balcerzak, Tr. 4116, *in camera*).

732. {

} (PX0637 at 002-009, *in camera*;
RX01519, *in camera*).

Response to Finding No. 732:

Complaint Counsel's finding number 732 is incomplete and misleading. First, the supply agreement does not require East Penn to purchase 100% of its stationary separator needs from Daramic. Rather, {
}

(RX01519, *in camera*).

In addition, {

} (RFOF 772; Leister, Tr. 3999-4000, *in camera*). {

} (RFOF 772; Leister, Tr. 4000, *in camera*).

Moreover, {

} (RFOF 773;

RX01519, *in camera*).

733. After East Penn had entered into a three-year contract in 2008 for most, if not all, of its PE separator needs, that left Microporous with virtually "no more opportunities to sell much CellForce, or PE for that matter, for motive power or SLI in North America." (PX0108).

Expert Report which is not evidence. As Mr. Robertson himself noted at the pre-trial conference “they're [the expert reports] admissible, but they can't be used to support facts.” (JX2; Pretrial Hearing Tr. at 20). Dr. Simpson’s report is not a “fact” and Complaint Counsel’s use of his testimony and report as a finding of “fact” is improper and should be disregarded.

Furthermore, it is inaccurate to separate a PE separator used for one end-use application from a PE separator used in other end-use applications. (RFOF 78; Whear, Tr. 4694). Therefore, a “motive battery separator market” is not a valid product market in this case. Instead, the “alternative” all PE separator market is the correct relevant market here. (RX01572 at 003; RFOF 76, 77, 116, 126; RPT Brief at 9).

In addition, {
}. (PX0033 at 047, *in camera*). The long term contracts entered into by Daramic with { } are not “exclusionary.” For instance, { } was entered into as part and parcel of the { }, and was entered into prior to the time that Microporous even had a PE line. Furthermore, at the time { } (RFOF 526, 551-56).

Likewise, the { } Daramic entered into in January 2008, is not exclusive and allows purchase of up { } separators from another supplier, and was entered into during a time that Microporous had no excess capacity so could not have supplied product to { } (PX0637 at 002, *in camera*). Further, { } testified at trial that it did not consider Microporous and entered the contract with Daramic because it contained good terms and pricing. This is not an exclusionary contract. (RFOF 773, 775, 779, 782). Neither the { } contract, nor the { } contract were exclusionary either since both {

} (Balcerzak, Tr. at 4106-08, *in camera*; Douglas, Tr. at 4063, 4067, *in camera*; RFOF 814, 832).

Additionally, {

} (RX00953, *in camera*). {

} (RX00953, *in*

camera).

Moreover, the supplier to Exide, East Penn, Crown and Douglas did not change between 2007 and the first quarter of 2008. (RFOF 526, 530, 531, 772, 796 and 825). Because of its size, EnerSys' sales represent approximately 38-40% of the industrial battery sales in the world. (RFOF 606; Axt, Tr. 2227). Accordingly, Daramic's assumption of Microporous' contract with EnerSys, and not the use of exclusive contracts, caused an increase in Daramic's sales of separators for motive power applications.

736. In addition to Crown, Douglas and East Penn, Daramic specifically identified various European customers who were at risk of loss to MPLP, including Midac, Germanos, TAB and Nuova Brescia. (PX0258 at 002). Daramic offered the same contractual terms to these customers that it had offered to the North American customers identified in the MP Plan. (Roe, Tr. 1294).

Response to Finding No. 736:

Complaint Counsel's finding number 736 is incomplete and misleading. Complaint Counsel's citation to Roe's trial testimony at page 1294 does not support the statement in this finding. The following exchange took place at trial:

Q: And I'm not going to go into the details of what you ended up negotiating right now because I think that some of that is *in camera*, so I'll hold off on that.

But those same terms, the no price increase in 2009, were offered to some of the European customers that you outlined on page 2 of PX0258 as well; correct?

A: That's correct.

Complaint Counsel's question at trial was very general and, frankly, convoluted. It is improper for Complaint Counsel to now use this testimony as a basis to support their statement that all of the same contractual terms to specific customers, including Midac, Germanos, TAB and Nuova Brescia.

Moreover, although Microporous attempted to secure business at TAB and Midac, Microporous was unable to secure a single MOU, commitment or supply agreement with either of these customers. (RFOF 384; McDonald, Tr. 3831; Gilchrist, Tr. 539).

For a further response to this finding, Respondent incorporates its reply to finding number 725.

737. Daramic then entered contracts with { } in Europe under the terms of the MP Plan. (Roe, Tr. 1353-1354, *in camera*).

Response to Finding No. 737:

Complaint Counsel's finding number 737 is incomplete and misleading. Respondent refers to its replies to finding numbers 725 and 736 for context.

738. As demonstrated by Daramic's contracting under the MP Plan, pre-merger competition from MPLP constrained Daramic's pricing to customers in North America of automotive, motive and deep-cycle separators. Because of competition from MPLP, Daramic was unable to pass through any price increases in 2009 to {

} (Roe, Tr. 1352, *in camera*). { } received no price increase in 2009 under the terms of the contract entered into under the MP Plan despite Daramic's alleged increases in raw material and energy costs during that time period. (Roe, Tr. 1353, *in camera*).

Response to Finding No. 738:

Complaint Counsel's finding number 738 is incomplete and misleading. {

} (Roe, Tr. 1352, *in camera*). There is no evidentiary basis to support Complaint Counsel's conclusion that this was caused by "competition from MPLP." In fact, the evidence in this case shows the opposite: {

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*). {

} (RFOF 814; Balcerzak, Tr. 4107-08, *in camera*).

For a further response to this finding, Respondent incorporates its reply to finding number 725.

739. Similarly, Daramic was unable to pass through any price increase to { } in 2009 due to the pre-merger constraint that MPLP had posed at { } (Roe, Tr. 1353, *in camera*).

Response to Finding No. 739:

Complaint Counsel's finding number 739 is incomplete and misleading. {

} (Roe, Tr. 1352-53, *in camera*). There is no evidentiary basis to support Complaint Counsel's conclusion that this was caused by "pre-merger constraint that MPLP had posed at { }." In fact, the evidence in this case shows the opposite: {

} (RFOF 828; Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*). {

} (RFOF 832; Douglas, Tr. 4063, Douglas, Tr. 4067, *in camera*). {

} (RFOF 838; Douglas, Tr. 4068, *in camera*).

740. Daramic succeeded in passing through limited price increases to {

} (Roe, Tr. 1353, *in camera*).

Response to Finding No. 740:

Complaint Counsel's finding number 740 is incomplete and misleading. {

} (Roe, Tr. 1353, *in camera*). For a

further response to this finding, Respondent incorporates its replies to finding numbers 725, 732 and 733.

741. In contrast to the customers at threat of loss to MPLP, Daramic was unwilling to offer to {

} (PX0985, *in camera*;

Roe, Tr. 1344-1345, *in camera*).

Response to Finding No. 741:

Complaint Counsel's finding number 741 is false and misleading. During trial, Roe testified {

(Roe, Tr. 1344, *in camera*). Moreover, Roe explained that {

} (Roe, Tr. 1344, *in camera*).

For a further response to this finding, Respondent incorporates its reply to finding number 725.

742. In at least one instance, MPLP had an immediate constraining influence on Daramic's automotive separator pricing. In late 2007, Daramic was involved in negotiations with {

} (Roe, Tr. 1345-1346, *in camera*). {

} automotive battery manufacturer in Europe. (Roe, Tr. 1345, *in camera*; PX0215 at 002, *in camera*). While Daramic's sales personnel were meeting customers in

pursuit of the strategy outlined in the MP Plan, Daramic learned that {
} (Roe, Tr. 1352, *in camera*;
PX0215 at 004, *in camera*).

Response to Finding No. 742:

Complaint Counsel's finding number 742 is false and misleading, and it is based on
falsified information. {

} (Roe, Tr. 1782, *in camera*). {

} (Roe, Tr. 1782, *in camera*). Complaint Counsel's
conclusion that "MPLP had an immediate constraining influence on Daramic's automotive
separator pricing" is completely false, because {

}. (Roe, Tr. 1782, *in camera*).

Complaint Counsel's position is reckless because it encourages customers to lie to separator
manufacturers under the guise of "competition."

Because this finding is based on falsified information, it should be rejected.

743. Initially, Daramic had not anticipated that {
} (PX0215 at 002, *in camera*). Upon learning of the competition from MPLP at {
} Daramic believed that they faced competition for {
} from MPLP as
well as from Asian suppliers, specifically from Anpei. (PX0214, *in camera*). Soon
thereafter, Daramic learned that "{
}" (PX0215 at 002-003, *in camera*; Roe, Tr. 1348-1349, *in camera*). Daramic
further understood that {
} testing and therefore
MPLP was the "only full scale alternative to {
}" (PX0215 at 002, *in camera*;
Roe, Tr. 1349-1350, *in camera*).

Response to Finding No. 743:

Complaint Counsel's finding number 743 is false and misleading. For its response to this
finding, Respondent incorporates its replies to finding numbers 692 and 742. Significantly, Roe
explained at trial that {

}. (Roe, Tr. 1349, *in camera* (discussing PX0215, *in camera*)).

744. Daramic grew concerned because { } would be “a key customer for [MPLP] and pave the way for others to follow.” (PX0215 at 003, *in camera*). Daramic feared that a customer the size of { } would be “a fantastic communication tool for MPLP’s Automotive products with other customers” and would thus provide credibility to MPLP. (Roe, Tr. 1350, *in camera*; PX0215 at 002, *in camera*).

Response to Finding No. 744:

Complaint Counsel’s finding number 744 is false and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 692, 742 and 743.

745. Daramic’s worldwide VP of sales contacted Mr. Hauswald to inform him of the threat to Daramic’s position at { } (PX0215 at 002, *in camera*). Daramic believed that MPLP had “made a very persuasive pricing proposal” for { } business, and that the “competitive threat [was] real.” (PX0215 at 002, *in camera*). In response to the MPLP threat, Mr. Roe sought and received approval from Mr. Hauswald to offer to { } (PX0215 at 001-002, *in camera*; Roe, Tr. 1350-1351, *in camera*). { } (PX0215 at 002, *in camera*). Additionally, Daramic offered to { } just as it was doing for customers identified under the { }. (PX0215 at 002, *in camera*).

Response to Finding No. 745:

Complaint Counsel’s finding number 745 is false and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 692, 742 and 743.

746. While Daramic was constrained from increasing prices to certain customers by MPLP’s pre-merger competition, in the post-acquisition environment, Daramic was unconstrained by the terms of the { } with regards to separators sold by MPLP to the very same customers. Thus, while { } received no price increase in 2009 for PE and HD separators purchased from Daramic under the terms of the { } did receive a { } price increase on all Flex-Sil separators it purchases from Daramic in 2009. (PX0950 at 015, *in camera*).

Response to Finding No. 746:

Complaint Counsel’s finding number 746 is incomplete and misleading. While Complaint Counsel keeps setting forth their conclusion that Daramic was constrained from increasing prices by Microporous’ pre-merger competition, the actual evidence in this case

shows otherwise. (See, e.g., Respondent's replies to finding numbers 725, 729, 732, 736, 738, 739, 742, 743, 744 and 745).

Complaint Counsel twists the facts of this case to assert that "Daramic was unconstrained by the terms of the { } in implementing a price increase on Flex-Sil purchases by { } The truth of the matter is that Daramic could not raise prices for its products in 2009 due to its contract with { }. (RX00994, *in camera*). Since Daramic did not sell Flex-Sil at the time its contract with { } was entered into, that product obviously could not be covered by the contract. (RX00994, *in camera*). {

{ (RFOF 257; Seibert, 4191-92, *in camera*; RX00542, *in camera*; RX00927 at 14-16, *in camera*). {

{ (RFOF 257; Seibert, Tr. 4194-95, *in camera*).

747. The MP Plan also detailed Daramic's proposed reaction if the favorable terms offered under the MP Plan did not induce customers to sign long term contracts with Daramic. Under the MP Plan, Daramic planned on punishing those customers that intended to switch some of their business to MPLP, indicating that as a "last resort we play hard - no agreement - no supply." (PX0258 at 01; Roe, Tr. 1291-1292). Indeed, soon after the creation of the MP Plan, Mr. Roe informed Mr. Hauswald and others at Daramic that {

{ (PX0214, *in camera*). Shortly thereafter, the message of hard ball had clearly made it to Daramic's sales team, as one of Daramic's European sales personnel who was {

{ (PX0252 at 001, *in camera*).

Response to Finding No. 747:

Complaint Counsel's finding number 747 is false. Contrary to Complaint Counsel's assertion, Tucker Roe testified that neither he nor any of his sales team ever told a customer to "take it or leave it," that Daramic was going to "play hardball," or that Daramic was going to show "no mercy" with respect to pricing and contract negotiations. (Roe, Tr. 1725-26). Roe

further explained that neither he nor any of his sales team have ever taken such a position with a customer. (Roe, Tr. 1725-26). This type of posturing would be inconsistent with the manner in which Roe has operated for more than 20 years – a philosophy that builds intimate, long-term customer relationships. (Roe, Tr. 1725-26).

Moreover, there is no evidentiary basis to support Complaint Counsel’s position {

} (PX0252 at 001, *in camera*). Complaint Counsel’s linking of these two ideas is inaccurate.

For a further response to this finding, Respondent incorporates its replies to finding numbers 725, 738, 739, 742 and 743.

1. Polypore Board documents analyzing the acquisition predict unilateral anticompetitive effects

748. As chairman of the board, Mr. Graff’s role in the Microporous acquisition was to “encourage management to do diligence and come forward with a recommendation of how they wanted to proceed.” (Graff, Tr. 4855). {
} (Graff, Tr. 4865, *in camera*).
{
} (Graff, Tr. 4865, *in camera*).

Response to Finding No. 748:

Complaint Counsel’s finding number 748 is incomplete and misleading. {

} (Graff, Tr. 4861-62, *in camera*). The Board determined that {

} (Graff, Tr. 4862-63, *in camera*). {

} (Graff, Tr. 4862-63, *in camera*). In fact, {

} (Graff, Tr. 4863, *in camera*). {

}

(Graff, Tr. 4862-63, *in camera*). {

} (Graff, Tr. 4862-63, *in camera*).

749. {

} (Graff, Tr. 4868-69, *in camera*). {

} (Graff, Tr. 4870-71, *in camera*; PX0738, *in camera*). {

}

(Graff, Tr. 4879-80, *in camera*).

Response to Finding No. 749:

Complaint Counsel's finding number 749 is incomplete and misleading. As Mr. Graff explained, {

} (Graff, Tr.

4878-79, *in camera*).

750. {

}

(PX0738 at 004, *in camera*). {

} (Graff, Tr. 4872, *in camera*). {

} (Graff, Tr. 4873, *in camera*).

Response to Finding No. 750:

Complaint Counsel's finding number 750 is incomplete and misleading. {

} (Graff, Tr. 4878-79, *in camera*).

{

}

(Graff, Tr. 4872-73, *in camera*).

As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (See Responses to Finding Nos. 692, 693, 696 and 725). Moreover, Respondent's CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

In addition, this finding completely ignores evidence {

} (RFOF 108, 262; Hauswald, Tr. 897-899, *in camera*; Toth, Tr. 1422-23, 1504, 1551-52, 1554-55; Graff, Tr. 4857-58; Graff, Tr. 4861, 4877, *in camera*; RX01097, *in camera*).

751. {

} (Graff, Tr. 4873-74, *in camera*; PX0738 at 004, *in camera*). {

} (PX0738 at 007, *in camera*).

Response to Finding No. 751:

Complaint Counsel's finding number 751 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 750. In addition, this finding ignores Graff's testimony explaining:

{

}

(Graff, Tr. 4873, *in camera*).

Moreover, this finding omits critical information concerning the contemplated 5% price increase. PX0738 contemplates {

}

(PX0738 at 007, *in camera*, emphasis added).

752. {

}

(Graff, Tr. 4874, *in camera*; PX0738 at 008, *in camera*). {

} (PX0738 at 008, *in camera*).

Response to Finding No. 752:

Complaint Counsel’s finding number 752 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 750 and 751.

753. {

} (PX0738 at

010, *in camera*).

Response to Finding No. 753:

Complaint Counsel’s finding number 753 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 750 and 751. Additionally, this finding ignores evidence showing that {

}. (PX0901

(Toth, Dep. at 212-13), *in camera*).

Moreover, this finding completely ignores the facts which occurred following the acquisition. As Graff explained, {

}. (Graff, Tr. 4880, *in camera*).

754. {

} (Graff,

Tr. 4876-77, *in camera*; PX0738 at 010, *in camera*). {

} (Graff,

Tr. 4880, *in camera*).

Response to Finding No. 754:

Complaint Counsel’s finding number 754 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 750, 751 and 753. Additionally, this finding ignores Graff’s explanation about this subject that {

} (Graff, Tr. 4877, *in camera*). {

} (Graff,

Tr. 4877, *in camera*).

755. {

} (Compare PX0738 at 002-011, *in camera*, with PX0203 at 080-089, *in camera*). {

} (PX0203 at 085, *in camera*), {

} (PX0203 at 086, *in camera*), {

} (PX0203 at

088, *in camera*), {

} (PX0203 at 088, *in camera*), {

} (PX0203 at 088, *in*

camera).

Response to Finding No. 755:

Complaint Counsel’s finding number 755 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753 and 754. Moreover, this finding omits critical information concerning the contemplated 5% price increase. PX0203 contemplates {

}

(PX0203 at 085, *in camera*, emphasis added).

756. {

} (Graff, Tr. 4883-84, *in camera*; RX01097 at 002, *in camera*).

Response to Finding No. 756:

Complaint Counsel's finding number 756 is incomplete and misleading. {

} (Graff, Tr. 4883-84, *in camera*). {

} (Graff, Tr. 4884, *in camera*).

Moreover, {

} (Roe, Tr. 1781-82, *in camera*; PX0922 (Roe, IHT at 362-63), *in camera*).

For a further response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753 and 754.

757. {

} (PX0464 at 004, *in camera*).

Response to Finding No. 757:

Complaint Counsel's finding number 757 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754 and 756. Moreover, this finding omits critical information concerning the contemplated 5% price increase. PX0464 contemplates {

}

(PX0464 at 004, *in camera*, emphasis added).

758. {

} (PX0823, *in camera*; Roe Tr. 1225; Graff, Tr. 4885-88, *in camera*). Daramic assembles its budget based on certain assumptions with regard to volume and pricing and includes a three year long term plan. (Roe, Tr. 1226-1227). The assumptions that Daramic incorporates into the budget are Daramic's best estimate of what is going to happen in the upcoming year with respect to volume and pricing of the separators that Daramic sells. (Roe, Tr. 1226-1230). These assumptions are specifically laid out in the budget so that the Polypore board can understand how the budgetary figures were prepared. (Roe, Tr. 1226-1227).

Response to Finding No. 758:

Complaint Counsel's finding number 758 is false, incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754 and 756. Additionally, Complaint Counsel improperly cites Roe's testimony. The following exchange took place at trial:

Q: And when you do this and the budget is presented to the board, the most important assumptions are specifically identified for the board so they can understand how the budget was put together; correct?

A: Again, I don't sit in the board presentation, so I'm not sure exactly what assumptions are being made.

(Roe, Tr. 1226).

Given Roe's answer, it is entirely inappropriate for Complaint Counsel to assert the "facts" in this finding. The evidence shows that Roe is not a Board member, has never attended a Board meeting and has no knowledge about what information is presented to the Board or what assumptions are considered by the Board. (Roe, Tr. 1226-28). It is particularly telling that Complaint Counsel principally relies on testimony by Roe, rather than someone who actually attends Board meetings, to support this finding.

759. Daramic did not know whether the { } would successfully maintain customers at risk of loss to MPLP. Despite launching the { }, Daramic's 2008 budget included the assumption that {

} (PX0823 at 002, 008, *in camera*; Graff, Tr. 4887-88,

in camera). This is the same volume that Daramic was projecting on losing in the {
}. (Roe, Tr. 1370, *in camera*).

Response to Finding No. 759:

Complaint Counsel's finding number 759 is false and misleading. Respondent refers to its replies to finding numbers 725, 738, 739, 742, 743 and 746 for context. Additionally, this finding ignores Graff's testimony that {

}.
(Graff, Tr. 4886-87, *in camera*). {

(Graff, Tr. 4886-87, *in camera*). {

} (Graff, Tr.

4887, *in camera*).

For a further response, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754 and 756.

760. The 2008 budget also included Daramic's long range plans covering the time period of 2008 to 2010. (PX0823 at 007-012, *in camera*). {
} (PX0919 (Riney, IHT at 298), *in camera*). In its long range plans, using its best estimates of what was likely to occur in the coming three years, Daramic's management assumed that {

} (PX0823 at 008, *in camera*; Roe, Tr. 1371-1375, *in camera*; Graff, Tr. 4887-88, *in camera*). {
} (Graff, Tr. 4888-89, *in camera*).

Response to Finding No. 760:

Complaint Counsel's finding number 760 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754, 756 and 759. In addition, this finding ignores evidence demonstrating that {

}. (Graff, Tr.

4887-89, *in camera*). This finding further ignores Graff's testimony that {

}. (Graff, Tr. 4888-89, *in camera*).

761. {

} (PX0823 at 008, 013, *in camera*;
PX0276 at 019, *in camera*; PX0919 (Riney, IHT at 296, 304-305, 317, 321-322, *in camera*; Roe, Tr. 1382, *in camera*). {

} (PX0276 at 016, 019,
in camera).

Response to Finding No. 761:

Complaint Counsel's finding number 761 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754, 756, 759 and 760.

762. When Daramic presented the 2008 budget to the board for approval in December 2007, Daramic also provided a comparison of how the long range plan would look with and without the MPLP acquisition. (PX0823 at 013-014, *in camera*). With an acquisition of MPLP, Daramic's underlying sales assumptions changed dramatically. Daramic assumed that with an acquisition of MPLP, {

} (PX0823 at 013, *in camera*).

Response to Finding No. 762:

Complaint Counsel's finding number 762 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754, 756, 759 and 760.

763. {

} (Roe, Tr. 1382, *in camera*).

Response to Finding No. 763:

Respondent has no specific response.

- i) Daramic acquired MPLP to avoid market share loss and EBITDA loss

764. Daramic believed, and Mr. Hauswald reported to Polypore's Board, that a { } (PX0203 at 088, *in camera*; PX0738 at 010, *in camera*; see also PX0275 at 012, *in camera*). Daramic also believed, and Mr. Hauswald also reported to the Polypore Board, that a { } (PX0203 at 088, *in camera*; PX0738 at 010, *in camera*).

Response to Finding No. 764:

Complaint Counsel's finding number 764 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 753, 754 and 758.

765. { } (PX0203 at 080-089, *in camera*; Hauswald, Tr. 776, 778-79, *in camera*; PX0951 at 004, *in camera*). { } (Hauswald, Tr. 778-79, *in camera*; PX0203 at 84, *in camera*). { } (Hauswald, Tr. 900-901, *in camera*). { } (PX0203 at 84, *in camera*)

Response to Finding No. 765:

Complaint Counsel's finding number 765 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754, 756, 759 and 760.

766. The Project Titan Board presentation revealed that the impact on Daramic LRP EBITDA without the acquisition would be a { } (PX0203 at 86, *in camera*; Hauswald, Tr. 783, *in camera*). While the { } (PX0203 at 086, 088, *in camera*; Hauswald, Tr. 783, *in camera*).

Response to Finding No. 766:

Complaint Counsel's finding number 766 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749, 750, 751, 753, 754, 756, 759 and 760.

767. Mr. Hauswald's speaker notes for the October 2007 Project Titan Board presentation showed, {
} (PX0174 at 003, *in camera*,
Hauswald, Tr. 788-89, *in camera*). Mr. Hauswald confirmed that Daramic will {
} (Hauswald, Tr. 788-89, *in camera*, PX0174 at
003, *in camera*). {
} (PX0174 at 003, *in camera*). Interestingly, Daramic predicted {
} (PX0174 at 003, *in camera*; Hauswald, Tr.
789, *in camera* ({
})).

Response to Finding No. 767:

Complaint Counsel's finding number 767 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-766, this finding should be rejected.

As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (*See Responses to Finding Nos. 692, 693, 696 and 725*). Moreover, Respondent's CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

Furthermore, the evidence in this case shows how incorrect Daramic was in its market intelligence and predictions. Daramic lost absolutely no JCI business to Microporous. Instead, {
} (RX00072, *in camera*). {
} (RFOF 475; RX00072, *in camera*; Hall, Tr. 2747, *in camera*).

Additionally, Daramic lost no East Penn business to Microporous. The evidence demonstrates that discussions between East Penn and Microporous “fizzled out” prior to Daramic’s acquisition of Microporous, and East Penn did not give serious consideration to obtaining supply from Microporous. (RFOF 781; Leister, Tr. 4019).

768. Mr. Hauswald also acknowledged that Daramic would {
} (Hauswald, Tr. 789, *in camera*; PX0174
at 003, *in camera*). Mr. Hauswald further confirmed that Daramic was projecting that
without the acquisition it {
} (Hauswald, Tr. 789, *in camera*; PX0174 at 003, *in camera*). He also
agreed that if Daramic did not purchase Microporous, it would have to {
} (Hauswald, Tr. 791, *in camera*; PX0174 at
003, *in camera*).

Response to Finding No. 768:

Complaint Counsel’s finding number 768 is incomplete, misleading and speculative. For the reasons set forth in Respondent’s replies to finding numbers 749-766, this finding should be rejected.

As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (*See Responses to Finding Nos. 692, 693, 696 and 725*). Moreover, Respondent’s CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

Furthermore, the evidence in this case demonstrates that Exide had no intention to move forward with any business relationship with Microporous. (*See Response to Finding No. 688*).

769. Daramic believed that absent the acquisition, it would have to lower prices and build low cost facilities to compete on price with MPLP. The October Board presentation speaker notes, which were reviewed by Polypore Board members Mr. Graff and Mr. Toth, stated under the heading, {

} (PX0738 at 017, *in camera*). Moreover, the presentation indicated that without an acquisition all customers would benefit because {
} (PX0738 at 017, *in camera*).

Response to Finding No. 769:

Complaint Counsel's finding number 769 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-768, this finding should be rejected.

770. Mr. Hauswald presented to the Board that a benefit of the acquisition was to {
(Hauswald, Tr.784, *in camera*; PX0203 at 086, *in camera*). Microporous had {
} (PX0462 at 005, *in camera*; PX0738 at 013, *in camera*; PX0463 at 002, *in camera*). Daramic expected {
} (PX0463 at 003, *in camera*).

Response to Finding No. 770:

Complaint Counsel's finding number 770 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-768, this finding should be rejected.

771. {
} (PX0203 at 088, *in camera*; Hauswald Tr. 785-86, *in camera*).

Response to Finding No. 771:

Complaint Counsel's finding number 771 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-768, this finding should be rejected.

772. Prior to the acquisition, Daramic projected profit and loss scenarios with and without the acquisition of Microporous. (PX0051, PX0095 at 001-002, *in camera*). {
} (PX0051). {
}. (PX0051, PX0095 at 001-002, *in camera*).

Response to Finding No. 772:

Complaint Counsel's finding number 772 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-766, this finding should be rejected.

As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (See Responses to Finding Nos. 692, 693, 696 and 725). Moreover, Respondent's CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

ii) Daramic acquired MPLP in order to raise prices

773. Mr. Hauswald explained to the Polypore Board that with the acquisition, Daramic would be able to institute a { } products which would result in { } (Hauswald, Tr. 782, 819-20, *in camera*; PX0203 at 84, *in camera*; PX0738 at 006-007, *in camera*; PX0463 at 008, *in camera*; PX0464 at 004).

Response to Finding No. 773:

Complaint Counsel's finding number 773 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-766, this finding should be rejected.

As stated, Daramic and several of its employees speculated on certain things based on market intelligence that was erroneous. (See Responses to Finding Nos. 692, 693, 696 and 725). Moreover, Respondent's CEO and the Chairman of its Board rejected these prognostications which were later confirmed to be erroneous. (Toth, Tr. 1546-56; Graff, Tr. 4856-58).

Moreover, this finding omits critical information concerning the contemplated 5% price increase. The documents cited by Complaint Counsel contemplate {

} (PX0738 at 007, *in camera*, emphasis added; PX0203 at 085, *in*

camera, emphasis added; PX0463 at 008, *in camera*, emphasis added; PX0464 at 004, *in camera*, emphasis added).

774. The Polypore Board documents also stated that Daramic planned to {
(PX0203 at 085, *in camera*; PX0738 at 006, 007, *in camera*; PX0463 at 005, 008, *in camera*; PX0464 at 004, *in camera*). Mr. Hauswald acknowledged that {
} (Hauswald, Tr. 819, *in camera*).

Response to Finding No. 774:

Complaint Counsel's finding number 774 is incomplete, misleading and speculative. For the reasons set forth in Respondent's replies to finding numbers 749-768, this finding should be rejected.

Additionally, this finding ignores evidence demonstrating that more than a year after the acquisition, Daramic has made no decision whether to phase out its HD product in favor of CellForce. (Whear, Tr. 4707-08). This finding is purely speculative and should be disregarded.

iii) Daramic acquired MPLP to avoid capacity expansion

775. {
} (PX0306 at 001, *in camera*).

Response to Finding No. 775:

Complaint Counsel's finding number 775 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749-768. Additionally, this finding ignores evidence {

} (RFOF 108, 262;

Hauswald, Tr. 897-899, *in camera*; Toth, Tr. 1422-23, 1504, 1551-52, 1554-55; Graff, Tr. 4857-58; Graff, Tr. 4861, 4877, *in camera*; RX01097, *in camera*).

2. Polypore Board approved the acquisition based on the due diligence team's findings as stated in the Board Documents

776. {
} (PX0742 at 001, *in camera*; Toth, Tr. 1476-1477, *in camera*). At the meeting, Mr. Toth first provided a summary of the strategic rationale for the transaction and the key financial projections. (Toth, Tr. 1477, *in camera*; PX0742 at 001, *in camera*). Based on the management team's presentation and recommendation, the Board members then unanimously adopted a resolution to acquire Microporous. (Toth, Tr. 1477, *in camera*; PX0742 at 001 *in camera*).

Response to Finding No. 776:

Respondent has no specific response.

777. When the Board voted for the resolution approving the Microporous purchase, it was relying on the term sheet that was attached. (PX0742 at 001, *in camera*; Toth, Tr. 1607, *in camera*). The term sheet includes {
} (Toth, Tr. 1607, *in camera*; PX0742 at 007, *in camera*). The Board's resolution stated that {

} (PX0742 at 001, *in camera*). The presentations analyzed at the prior meetings included the financial data presented in the Board documents, above, that {

} (PX0203 at 080-089, *in camera*; PX0738, *in camera*; PX0463, *in camera*; PX0464, *in camera*). {

} (Graff, Tr. 4890-4891, *in camera*).

Response to Finding No. 777:

Complaint Counsel's finding number 777 is incomplete and misleading. Contrary to Complaint Counsel's position, Toth explained {

}
(Toth, Tr. 1607, *in camera*). {

} (Toth, Tr. 1607, *in camera*). In approving the acquisition, {

} (Toth, Tr. 1607-08, *in camera*).

Moreover, the evidence demonstrates that IGP had become increasingly concerned about Microporous' financial viability. (RFOF 398). This finding ignores evidence showing that IGP

pulled back on Microporous' expansion plans, mandating that Microporous "avoid competition with larger, entrenched competitors with products that are not differentiated; this is particularly important when such strategies require large capital commitments." (RFOF 390). The complete evidence demonstrates that IGP questioned a pure-PE growth strategy and felt that it was "just not practical to grow in every market," (RFOF 406) and that the Board did not envision growth by Microporous in every application. (RFOF 386-409). {

} (RFOF 391). Thus, the expansion plans listed in the "Underlying Assumptions" of the term sheet did not occur.

For a further response to this finding, Respondent incorporates its replies to finding numbers 749-768.

778. {
4892, *in camera*). {
} (PX0742 at 001, Graff, Tr.
} (PX0742 at 003, 007; Graff, Tr. 4892, *in camera*).

Response to Finding No. 778:

Complaint Counsel's finding number 778 is inaccurate and misleading. Contrary to Complaint Counsel's assertion, PX0742 indicates that {

} (PX0742, *in camera*). {

} (PX0742, *in camera*). For these reasons, this finding should be rejected.

Moreover, Toth explained {

} (Toth, Tr. 1607,

in camera). {

} (Toth, Tr. 1607, *in camera*). In approving the acquisition, {

} (Toth, Tr. 1607-08, *in*

camera).

779. {

}

(PX0742 at 001, *in camera*).

Response to Finding No. 779:

Complaint Counsel's finding number 779 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 749-768, 775, 777 and 778. Additionally, Toth explained {

} (Toth, Tr. 1607,

in camera). {

} (Toth, Tr. 1607, *in camera*). In approving the acquisition, {

} (Toth, Tr. 1607-08, *in*

camera).

3. MPLP recognized that Daramic's offer to acquire it eliminated competition

780. On August 9, 2007, Eric Heglie and Phillip Bryson met "to have an initial discussion . . . concerning a potential acquisition." (PX1104 at 002). While Mr. Bryson is in-house counsel for Polypore, he described his function to Microporous "as probably less than (sic) 50% on legal duties and the rest as part of the 'business.'" (PX1104 at 001; *see also* PX1105 at 001 ("Phillip [Bryson] gave me his background. He is their general counsel

but also leads their corporate development work.”)). With regard to Mr. Bryson’s role on the Microporous acquisition, Mr. Gilchrist reported to Jeff Webb, an IGP member of the Microporous board, that Microporous might consider a response “to Bryson’s not so veiled ‘threats’ about the coming ‘war’ between us if they don’t acquire MPLP.” (PX1112 at 002).

Response to Finding No. 780:

Complaint Counsel’s finding number 780 is irrelevant, incomplete and misleading. Furthermore, this finding is based on hearsay and should be disregarded. The evidence shows that Daramic’s interest in acquiring Microporous was rekindled during the course of settlement discussions between the parties in August 2007 related to a pending arbitration proceeding. (RFOF 267; Roe, Tr. 1758; Graff, Tr. 4854-55). The arbitration involved a contractual dispute between Daramic and Microporous concerning equipment and technology for a PE line which was purchased by Microporous from Jungfer in 2001. (RFOF 267; Roe, Tr. 1758; PX2237). Roe, Hauswald, and Daramic’s in-house legal counsel attended on behalf of Daramic, and Trevathan, Gilchrist, and Microporous’ outside legal counsel attended on behalf of Microporous. (RFOF 267; Roe, Tr. 1758). A variety of settlement options were discussed at the meeting, including: (1) Daramic selling its industrial business to Microporous; (2) Daramic acquiring Microporous; and, (3) Microporous acquiring Daramic. (RFOF 267; Trevathan, Tr. 3615). During the course of settlement discussions, Daramic never conditioned the sale of its industrial business, or any other settlement options, on the promise by Microporous to stay out of the SLI business. (RFOF 267; Roe, Tr. 1759).

Furthermore, this finding omits the threat by Microporous set forth in PX1112 to file suit against Daramic in Europe. (PX1112 at 002). The evidence raises significant credibility questions about Gilchrist’s testimony in this proceeding (RFOF 396, 402, 403, 409, 581), and Gilchrist’s testimony on this issue should be disregarded.

781. In preparation for the meeting between Mr. Heglie and Mr. Bryson, Mike Gilchrist emailed Mr. Heglie suggesting that Mr. Heglie stress that MPLP “be valued at what its

immediate significant growth opportunities offer;” and that “IGP [is] committed to growth and infusing necessary capital for MPLP to execute its growth plans.” (PX1104 at 001). In addition, Mr. Gilchrist suggested that Mr. Heglie stress the following:

Any offer must take into account the significant strategic implications of what Daramic gains by owning MPLP:

- Total control of deep-cycle markets (no competitor)
 - Total control of industrial markets (no competitor)
 - Regains complete upper hand in automotive with no new competitor being introduced
 - Control of CellForce
 - Control of new developments in our chemistry

(PX1104 at 001; PX1106 at 040).

Response to Finding No. 781:

Complaint Counsel’s finding number 781 is incomplete, misleading and unreliable. First, the evidence in this case raises significant credibility questions about Gilchrist’s testimony in this proceeding (RFOF 396, 402, 403, 409, 581), and Gilchrist’s testimony on this issue should be disregarded.

The evidence demonstrates that as a result of the ongoing discussions at the Microporous Board level, Gilchrist and Trevathan began to communicate among themselves about what they later referred to as “our ruse” and “smokescreen.” (RFOF 411; RX00283 and RX00402). Trevathan and Gilchrist had decided that Microporous needed to have “parallel stories” on parallel paths to tell Microporous employees, Microporous suppliers and Daramic, with whom Microporous had not revealed any change in plans. (RFOF 411; Trevathan, Tr. 3621, 3637).

The evidence further shows that some management members had a financial interest in Microporous: they “owned a good chunk of the company and they also owned options in the company which had certain exercise prices. (RFOF 413; PX2300 (Heglie, IHT at 114)). If the company was sold to Daramic, Microporous would not reap the financial rewards of those options. (RFOF 413; PX2300 (Heglie, IHT at 114)). Microporous management, therefore, was hesitant about the looming merger with Daramic, and if sold to Daramic, wanted to maximize the

value of the company. (RFOF 413; PX2300 (Heglie, IHT at 114-15); Gilchrist, Tr. 471, *in camera*).

As part of their ruse, Microporous Management became intent on securing a renewal of the expired MOU with Exide. (RFOF 414; McDonald, Tr. 3841-42; PX1052; Gilchrist, Tr. 448, *in camera*). Microporous was concerned that Daramic would see through Microporous' "smoke screen," and in a November 27, 2007 email, Trevathan stated "the greatest flaw we have right now in our ruse is that the Exide MOU has expired and we have no evidence of progress on a contract." (RFOF 414; RX00402 at 001). {

}

(RFOF 414; Gilchrist, Tr. 471-72, 476, *in camera*).

Based on the actions of Microporous management, the statements made by Gilchrist in PX1104 are an example of management continuing their "ruse" in an effort to maximize the value of Microporous. For these reasons, this finding is unreliable and should be rejected.

Moreover, the evidence demonstrates that Polypore purchased Microporous {

} (Toth, Tr. 1589-90, *in camera*). The structure of the sales price confirms the fact that neither IGP nor Polypore believed that Microporous held "significant growth opportunities."

782. Mr. Gilchrist's email to Mr. Heglie concluded that Daramic's attempt to purchase Microporous "is a 'strategic' play on Daramic's part and not based on current financials but the prospects of taking Daramic's most dangerous competitor out of play." (PX1104 at 001).

Response to Finding No. 782:

Complaint Counsel's finding number 782 is misleading. For its response to this finding, Respondent incorporates its reply to finding number 781. In addition, this finding ignores

evidence concerning Daramic's true rationale for the acquisition of Microporous, including diversification of its product line, gaining access to Microporous' rubber technology and entering the niche rubber market. (RFOF 108, 262; Hauswald, Tr. 897-899, *in camera*; Toth, Tr. 1422-23, 1504, 1551-52, 1554-55; Graff, Tr. 4857-58; Graff, Tr. 4861, 4877, *in camera*; RX01097, *in camera*).

783. On the evening of August 9, 2007, the same day that he met with Mr. Bryson, Mr. Heglie documented the conversation the two had that day, "while fresh in [his] mind." (PX1105 at 001). In an email to Mr. Gilchrist, Mr. Heglie reported that Polypore's Phillip Bryson stated that Daramic management saw "benefits in pricing/market share consolidation. . . ." (PX1105 at 001). Mr. Heglie further reported that Mr. Bryson said that "one of their strategic goals is to get bigger in golf cart market, and that we can either battle it out or combine to achieve that." (PX1105 at 001).

Response to Finding No. 783:

Complaint Counsel's finding number 783 is incomplete, misleading and based on unreliable hearsay, and it should be disregarded. For its response to this finding, Respondent incorporates its replies to finding numbers 781 and 782.

784. Daramic was well aware of Microporous' expansion plan during the initial discussions concerning a potential acquisition. In August 9, 2007 email reporting on his conversation with Mr. Bryson about a possible acquisition of Microporous, Mr. Heglie wrote that he "told him [Mr. Bryson] that we were in the early stages of our investment, had partnered with management and were not looking to divest, and are in the midst of executing on our own multi-pronged expansion plan for which we have plenty of capital and support." (PX1105 at 002).

Response to Finding No. 784:

Complaint Counsel's finding number 784 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 781 and 782. In addition, this finding ignores evidence demonstrating that {

} (Roe, Tr. 1781-82, *in camera*; PX0922 (Roe, IHT at 362-63), *in camera*). It further ignores evidence demonstrating that IGP became increasingly concerned about Microporous' financial viability. (RFOF 398). It also ignores evidence

showing that IGP pulled back on Microporous' expansion plans, mandating that Microporous "avoid competition with larger, entrenched competitors with products that are not differentiated; this is particularly important when such strategies require large capital commitments." (RFOF 390). The complete evidence demonstrates that IGP questioned a pure-PE growth strategy and felt that it was "just not practical to grow in every market," (RFOF 406) and that the Board did not envision growth by Microporous in every application. (RFOF 386-409). {

} (RFOF 391).

785. In preparing for a follow-up meeting scheduled for August 21, 2007 between Michael Gilchrist and Daramic, IGP and Microporous spent the weekend of August 18 and 19, working on information sheets for Mr. Gilchrist to present verbally to Daramic. (PX0069; PX1108; PX1109). According to Mr. Heglie, the theme of the discussion "obviously being that in 4-5 years we will be competing more head-on with Daramic in their key markets and will be a much more diversified business than we are today." (PX0069 at 001). Moreover, Mr. Heglie believed that at the meeting Microporous should

play up our differentiated technology via CellForce and its derivatives. I think if we can make Daramic feel that we are not only going to attack their markets, but also do it with proprietary technology that has significant benefits over their existing products, it will make our case that much stronger.

(PX1108 at 001).

Response to Finding No. 785:

Complaint Counsel's finding number 785 is incomplete and misleading. For the reasons set forth in Respondent's replies to finding numbers 781, 782 and 784, this finding should be rejected. Respondent further notes that Heglie stressed Microporous' "proprietary technology that has significant benefits over their existing products," which Polypore's CEO and Board Chairman also stressed as a reason for the acquisition. (Toth, Tr. 1422-23, 1504, 1551-52, 1554-55, 1564; Graff, Tr. 4857-58, 4877, *in camera*).

786. The August 20, 2007 revised information sheet that Microporous was to share verbally with Daramic included the **“Current Situation**: MPLP is spending capital to execute a three-phase capacity expansion plan which includes facility construction and five (5) new CellForce and/or polyethylene process lines.” (PX1109 at 002 (emphasis in original)). The information sheet also included **“End of Year 2010 Financial Estimate**: Incremental estimated EBITDA growth from present to End-of-Year 2010: \$13,500,000. Of the \$13,500,000 in incremental growth, approximately 90% will be replacing Daramic existing business.” (PX1109 at 002 (emphasis in original)). The incremental growth that Microporous is expecting by 2010 tracks closely to the { } of EBITDA loss in 2010 that Daramic reported to the Polypore Board of Directors as the impact on its long range plan if it did not acquire Microporous. (PX0203 at 086, *in camera*).

Response to Finding No. 786:

Complaint Counsel’s finding number 786 is incomplete, misleading and purely speculative, and it should be disregarded. For its response to this finding, Respondent incorporates its replies to finding numbers 781, 782 and 784. It is speculative and unreliable to set forth as a “fact” Microporous’ projected end-of-year 2010 financial estimates. The true facts in this case show that since the fall of 2008, the economy in United States and the economies throughout the rest of the world have been crippled by a severe economic recession. (RFOF 423; Gaugl, Tr. 4569; Riney, Tr. 4969-70, *in camera*; Thuet, Tr. 4328). For this reason, financial projections for 2010 are unreliable and cannot be considered as “fact.”

Moreover, the evidence demonstrates that {

} (RFOF 296; Riney, Tr.

4960, *in camera*). {

} (RFOF 296; Riney, Tr. 4960, *in camera*).

{

} (RFOF 296; Riney, Tr. 4960, *in camera*).

{

} (RFOF 297; Riney, Tr. 4961, *in camera*). {

} (RFOF 297; Riney, Tr. 4961, *in camera*). {

} (RFOF 298;
Riney, Tr. 4961, *in camera*; RX00697 at 9, *in camera*). {

} (RFOF 298; Riney, Tr. 4961, *in camera*).

{

} (RFOF 299;

Riney, Tr. 4961, *in camera*). {

} (RFOF 299;

Riney, Tr. 4961, *in camera*).

{

} (RFOF 301; Riney, Tr. 4962, *in*

camera). {

} (RFOF 301; Riney, Tr. 4962-4963, *in camera*).

{

} (RFOF 301; Riney, Tr. 4969, *in*

camera).

None of the evidence in this case supports the expansion plans or financial estimates set forth in PX1109, and this finding should be rejected.

787. The August 20, 2007 revised information sheet also included **“Strategic Implications to be Considered:**

- Daramic will have the benefit of existing differentiated technologies (Flex-Sil, Ace-Sil, and CellForce).
- Daramic will have complete control of 100% of the deep-cycle markets.
- Daramic will have complete control of >97% of the Industrial markets for motive power.
- Daramic will have complete control of 100% of the industrial flooded reserve power markets.
- Daramic will dissolve the threat of MPLP in automotive SLI as no new competitor will be introduced into the market with a secured position.”

(PX1109 at 003 (emphasis in original)).

Response to Finding No. 787:

Complaint Counsel’s finding number 787 is incomplete and misleading. For the reasons set forth in Respondent’s replies to finding numbers 781, 782, 784 and 786, this finding should be rejected.

- i) MPLP and Daramic found assignment of contracts irrelevant because customers had no options

788. In an August 2007 email from Mr. Gilchrist to Mr. Heglie regarding EnerSys’s reaction to a potential acquisition of Microporous by Daramic, Mr. Gilchrist wrote:

EnerSys, as well as others, will be frustrated by this acquisition. Our contract with EnerSys allows only for the fact that EnerSys cannot be compelled to assign the contract to a competitor buying MPLP. The reality is that this means basically nothing as there are not other choices from which to source industrial separators but MPLP and Daramic – Amer-Sil is not an option. The reality is that everyone would be struck with Daramic – like it or not. This lack of assignment does not diminish our value to Daramic.

(PX1104 at 001).

Response to Finding No. 788:

Complaint Counsel’s finding number 788 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 781, 782, 784 and 786. In addition, this finding ignores evidence demonstrating that {

} (RFOF 690-93, 968, 970, 991, 1026, *in camera*).

789. In late January 2008, with the closing for the acquisition just a month away, IGP was concerned that it needed to make assignments of the Trojan and Daramic contracts post-closing issues, because it feared that Daramic's general counsel, Phillip Bryson, would refuse to close without knowing what the customers would say. (PX1125 at 001). Jeff Webb of IGP and Mike Gilchrist agreed that Mr. Gilchrist should broach the subject with Pierre Hauswald because he "will best understand the practical business issue of both EnerSys and Trojan having nowhere else to go and will probably be the most agreeable to dealing with assignments after closing." (PX1125 at 001). Mr. Hauswald agreed with this assessment. (PX0079).

Response to Finding No. 789:

Complaint Counsel's finding number 789 is misleading and unreliable. It is based on hearsay. The evidence in this case raises significant credibility questions about Gilchrist's testimony in this proceeding (RFOF 396, 402, 403, 409, 581), and Gilchrist's testimony on this issue should be disregarded.

4. The acquisition resulted in anticompetitive price increases

790. "Daramic's acquisition of Microporous led to price increases." (Simpson, Tr. 3165).

Response to Finding No. 790:

Complaint Counsel's finding number 817 is false and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Moreover, {

} (RFOF 1255; Simpson, Tr. 3369-70, *in camera*). {

} (RFOF 1255; Simpson, Tr. 3370, *in camera*). {

} (RFOF 1255; Simpson, Tr. 3218, *in camera*). {

} (RFOF 1255; RX00631, *in camera*; RX00677, *in camera*; RX01119, *in camera*; RX01323, *in camera*; RX01604, *in camera*; RX01605, *in camera*; and PX01450, *in camera*).

{

} (RFOF 1258;

Seibert, Tr. 4189-91, *in camera*). {

} (RFOF 1258; Seibert, Tr. 4190-91, *in camera*).

{

} (RFOF 1259; PX0789, *in camera*; Simpson, Tr. 3373, *in*

camera). {

}

(RFOF 1259; Kahwaty, Tr. 5205-07, *in camera*). {

}

(RFOF 1259; Kahwaty, Tr. 5207, *in camera*).

Based on the evidence, Simpson's opinion regarding Daramic's price increases is unreliable, and this finding should be disregarded.

791. "The most straightforward method of looking to see whether an acquisition or a merger led to higher prices is to compare pricing before and pricing after the acquisition. . . . [T]here are other factors that also affect price, and one has to control for these factors . . ." (Simpson, Tr. 3209-3210, *in camera*).

Response to Finding No. 791:

Complaint Counsel's finding number 791 is misleading and unreliable. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and his testimony should therefore be disregarded. For its response to this finding, Respondent incorporates its reply to finding number 790. Additionally, in comparing prices before and after the acquisition, Simpson's analysis fails to account for the extraordinary production cost shocks experienced in 2008 (RFOF 1261-70) or the fundamental fact that

Daramic's price increases could not be enforced, but had to be negotiated with customers. (See Response to Finding No. 807).

792. The empirical industrial organization literature uses one of two approaches to evaluate post merger price increases. (Simpson, Tr. 3210, *in camera*). While econometrics is often used to implement these two approaches, the analysis here did not require the use of econometrics. (Simpson, Tr. 3366-3367, *in camera*). The first approach examines the residual price change after accounting for the other factors that might affect market price. (Simpson, Tr. 3210, *in camera*). The second approach, called the difference-in-differences approach, uses prices in a market that is free of the effects of the acquisition but subject to the same supply and demand shocks as the market where the acquisition occurred to control for other factors that might affect price in the acquisition market. (Simpson, Tr. 3210-3211, *in camera*).

Response to Finding No. 792:

Complaint Counsel's finding number 792 is misleading, unreliable, and is certainly not factual evidence. For its response to this finding, Respondent incorporates its reply to finding number 790. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and his testimony should therefore be disregarded. Second, {

} (RFOF 1373; Kahwaty, Tr. 5187-88, *in*

camera). Additionally, {

} (RFOF 1263;

Simpson, Tr. 3380-81, *in camera*). As Simpson testified:

{

}

(Simpson, Tr. 3380-81, *in camera*).

Yet, Simpson's control group, which consists of three customers that entered into contracts with Daramic in late 2007 or early 2008, in no way accounts for the extraordinary cost shocks experienced in 2008. (RFOF 1264). {

} (RFOF 1265; Simpson, Tr. 3383-84, *in camera*).

{

} (RFOF 1266; Simpson, Tr. 3382, *in camera*). Based on this fact alone, it is apparent that Simpson violated the very requirement that he testified must be followed of accounting for cost shocks. There is no way that a contract with price adjustments set to 0% for 2009 could in any way account for and tell us anything about how pricing would have changed in 2009 had the acquisition not occurred.

{

3378-79, *in camera*). {
 } (RFOF 1268; Simpson, Tr. 3379-80, 3387-88, *in camera*). {
 } (RFOF 1268; Simpson, Tr. 3388, *in camera*). {
 } (RFOF 1268; Simpson, Tr. 3388, *in camera*). {
 } (RFOF 1269; Simpson, Tr. 3473, *in camera*).

Based on this evidence, Simpson's opinion regarding Daramic's price increases is unreliable, and this finding should be disregarded.

793. Dr. Simpson testified that four factors could lead to higher prices in a market: increasing demand for the product, changes in productivity, increasing input costs, and increasing market power. (Simpson, Tr. 3212, *in camera*). Dr. Simpson noted {
 }.
 (Simpson, Tr. 3212-3213, *in camera*). Dr. Simpson also noted that {
 }. (Simpson, Tr. 3213, *in camera*).

Response to Finding No. 793:

Complaint Counsel's finding number 793 is inaccurate and misleading. It is unreliable and should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790, 791 and 792.

794. In Dr. Simpson's opinion, {
 }. (Simpson, Tr. 3213-3220, *in camera*). Moreover, {

4511, *in camera*).

}. (Weerts, Tr. 4510-

Response to Finding No. 794:

Complaint Counsel's finding number 793 is inaccurate and misleading. It is unreliable and should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790, 791 and 792. Moreover, Weerts testified that {

} (Weerts, Tr.

4462-63, *in camera*). {

} (RFOF 257; Seibert, 4191-92,

in camera; RX00542, *in camera*; RX00927 at 014-16, *in camera*) {

}

795. For example, Daramic's raw material and energy inputs are based on crude oil. (PX2068 at 001). Several price indices can be used to estimate changes in the price of these raw material and energy inputs. (PX2068 at 001). The U.S. Bureau of Labor Statistics publishes price indices for crude petroleum – domestic production and fuels and related products and power on its website. (Simpson, Tr. 3215-3216, 3217, *in camera*). {

} (Simpson, Tr. 3217, *in camera*).

Response to Finding No. 795:

Complaint Counsel's finding number 795 is inaccurate and misleading. It is unreliable and should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790, 791 and 792. Significantly, {

} (Seibert, Tr. 4189-91, *in camera*). {

} (Seibert, Tr. 4190-91, *in camera*).

Following this approach, a drop in petroleum after August 2008 would have no bearing and would be irrelevant to the question of whether pricing sought in August of 2008 was cost justified. {

} (Kahwaty, Tr. 5203-08, *in camera*). Simpson's consideration of general costs following the relevant period when pricing was set demonstrates again that Simpson's methodology is flawed and that Simpson is attempting to find facts to buttress his opinion rather than basing his opinion on the relevant facts.

796. The price index for crude petroleum – domestic production was 252.6 in November 2007; this price index was 150.6 in November 2008. (PX0033 at 045 (Simpson Report), *in camera*). Dr. Simpson concluded that {
}. (Simpson, Tr. 3218, *in camera*).

Response to Finding No. 796:

Complaint Counsel's finding number 796 is incomplete and misleading. It is unreliable and should be rejected. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Second, Complaint Counsel cites to Dr. Simpson's Expert Report which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing Tr. at 20). Dr. Simpson's report is not a "fact" and Complaint Counsel's use of his testimony and report as a finding of "fact" is improper and should be disregarded.

For a further response to this finding, Respondent incorporates its replies to finding numbers 790, 791, 792 and 795.

797. Dr. Simpson also {
}. (Simpson, Tr. 3211, *in camera*). Dr. Simpson explained that {
}. (Simpson, Tr. 3378, *in camera*).

Response to Finding No. 797:

Complaint Counsel's finding number 797 is inaccurate and misleading. It is unreliable and Dr. Simpson's opinion in this regard has been discredited and should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790, 791, 792 and 795.

798. The Difference in Difference methodology is an empirical approach. (Simpson, Tr. 3473, *in camera*). The court in Evanston/Northwestern Hospital accepted the Difference in Difference methodology Dr. Simpson employed in this case. (Simpson, Tr. 3473, *in camera*).

Response to Finding No. 798:

Complaint Counsel's finding number 798 is inaccurate and misleading. It is unreliable and should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790, 791, 792 and 795. Furthermore, it is completely inappropriate for Complaint Counsel to cite as a "fact" that the court in another case allegedly accepted Simpson's difference in difference methodology in that other case. Such a statement is irrelevant to the determination of this case. Moreover, Complaint Counsel have submitted nothing to demonstrate that Dr. Simpson used the exact same methodology or committed the same egregious errors in that case that he did here."

799. Dr. Simpson explained that {

} (Simpson, Tr. 3221, *in camera*). Daramic was concerned that Crown Battery, Douglas Battery, and East Penn Battery would shift their purchases to Microporous. (Roe, Tr. 1287-1289; PX0258 at 002). To prevent this, in the Fall of 2007, Daramic offered these firms long-term contracts under its MP plan that limited their price increases in 2009. (Roe, Tr. 1293; PX0258 at 001). Dr. Simpson stated that {

}. (Simpson, Tr. 3221-3222, *in camera*; PX0033 at 025, *in camera*).

Response to Finding No. 799:

Complaint Counsel's finding number 799 is inaccurate and misleading. It is entirely speculative and unreliable, and it should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 725-47, 790-92 and 795. Significantly, this finding ignores {

} (RFOF 814; Balcerzak, Tr. 4106-08, *in camera*; RFOF 828, 832, 838; Douglas, Tr. 4063, 4067-68, *in camera*; RFOF 781; Leister, Tr. 4019). Moreover, the three contracts that form his control group do not account for cost shocks that occurred in 2008. Therefore, Dr. Simpson's DID approach is wholly unreliable and should be disregarded.

800. Dr. Simpson noted that {

} (Simpson, Tr. 3465-3466, *in camera*). Dr. Simpson also noted that {

} (Simpson, Tr. 3464, *in camera*). Dr. Simpson explained that {
}. (Simpson, Tr. 3464, *in camera*; PX0033 at 024, *in camera*).

Response to Finding No. 800:

Complaint Counsel's finding number 800 is inaccurate and misleading. It is speculative and unreliable, and completely ignores the large cost shocks in 2008 and therefore it should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 725-47, 790-92 and 795.

801. Dr. Simpson testified {

} (Simpson, Tr. 3221-3222, *in camera*). {
} (RX00945 at 097, *in camera*, (Roe, Tr. 1352-53, *in camera*)).

Daramic increased the price for PE battery separators to East Penn by 5 percent in 2009. (Roe, Tr. 1222).

Response to Finding No. 801:

Complaint Counsel's finding number 801 is inaccurate and misleading. It is entirely speculative and unreliable, and it should be rejected. For its response to this finding, Respondent incorporates its replies to finding numbers 790-92, 795, 799 and 800.

802. Other firms, which were not offered long-term contracts under the { }, received much larger price increases. {

{ (RX00945 at 091, *in camera*;
PX0950 at 015, 071-072, *in camera*). {

{ (RX00945 at 091,
in camera). {

{ (Gillespie, Tr. 3000, *in camera*). Trojan, which had a contract with Microporous,
{ (Godber, Tr. 236-38, *in camera*; PX0950 at 014, *in camera*).

Response to Finding No. 802:

Complaint Counsel's finding number 802 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 725-47, 790-92, 795 and 799. Moreover, Complaint Counsel cites to Dr. Kahwaty's Expert Report (RX00945) which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing Tr. at 20). Dr. Kahwaty's report is not a "fact" and Complaint Counsel's use of his report as a finding of "fact" is improper and should be disregarded.

Furthermore, this finding ignores the fact that {

{ (RFOF 759-61;

Riney, Tr. 4947-48, *in camera*). In fact, {

{ (RFOF 759; Seibert, Tr. 4205-08, *in camera*; PX2115, *in camera*). {

} (RFOF 759;

Godber, Tr. 245, *in camera*). {

} (RFOF 759;

Godber, Tr. 246, *in camera*). As a further concession to {

} (PX0950

at 014, *in camera*).

In addition, { }

(Riney, Tr. 4948, *in camera*). Bulldog did not protest Daramic's 2009 price adjustment because Bulldog understood Daramic was simply passing along its justified production cost increases. (RFOF 919; Benjamin, Tr. 3553-54).

803. { } (Gillespie, Tr. 3001-3002, *in camera*; see e.g., PX2052 at 003, *in camera*).

Response to Finding No. 803:

Complaint Counsel's finding number 803 is inaccurate and misleading. First, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded. Moreover, {

} (RFOF 556; Gillespie, Tr. 3073, 3101-03, *in camera*;

RX00537, *in camera*).

In each case, {

} (RFOF 557;

RX00019, *in camera*; Gillespie, 3101-04, *in camera*; RX00927 at 005-16, *in camera*). {

} (RFOF 557;

RX00019, *in camera*; Gillespie, Tr. 3101-04, *in camera*).

804. Subsequent to Daramic's acquisition of MPLP, Daramic has {
} (Gillespie, Tr. 3002, *in camera*).

Response to Finding No. 804:

Complaint Counsel's finding number 804 is vague, inaccurate and misleading. Respondent incorporates its replies to finding numbers 802 and 803 as a response to this finding. Furthermore, {

} (RFOF 560; Gillespie, Tr. 3120-21, *in camera*;

PX1097, *in camera*; RX00652; RX00263, *in camera*; RX00661, *in camera*).

{

} (RFOF 256; Riney, Tr. 4949, *in camera*; Seibert, Tr. 4193, *in camera*; RX00927 at 005-13, *in camera*). {

} (RFOF 256; Riney, Tr. 4949, *in camera*; RX00927 at 500-13, *in camera*). {

} (RFOF 256; Riney, Tr. 4951, *in camera*).

{

} (RFOF 256; Riney, Tr.

4950, *in camera*). {

} (RFOF 1389; Kahwaty, Tr. 5230-5231, *in camera*).

After the energy surcharge was rescinded, 2009 price adjustments were implemented for Exide. {

} (Riney, Tr. 4947-48, *in camera*).

In addition, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

805. Daramic's post-acquisition supply proposals to Exide are {
(Gillespie, Tr. 3047, *in camera*). Daramic's pricing proposals have {
} (Gillespie, Tr. 3047, *in camera*). Exide's analysis shows
that it will {
} (Gillespie, Tr. 3047, *in camera*).

Response to Finding No. 805:

Complaint Counsel's finding number 805 is inaccurate and misleading. First, the evidence in this case raises significant credibility questions about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

Moreover, the evidence demonstrates that {

} (PX2296 at

002, *in camera*; Roe, Tr. 1779-81, *in camera*). {

} (PX0261 at 001-02, *in*

camera; Roe, Tr. 1775-76, *in camera*). Despite Daramic's efforts, {

} (Roe, Tr. 1776, 1780-81, *in camera*).

Furthermore, one of the reasons why Exide may pay more for its separator supply in 2010 is because it will no longer be able to take advantage of the credit it receives for purchasing HD under the current contract with Daramic. The evidence in this case demonstrates that {

} (RPT Brief at 13; RFOF 535-39;

PX0442; RX00677). In 2008, the purchase of {

} (RPT Brief at 13; RX00677, *in camera*; PX1040 at 002, *in camera*; PX1063, *in camera*). When the credit is included in the price comparison for 2008, the adjusted selling price for {

} (RPT Brief at 13; RX00677, *in camera*; PX0489).

806. {

} (Seibert, Tr. 4285, 4299, *in camera*). {

Tr. 4285, *in camera*; RX00542).

} (Seibert,

Response to Finding No. 806:

Complaint Counsel's finding number 806 is incomplete and misleading. During trial, Mr. Seibert {

} (Seibert, Tr. 4285,

in camera). {

} (RFOF 256; Riney, Tr. 4950, *in camera*).

Furthermore, this finding ignores evidence that {

} (RFOF 249; Riney, Tr. 4941-42, *in*

camera). {

} (RFOF 249; Riney, Tr. 4952, *in camera*).

Additionally, this finding omits evidence showing that {

} (RFOF 250; Riney, Tr. 4954, *in camera*).

807. {

} (PX0704 at 010, *in camera*).

Response to Finding No. 807:

Complaint Counsel's finding number 807 is inaccurate and misleading. For its response to this finding, Respondent incorporates its reply to finding number 806. This finding ignores evidence demonstrating that {

} (RFOF 249-253, 257; Seibert, Tr. 4194-95, *in camera*). {

} (RFOF 251; Riney, Tr. 4945, *in camera*; RX00927 at

014-16; *in camera*). {

} (RFOF

251; Riney, Tr. 4945, *in camera*; RX00927 at 014-16; *in camera*). {

} (RFOF 251; Riney, Tr. 4945, *in*

camera; RX00927 at 014-16, *in camera*).

808. Mr. Hauswald sent an email to Mr. McDonald explaining his frustrations with the Daramic organization {

} (McDonald, Tr. 3881-3882, *in camera*; PX0617 at 001-002, *in camera*). Mr. McDonald emailed a response to Mr. Hauswald ideas for improving earnings {

} (PX0617; McDonald, Tr. 3885-3886 *in camera*).

Response to Finding No. 808:

Complaint Counsel's finding number 808 is incomplete and misleading. It omits {

} (McDonald, Tr. 3893-94, *in camera*). This finding further ignores evidence showing that following the acquisition, {

}
(RX00537, *in camera*; RX01272, *in camera*).

For a further response to this finding, Respondent incorporates its reply to finding number 804.

O. Daramic Used its Enhanced Market Power to Extract Monopoly Rents in 2008 and 2009

809. {
(Seibert, Tr. 4301, *in camera*). {
Tr. 4284, *in camera*). } (Seibert,

Response to Finding No. 809:

Complaint Counsel's finding number 809 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 806 and 807. In addition, this finding ignores evidence showing that {

} (RFOF 250; Riney, Tr. 4943-44, *in camera*). Significantly, {

} (RFOF 250; Riney, Tr. 4944, *in camera*). {

}
(RFOF 249-53, 257; Seibert, Tr. 4194-95, *in camera*).

Moreover, {
Tr. 4945, *in camera*; RX00927 at 014-16; *in camera*). {
} (RFOF 251; Riney,

} (RFOF 251; Riney, Tr. 4945, *in camera*; RX00927 at 014-16, *in camera*). {

} (RFOF 255; Riney, Tr. 4928, *in camera*). {

} (RFOF 255; Riney, Tr. 4931, *in camera*).

810. {
} (PX0950 at 004-013, *in camera*; Riney, Tr. 4949, *in camera*, 4951, *in camera*). {
} (PX0950 at 013, *in camera*). {

} (PX0950 at 014, *in camera*; PX0371). The proposed price increases by customer range from {
} (PX0950 at 014-5, *in camera*).

Response to Finding No. 810:

Complaint Counsel's finding number 810 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 802-804, 806, 807 and 809. Furthermore, this finding omits evidence demonstrating that Microporous implemented a rubber pass through to its customers prior to the acquisition. In August of 2007, Microporous not only raised prices but also announced a rubber surcharge component for future pricing, which would become effective on January 1, 2008 (prior to the acquisition). (RX00084; McDonald, Tr. 3805-07). The rubber surcharge sought to offset the volatile nature of the price of rubber at the time. (McDonald, Tr. 3806). In fact, the complete statement in PX0950 (which Complaint Counsel did not provide) indicates that {

} (PX0950 at 013, *in camera*,

emphasis added). Additionally, {

} (RFOF 257;

Seibert, 4191-92, *in camera*; RX00542, *in camera*; RX00927 at 14-16, *in camera*).

811. The final price increases associated with the Fall 2008 proposed price increases vary by customer; for instance, Daramic did not increase prices for PE battery separators to {
} (RX00945 at 097, *in camera*; (Roe, Tr. 1352-53). Daramic increased the price for PE battery separators to East Penn by 5 percent. (Roe, Tr. 1222).

Response to Finding No. 811:

Complaint Counsel's finding number 811 is incomplete and misleading. It omits evidence showing that {

} (RFOF 244; Riney, Tr. 4956, *in camera*). {

} (RFOF 244; Riney, Tr. 4956, *in camera*). {

}

(RFOF 244; Riney, Tr. 4956, *in camera*). {

} (RFOF 244; Riney, Tr. 4956, *in camera*).

{

} (RFOF 245; Riney, Tr. 4958-59, *in camera*). {

} (RFOF 245; Riney, Tr. 4958-59, *in camera*; RX01401, *in camera*).

Moreover, {

} (RFOF 246;

Riney, Tr. 4942, *in camera*; RX00960, *in camera*; RX00994, *in camera*; RX00993, *in camera*; RX01519, *in camera*; RX00983, *in camera*; RX00976, *in camera*; RX00988, *in camera*).

{

} (RFOF 246; Riney, Tr. 4943, *in camera*). {

} (RFOF 246; Riney, Tr. 4943, *in camera*).

812. Daramic increased the price of battery separators to {

} (RX00945 at 091, *in camera*). {

} (PX0950 at 071-072, *in camera*).

Response to Finding No. 812:

Complaint Counsel's finding number 812 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 802, 806, 809 and 811. Moreover, Complaint Counsel cites to Dr. Kahwaty's Expert Report (RX00945) which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing at 20). Dr. Kahwaty's report is not a "fact" and Complaint Counsel's use of his report as a finding of "fact" is improper and should be disregarded.

813. Daramic increased the price of both PE battery separators and CellForce battery separators to { } (RX00945 at 091, *in camera*). C&D purchases battery separators from Daramic under a contract that took effect { } (PX0950 at 71, *in camera*).

Response to Finding No. 813:

Complaint Counsel's finding number 812 is incomplete and misleading. First, Complaint Counsel cites to Dr. Kahwaty's Expert Report (RX00945) which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing Tr. at 20). Dr. Kahwaty's report is not a "fact" and Complaint Counsel's use of his report as a finding of "fact" is improper and should be disregarded.

Moreover, this finding ignores evidence demonstrating that {

} (Riney, Tr. 4948, *in camera*). For a further

response, Respondent incorporates its replies to finding numbers 802, 806, 809 and 811.

814. Exide purchases battery separators from Daramic under a contract that took effect {
} (PX0950 at 72, *in camera*). Daramic
increased the price of PE battery separators to Exide {
} (RX00945 at 091,
in camera; (Gillespie, Tr. 3000, *in camera*)). Daramic increased the price of {
} (Gillespie, Tr. 3000, *in camera*).

Response to Finding No. 814:

Complaint Counsel's finding number 814 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 802-04, 806, 809 and 811.

Significantly, this finding ignores the fact that {

} (Riney, Tr. 4947-48, *in camera*).

815. In 2008, Daramic increased the price of CellForce battery separators to Bulldog by 10 percent. (Benjamin, Tr. 3521-3522).

Response to Finding No. 815

Complaint Counsel's finding number 815 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 802, 806, 809 and 811. In addition, Bulldog did not protest Daramic's 2009 price adjustment because Bulldog understood Daramic was simply passing along its justified production cost increases. (RFOF 919; Benjamin, Tr. 3553-54).

816. In October of 2008, Daramic announced price increases to {
} (Godber, Tr. 233, *in camera*). Daramic later
levied a {

} (Godber, Tr. 236-237, *in camera*). {
} (Godber, Tr. 238, *in camera*).

Compared to the pricing in the contract that Trojan had been negotiating with
Microporous pre-acquisition, {
(Godber, Tr. 239, *in camera*). }

Response to Finding No. 816:

Complaint Counsel's finding number 816 is incomplete and misleading. {

} (RFOF 759; Seibert, Tr. 4196-98, *in camera*).

{

} (RFOF 759; Seibert, Tr. 4196-4200, *in camera*) Seibert persisted in following up and shortly thereafter offered to compromise to 10% increases for both products, the implementation of the increases to be split between September 2008 and 2009. {

} (RFOF 759; Seibert, Tr. 4200, *in camera*). {

} (RFOF 759; Seibert, Tr. 4205-

08, *in camera*; PX2115, *in camera*). {

} (RFOF 759; Godber, Tr. 245, *in camera*). {

} (RFOF 759; Godber, Tr. 246, *in camera*).

{

} (RFOF 760; Seibert, Tr. 4209, *in*

camera). {

} (RFOF 760; Seibert, Tr. 4209-4210, *in camera*). {

} (RFOF 760; Seibert, Tr. 4210, *in camera*). {

} (RFOF 760; Seibert, Tr. 4211, *in camera*). {

}

(RFOF 760; Seibert, Tr. 4212, *in camera*).

In response to Trojan's continuing threats of a lawsuit, Daramic's CEO, in March 2009, initiated a telephone call to Trojan's CEO in response to Toth's request that he explained why there was this kind of disagreement that caused Trojan to threaten a lawsuit. Godber responded: "We need exclusivity and we need a long-term, secure supply position." (RFOF 761; Toth, Tr. 1542-43). Toth proceeded to give Trojan and Godber ideas about how the two companies could come together, to which Godber told Toth that he would have to call him back. (RFOF 761; Toth, Tr. 1543-44). Even after an additional message from Toth, however, Godber never returned the call. Instead, Daramic received another threat of a lawsuit, at which point Daramic decided to initiate a lawsuit in North Carolina in order to avoid suit in California. (RFOF 761; Toth, Tr. 1544-45). Even in his cross-examination, {

} (RFOF 761; Godber, Tr. 250, *in camera*).

Nonetheless, {

} (RFOF 761; Godber, Tr. 251, *in*

camera).

As a further concession to {

} (PX0950

at 014, *in camera*). Consistent with its prior conduct with Microporous, Trojan is using its superior economic power, the pendency of this proceeding and the threat of California-based lawsuits to negotiate a long-term contract and lower pricing for Daramic.

VII. Entry into the Battery Separator Markets at Issue would not be Timely, Likely and Sufficient

A. General

817. Dr. Simpson explained that {
Simpson testified: {

} (Simpson, Tr. 3205, *in camera*). Dr.

also cited {

} (Simpson, Tr. 3205-3206, *in camera*). Dr. Simpson

} (Simpson, Tr. 3206, *in camera*). Finally, Dr. Simpson noted that

{

} (Simpson, Tr. 3206, *in camera*).

Response to Finding No. 817:

Complaint Counsel's finding number 817 is incomplete and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Moreover, {

}

(RFOF 1244). {

} (RFOF

1244). {

} (RFOF 1245). {

} (RFOF 1245).

818. Dr. Simpson noted that {

} (Simpson, Tr. 3206, *in camera*). Dr. Simpson noted that {

(Simpson, Tr. 3207-3208, *in camera*). {

} (Simpson, Tr. 3207-3208, *in camera*, 3395, *in camera*).

Response to Finding No. 818:

For its response to Complaint Counsel's finding number 818, Respondent incorporates its reply to finding number 817. Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, the evidence shows that a PE separator production line can be completely installed and begin commercial operation in { }. (RFOF 1061; Gaugl, Tr. 4543; PX0907 (Kung, Dep. at 27-29, 43), *in camera*)). On average, it takes {

} (RFOF 1061; Gaugl, Tr. 4543; Hauswald, Tr. 873-75, 880, 883, *in camera*). A battery separator manufacturer does not need to complete construction of a new PE separator line before it can begin testing products from that line. Rather, much of the required testing { } (RFOF 1076; RX01045 at 001, *in camera*).

In addition, {

} (RFOF 1243). {

} (RFOF 1246). {

} (RFOF 1071, 1247). {

} (RFOF 1247).

Moreover, {

} (RFOF 1248; Simpson, Tr. 3401-02,

in camera). The evidence in this case is that {

} (RFOF

1073, 1248; Gaugl, Tr. 4543-44; RX01029, *in camera*; RX01045, {

}, *in camera*; RX01046, *in camera*). {

} (RFOF 1249; Simpson, Tr.

3402-03, *in camera*).

Simpson also failed to consider that James Kung {

}. (FOF 1074; PX0907 (Kung, Dep. at 27-28),

in camera). Additionally, Kung {

}. (RFOF 1074; PX0907 (Kung, Dep. at 43), *in camera*).

{

}

819. Learning by doing is present in the manufacture and sale of battery separators. (PX0033 at 010, *in camera*; PX0131 at 054; PX0265 at 011, *in camera*; PX0092 at 001; Simpson, Tr. 3263). Learning-by-doing is accumulated over multiple years. (PX0033 at 010, *in camera*; PX0131 at 054; PX0265 at 011, *in camera*; PX0092 at 001; Simpson, Tr. 3207, *in camera*, 3213, *in camera*; PX1715).

Response to Finding No. 819:

Complaint Counsel's finding number 819 is vague and misleading. For the reasons set forth in Respondent's reply to Complaint Counsel's finding number 818, this finding should be rejected.

820. Manufacturing know how is accumulated over multiple years. (PX0131 at 054, 056, 064; PX0092 at 001).

Response to Finding No. 820:

Complaint Counsel's finding number 820 is vague and misleading. For the reasons set forth in Respondent's reply to Complaint Counsel's finding number 818, this finding should be rejected.

821. On average it takes an experienced PE line builder approximately 18 months to install a PE separator line in an existing facility. (Gaugl, Tr. 4543). But that time may range up to 20 months. (Gaugl Tr. 4543).

Response to Finding No. 821:

Complaint Counsel's finding number 821 is misleading. For its response to this finding, Respondent incorporates its reply to finding number 818. Additionally, this finding ignores the uncontroverted fact that Daramic built a greenfield production facility in Prachinburi, Thailand with a capacity of 15 million square meters in approximately 16 months. (RFOF 1070; Hauswald, Tr. 1111-12).

822. Dr. Simpson testified that Daramic could further extend the time a firm needs to enter by using exclusive contracts to deprive that firm of sales. (Simpson, Tr. 3209, *in camera*).

Response to Finding No. 822:

Complaint Counsel's finding number 822 is inaccurate and misleading, and it must be rejected. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Additionally, Simpson fails to acknowledge that many of Daramic's contracts are not exclusive and, in fact, permit the customer to buy from other suppliers. (RFOF 1272; RX00983 (EnerSys contract), *in camera*; RX01519 (East Penn Contract), *in camera*). Further, Simpson fails to consider that neither Crown nor Douglas would have purchased any separators from Microporous. (RFOF 1273; Douglas, Tr. 4067, *in camera*; Balcerzak, Tr. 4106-07, *in camera*). In fact, Jim Douglas testified that Douglas Battery had not seen anyone from Microporous for years prior to the merger. (RFOF 1273; Douglas, Tr. 4062-63). {

} (RFOF 1274; PX0265, *in camera*; PX0295, *in camera*; PX0536, *in camera*). {

}

(RFOF 1275; RX00927 at 071-72, *in camera*). Accordingly, at any given point, volume was available to be provided to a new supplier. (RFOF 1276).

{

} (RFOF 1277; Hall, Tr. 2802-03). This fact undermines Simpson's premise that exclusive contracts impeded entry or buying from Daramic's rivals. (RFOF 1277).

Complaint Counsel's finding number 822 also fails to consider the fact that {

} (RFOF 475; Hall, Tr. 2747, *in camera*). It further ignores the fact that until the acquisition of Microporous by Polypore in 2008, Microporous was Trojan's exclusive battery separator supplier. (RFOF 742; Godber, Tr. 153).

There is no basis to believe that Daramic could somehow prevent the expansion or entry into North America by its competitors.

823. Barriers to entry include a significant capital investment, sophisticated production processes, extensive customer relationships, patent protected technology and high customer switching costs. (Gilchrist, Tr. 604-05; RX00741 at 015).

Response to Finding No. 823:

Complaint Counsel's finding number 823 is inaccurate. The evidence in this case demonstrates that barriers to entry are low. (RFOF 1061-1122). This finding ignores the fact that a PE line with a production capacity of 3 to 5 million square meters can be constructed for approximately { }. (RFOF 1095; Hauswald, Tr. 881, *in camera*). It costs approximately { } to build a PE line with a capacity to produce 11 million square meters per year. (RFOF 1097; Gaugl, Tr. 4547). {

}

(RFOF 1098; Gaugl, Tr. 4553; Weerts, Tr. 4488-89, *in camera*). This finding also ignores numerous real-world examples which show a relatively small capital investment, including:

- Daramic installed a greenfield production line with a capacity of 15 million square meters in Prachinburi, Thailand for a cost of \$11.5 million. (RFOF 1099; Hauswald, Tr. 1111-12).
- Daramic's cost estimate for installing a 30 million square meter production line in Prachinburi totaled { }. (RFOF 1101; RX01050 at 005, *in camera*; RX01050 at 017, *in camera*).
- The { } square meter line installed by Microporous in Piney Flats cost { }. (RFOF 1096; Hauswald, Tr. 882, *in camera*).
- James Kung { }. (RFOF 1102; PX0907 (Kung, Dep. at 27, 34-35), *in camera*).
- Additionally, Kung { }. (RFOF 1103; PX0907 (Kung, Dep. at 54, 61), *in camera*).

Furthermore, PE separators have been manufactured for over fifty (50) years and the manufacturing technology for such separators is well known. (RFOF 1063; Hauswald, Tr. 957-59). It is not difficult to find and learn about the equipment needed to build a PE line. (RFOF 1067; Gaugl, Tr. 4546). Anyone can learn about the equipment by visiting trade shows, researching online, or reviewing catalogues provided by vendors. (RFOF 1067; Gaugl, Tr. 4546). The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (RFOF 1068; Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (RFOF 1068; Gaugl, Tr. 4547). To the contrary, there are "a lot of people" who know the process. (RFOF 1068; Gaugl, Tr. 4547).

Although polyethylene separators were patented in 1967 by W.R. Grace (RFOF 79; Whear, Tr. 4678-79), the patent expired in the mid-1980s, and thereafter, the information necessary to manufacture polyethylene separators was publicly available. (RFOF 80; Whear, Tr. 4679; Toth, Tr. 1626). Consequently, there are no patent barriers which would prevent any

individual or company from manufacturing a polyethylene separator. (RFOF 80; Toth, Tr. 1626).

824. Learning how to build a PE battery separator line is an ongoing process where you learn day by day. (Gaugl, Tr. 4591). Mr. Kung has {
}. (PX0907 (Kung, Dep. at 100), *in camera*). Mr. Kung said, “{
}” (PX0907 (Kung, Dep. at 100), *in camera*).

Response to Finding No. 824:

Complaint Counsel’s finding number 824 is incomplete and misleading. This finding completely ignores the fact that any of Daramic’s competitors can hire Kung to build a PE line, thereby drawing from any experience he has gained through building lines over the years. (RFOF 977, 1074). In fact, Kung built PE lines for BFR, Separindo and Anpei, three of Daramic’s competitors. (RFOF 977, 1074). Moreover, other individuals in the battery separator industry besides Kung have experience installing PE separator lines, including Dr. Herwig Winkler, a former Jungfer employee, and Hans-Peter Gaugl, who is not under a non-compete with Daramic. (RFOF 1069; Gaugl, Tr. 4547-48, 4611; PX0907 (Kung, Dep. at 10), *in camera*).
{
} (RFOF 1069; RX00058, *in camera*).

825. Prior to designing and starting up the line for Microporous in Tennessee, Mr. Gaugl had previously designed and started up four other PE battery separator lines – two for Global Industries in South Korea; one for Batou in the province of inner Mongolia in China; and 1 for Jungfer in Jungfer’s Feistritz, Austria facility. (Gaugl, Tr. 4532-34). By the time Mr. Gaugl became responsible for designing the Microporous line in Piney Flats, Tennessee, he had seven years of experience setting up PE production lines. (Gaugl, Tr. 4543).

Response to Finding No. 825:

Respondent’s only clarification to Complaint Counsel’s finding number 825 is that Gaugl had five (5) years, not seven (7) years, of experience setting up PE production lines before the PE line was installed in Piney Flats. (Gaugl, Tr. 4532-34).

826. According to Mr. Gaugl, the eighteen months include: about two months to do the generic layout of the lines and the specification of the main equipment; about ten months to obtain the long lead time items; approximately four months to install the equipment; and about two months to start-up and debug the lines. (Gaugl, Tr. 4543-44).

Response to Finding No. 826:

Respondent has no specific response.

827. The, on average, 18-month project of setting up a PE battery separator line ends at the 24-hour test run. (Gaugl, Tr. 4595). In the 24-hour test, the line must demonstrate that it is capable of producing in spec material at a certain throughput. (Gaugl, Tr. 4539). The 24-hour test is to demonstrate the technical capabilities of the line. It has nothing to do with whether one is able to make a commercial product at a competitive cost. (PX0905 (Gaugl, Dep. at 43-44).

Response to Finding No. 827:

Respondent has no specific response.

828. Debugging of new lines continue well after the 24-hour test. (Gaugl, Tr. 4594-95). Passing the 24-hour test run does not mean that a new PE line will operate without problems. (Gaugl, Tr. 4595). Problems that occur after the 24-hour test are not always obvious at the time of the 24-hour test. (Gaugl, Tr. 4595).

Response to Finding No. 828:

Complaint Counsel's finding number 828 is misleading because it assumes that debugging a new PE line always continues "well after the 24-hour test." Additionally, this finding assumes that problems that occur after the 24-hour test are not always obvious at the time of the 24-hour test, based on only one specific example. (Gaugl, Tr. 4595).

B. Building and operating a PE line is a long and difficult process

829. {
(PX0907 (Kung, Dep. at 9-10), *in camera*). }

Response to Finding No. 829:

Respondent has no specific response.

830. {
} (PX0907 (Kung, Dep. at 27), *in camera*). {
} (PX0907 (Kung,

Dep. at 101), *in camera*). {

} (PX0907 (Kung, Dep. at 102), *in camera*).

Response to Finding No. 830:

Complaint Counsel's finding number 830 is inaccurate and misleading because it confuses the process of building a PE line with the process of operating a PE line to produce separators. There is no evidence that building a PE line "requires a team of several members with prior experience in PE production." Peter Gaugl, who holds a mechanical engineering degree from a technical high school and no other "advanced" degree, installed his first PE separator line in 1995, after working only one year in the PE separator industry. (Gaugl, Tr. 4529, 4531-32 (Gaugl began working for Jungfer in 1994 and had no prior experience with PE separators)). In fact, Gaugl had absolutely no experience installing PE separator lines before he installed the line in 1995. (Gaugl, Tr. 4534). Additionally, Gaugl by himself designed the equipment layout and managed the installation and start-up of the production line in Feistritz. (Gaugl, Tr. 4536-37).

Moreover, Complaint Counsel misinterprets Kung's testimony in claiming that four different engineers are required. Kung testified that {

} (PX0907 (Kung, Dep. at 102), *in camera*).

James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung {
} (PX0184 at 002; PX0273 at 009, *in camera*;
PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155),
in camera).

- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/Microporous] acquisition." (sic) (RX00022).
- Kung { } (PX1521 at 002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- { } (PX1510 at 002, *in camera*). { } (PX1510 at 002, *in camera*).
- Kung { } (PX1521 at 002, *in camera*).

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* ("We have no chance to make this material. So we don't need to discuss that.")). In direct contradiction of Kung's testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

831. {

_____ } (PX0907 (Kung, Dep. at 101), *in camera*).

Response to Finding No. 831:

Complaint Counsel's finding number 831 is entirely false. Peter Gaugl, one of the individuals in the industry who knows how to install a PE line, holds a mechanical engineering degree from a technical high school. (Gaugl, Tr. 4529). He has no other "advanced" degree. (Gaugl, Tr. 4529). Moreover, Gaugl installed his first PE separator line in 1995, after working only one year in the PE separator industry. (Gaugl, Tr. 4531-32 (Gaugl began working for Jungfer in 1994 and had no prior experience with PE separators)). In fact, Gaugl had absolutely no experience installing PE separator lines before he installed the line in 1995. (Gaugl, Tr. 4534).

832. {

} (PX0907 (Kung, Dep. at 98-100), *in camera*). Mr. Kung is not aware of any universities that teach students how to develop PE separator production lines. (PX0907 (Kung, Dep. at 98-99), *in camera*).

Response to Finding No. 832:

For its response to Complaint Counsel's finding number 832, Respondent incorporates its reply to finding number 831.

833. Mr. Kung and his team of {

} (PX0907 (Kung, Dep. at 25-27), *in camera*).

{

} (PX0907 (Kung, Dep. at 27, 34-35), *in camera*). It took {

} (PX0907 (Kung, Dep. at 28-29), *in camera*).

Response to Finding No. 833:

Complaint Counsel's finding number 833 is false and misleading. This finding ignores evidence demonstrating that it takes { } to build a PE line and begin commercial production. (RFOF 1061; Gaugl, Tr. 4543; Hauswald, Tr. 873-75, 880, 883, *in camera*). In fact, Daramic built a greenfield production facility in Prachinburi, Thailand with a capacity of 15 millions square meters in approximately 16 months. (RFOF 1070; Hauswald, Tr. 1111-12).

Kung is demonstrably not truthful. (See Response to CCFOF 830.)

834. { (PX0907
(Kung, Dep. at 45-46), *in camera*). {
} (PX0907 (Kung, Dep. at 45-46), *in camera*). {
(PX0907 (Kung, Dep. at 46), *in camera*). }

Response to Finding No. 834:

Complaint Counsel's finding number 834 is inaccurate and misleading. Clearly, training personnel to operate a PE line cannot be "endless" because no new PE line would ever begin producing separators. No credible evidence supports that suggestion. At trial, Gaugl testified that it takes approximately six months to fully train a workforce in the art of PE separator manufacturing. (Gaugl, Tr. 4606-07). However, a workforce is able to produce quality battery separators in a much shorter time frame. (Gaugl, Tr. 4606-07).

Kung is demonstrably not truthful. (See Response to CCFOF 830.)

835. { (PX0907 (Kung, Dep. at 132), *in camera*). For example, one PE line at { } pieces of equipment. If one machine is not working, the other { } "won't function right" and production yields will fall. (PX0907 (Kung, Dep. at 134-135), *in camera*).

Response to Finding No. 835:

Complaint Counsel's finding number 835 is incomplete and misleading. The initial start-up and debugging of a PE production line takes about 2 months. (RFOF 1062; Gaugl, Tr. 4544). During his trial testimony, Gaugl explained that the debugging phase is a "pretty short period" to achieve consistent quality and throughput on a new PE line. (Gaugl, Tr. 4544). Additionally, it is inaccurate to suggest that a PE production line is "just stuck there" during the debugging process. Gaugl testified that the 24-hour test run is performed prior to debugging the line. (Gaugl, Tr. 4594). Moreover, the debugging phase involves resolving smaller issues to be able to produce product on a consistent basis. (Gaugl, Tr. 4585). Thus, the evidence demonstrates

that a PE line can produce separators even before the debugging process. (Gaugl, Tr. 4585, 4594).

Kung is demonstrably not truthful. (See Response to CCFOF 830.)

836. Battery separator manufacturing involves {
(PX0907 (Kung, Dep. at 39-40), *in camera*). {
} (PX0907 (Kung, Dep. at 39).
{
(PX0907 (Kung, Dep. at 39-40), *in camera*). }

Response to Finding No. 836:

Complaint Counsel’s finding number 836 is incomplete and misleading. PE separators have been manufactured for over fifty (50) years and the manufacturing technology for such separators is well known. (RFOF 1063; Hauswald, Tr. 957-59). It is not difficult to find and learn about the equipment needed to build a PE line. (RFOF 1067; Gaugl, Tr. 4546). Anyone can learn about the equipment by visiting trade shows, researching online, or reviewing catalogues provided by vendors. (RFOF 1067; Gaugl, Tr. 4546). The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (RFOF 1068; Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (RFOF 1068; Gaugl, Tr. 4547). To the contrary, there are “a lot of people” who know the process. (RFOF 1068; Gaugl, Tr. 4547).

Additionally, the patent for PE separators expired in the mid-1980s, and thereafter, the information necessary to manufacture polyethylene separators was publicly available. (RFOF 80; Whear, Tr. 4679; Toth, Tr. 1626). Consequently, there are no patent barriers which would prevent any individual or company from manufacturing a polyethylene separator. (RFOF 80; Toth, Tr. 1626).

For a further response to this finding, Respondent incorporates its reply to finding numbers 830 and 831.

Kung is demonstrably not truthful. (See Response to CCFOF 830.)

837. { (Kung, Dep. at 103), *in camera*). { (PX0907
106, *in camera*). } (PX0907 (Kung, Dep. at

Response to Finding No. 837:

Complaint Counsel's finding number 837 is incomplete and misleading. According to Kung, {
} (PX0907 (Kung, Dep. at 106), *in camera*). Additionally, this finding ignores the evidence in this case demonstrating that numerous separator manufacturers have built PE lines or increased capacity, including NSG, Anpei, Separindo, Sebang, Baotou, Epoch, M-Arrow and Genius. (RFOF 997-1051).

Moreover, BFR is so proficient at production PE separators that JCI, the largest battery manufacturer in the world, entered into a joint venture with BFR in February 2007. (RFOF 438, 491). { (RFOF 493; Hall, Tr. 2854, *in camera*). At the signing of the agreement, it was JCI's intention to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RX00055; RFOF 493).

Kung is demonstrably not truthful. (See Response to CCFOF 830.)

838. The PE production process is a "very narrow field [of expertise] in the industry." {
} (PX0907 (Kung, Dep. at 102), *in camera*).

Response to Finding No. 838:

For its response to Complaint Counsel's finding number 838, Respondent incorporates its reply to finding number 836. Additionally, this finding ignores the evidence in this case demonstrating that numerous separator manufacturers have built PE lines or increased capacity, including BFR, NSG, Anpei, Separindo, Sebang, Baotou, Epoch, M-Arrow and Genius. (RFOF 977-1051). This finding further ignores trial testimony by Pierre Hauswald that {

} (RFOF 1050; Hauswald,

Tr. 932-33, *in camera*).

Kung is demonstrably not truthful. (*See* Response to CCFOF 830.)

839. Currently, only two "major players" remain in the world, with respect to PE separator manufacturing: Daramic and Entek. (PX0907 (Kung, Dep. at 40), *in camera*). {

} (PX0907 (Kung, Dep. at 39-40), *in camera*).

Response to Finding No. 839:

For its response to Complaint Counsel's finding number 839, Respondent incorporates its reply to finding numbers 834 and 836-38.

840. {

Dep. at 107), *in camera*).

} (PX0907 (Kung,

Response to Finding No. 840:

For its response to Complaint Counsel's finding number 840, Respondent incorporates its reply to finding numbers 834 and 836-38. In addition, this finding ignores evidence showing that numerous separator manufacturers across the globe produce PE separators which are on par with the quality and price of Daramic's separators, and Daramic competes with those companies every day. For example:

- {
 } (RFOF 986; Hauswald, Tr. p. 1034).
 Daramic has lost business to BFR, and that the business "goes back and forth." (RFOF 987; Hauswald, Tr. 1034; Thuet, Tr. 4331, 4348, 4445). Using its access to competitive material, Daramic has tested BFR's PE separators and has found them to be comparable to Daramic's product, with no significant difference in the material. (RFOF 988; Thuet, Tr. 4335-36). JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RFOF 985; RX00051; RX00055). In addition, {

} (RFOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*; RX00026, *in camera*; RX00027, *in camera* {

};

RX00061, *in camera*; RX00062, *in camera*).

- Daramic considers { } to be one of its primary competitors. (RFOF 1000; Thuet, Tr. 4330; PX0522, *in camera*). { } (RFOF 1006; PX0923 (Hauswald, IHT at 267-68), *in camera*). Since the joint venture between Daramic and NSG was consummated, Daramic has continued to test NSG's competitive product from Japan, and has continued to find NSG's separators to be comparable to its own separators. (RFOF 1009; Thuet, Tr. 4335-36; PX0194, *in camera*).
- { } Anpei produces high quality PE separators which are used in OEM applications. (RFOF 1021; Hauswald, Tr. 1037). In fact, Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (RFOF 1023; Thuet, Tr. 4336, 4349). { } (RFOF 1020; RX00342 at 072, *in camera*).
- Daramic has tested Separindo separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1032; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Sebang separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1040; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Baotou material and found it to be comparable to Daramic material, with no significant difference in the quality of the material. (RFOF 1043; Thuet, Tr. 4336, 4349).
- Daramic considers Epoch to be very aggressive in the global separator market. Today, Daramic faces competition from Epoch in China, as well as exports from Epoch in other areas of the world, including Europe. (RFOF 1047; Thuet, Tr. 4333; Hauswald, Tr. 1035-36; RX00195; PX0994, *in camera*; RX00551 at 004, *in camera*; RX01003 at 007, *in camera*).

Kung is demonstrably not truthful. (*See* Response to CCFOF 830.)

841. An individual PE line with annual production capacity of { } to operate profitably. (PX0907 (Kung, Dep. at 47), *in camera*). "If you don't

have big volume, you are not going to make any profit.” (PX0907 (Kung, Dep. at 47), *in camera*).

Response to Finding No. 841:

For its response to Complaint Counsel’s finding number 841, Respondent incorporates its reply to finding number 840.

Kung is demonstrably not truthful. (*See* Response to CCFOF 830.)

842. When BFR was operating just two PE separator lines, its capacity of { } because of the larger cost of investment to buy the land, build the building, and the lines. (PX0907 (Kung, Dep. at 61-62), *in camera*). Thus, { } of its PE manufacturing operations. (PX0907 (Kung, Dep. at 68), *in camera*).

Response to Finding No. 842:

For the reasons set forth in Respondent’s reply to Complaint Counsel’s finding number 840, this finding should be rejected.

843. During the 2008 strike at Daramic’s Owensboro, Kentucky manufacturing plant, Daramic brought its own management and employees over from Europe to help run the Owensboro manufacturing lines. Notwithstanding the use of experienced personnel to run the production lines, the separators produced on those lines during the strike had “quality issues” and the “number of defects rose significantly.” (Gillespie, Tr. 2986-2992).

Response to Finding No. 843:

Complaint Counsel’s finding number 843 is incomplete and misleading. Although this finding properly quotes a portion of Gillespie’s testimony, it completely ignores Gillespie’s testimony that Exide was able to get all of the separator product it needed during the strike. (Gillespie, Tr. 2986). Exide never had to shut down any of its production lines during the strike. (Gillespie, Tr. 2986). Moreover, this finding ignores evidence demonstrating that the strike had no adverse impact on other battery manufacturers, such as Crown Battery. (RFOF 798-802; Balcerzak, Tr. 4132). Crown emerged “remarkably unscathed” from the labor stoppage and congratulated Daramic for doing “a heckuva good job” keeping Crown in production. (RFOF 798-802; RX00330; Balcerzak, Tr. 4101-02).

844. For example, during the Owensboro strike, Daramic provided wavy separator rolls to Exide. (Gillespie, Tr. 2987-2988; PX1407). Exide was dissatisfied with the wavy separators but had no other qualified source of supply. (Gillespie, Tr. 2988-2990). Exide had no option but to use the wavy separators or face shutting down battery manufacturing operations. (Gillespie, Tr. 2989-2990). Using the wavy separators was a “big deal” for Exide in terms of manufacturability because the wavy separators caused variations in Exide’s productivity level costing Exide more money to run the product. (Gillespie, Tr. 2988-2989).

Response to Finding No. 844:

For its response to Complaint Counsel’s finding number 844, Respondent incorporates its reply to finding number 843. Moreover, the evidence demonstrates that only one (1) “wavy” roll was shipped to Exide during the strike. (Gillespie, Tr. 2987-89). Complaint Counsel’s claim that “Daramic provided wavy separator rolls to Exide” is false.

Furthermore, the evidence raises questions of credibility about Exide’s intent and Gillespie’s testimony in this proceeding (RFOF 550, 601), and Gillespie’s testimony on this issue should be disregarded.

845. Exide learned first hand lessons from Daramic’s Owensboro strike. The strike demonstrated to Exide that manufacturing separators takes more than turning a switch, as experienced Daramic employees were unable to run their own product, with their own designs, without encountering considerable quality problems. (Gillespie, Tr. 2992-2993).

Response to Finding No. 845:

Complaint Counsel’s finding number 845 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 843 and 844.

846. During the Owensboro strike, EnerSys also received poor quality separators from Daramic. A lot of material was out of specifications in a variety of ways. (Burkert, Tr. 2332). EnerSys had no choice but to accept the poor quality material, since it did not know how long it would take Daramic to replace it. (Burkert, Tr. 2332). These quality issues cost EnerSys money in terms of efficiency losses at the plants and will eventually show up in higher warranty returns on batteries. (Burkert, Tr. 2339). EnerSys estimates that these issues cost it \$1.4 million in costs which was approximately \$3.2 million in revenues. (Burkert, Tr. 2339).

Response to Finding No. 846:

Complaint Counsel's finding number 846 is incomplete and misleading. The Court should find that the testimony of Burkert is not credible because he was heavily coached by FTC lawyers. (Burkert, Tr. 2369-76). In addition, the claim that EnerSys "will eventually" experience higher warranty returns due to the strike is entirely speculative and should be disregarded.

Moreover, this finding ignores evidence showing that EnerSys never had to shut down any of its production lines during the strike. (Burkert, Tr. 2338-39). This finding further ignores evidence demonstrating that the strike had no adverse impact on other battery manufacturers, such as Crown Battery. (RFOF 798-802; Balcerzak, Tr. 4132). Crown emerged "remarkably unscathed" from the labor stoppage and congratulated Daramic for doing "a heckuva good job" keeping Crown in production. (RFOF 798-802; RX00330; Balcerzak, Tr. 4101-02).

1. MPLP entry into PE at Piney Flats took many years

847. The development of the CellForce product took many years. (Gilchrist, Tr. 323). CellForce was initially developed by Microporous in 1995-1996 and the first samples were given to Trojan in 1996-1997. (Gilchrist, Tr. 316-17, 324-25). {

} (PX 2235 at 004, *in camera*). Beginning in early 2001, MPLP began producing CellForce on a production line at its Piney Flats facility. (Gilchrist, Tr. 321-322).

Response to Finding No. 847:

Complaint Counsel's finding number 847 is incomplete and misleading. The CellForce production line in Piney Flats was installed in 2000. (RFOF 334; Gilchrist, Tr. 320; Gaugl, Tr. 4533-34). Moreover, there is contradictory evidence that the development of the formula for CellForce actually began in 1999. (McDonald, Tr. 3789). The first commercial sales of CellForce occurred in 2001. (McDonald, Tr. 3790). Given Gilchrist's lack of credibility, the Court should disregard his testimony on this issue.

848. Peter Gaugl built the PE/CellForce line for the former Microporous in Piney Flats, Tennessee in 2000. (Gaugl, Tr. 4534). At the time he built the line in Tennessee, Mr.

Gaugl was employed by Jungfer as a project engineer responsible for designing and starting up polyethylene battery separator lines for other companies. (Gaugl Tr. 4532). Mr. Gaugl incorporated the lessons from previous lines he designed and started up when designing and starting up later PE battery separator lines. (Gaugl, Tr. 4587.).

Response to Finding No. 848:

Respondent has no specific response.

849. {

} (PX0590 (Gaugl, Arb. Dep.
at 52-53), *in camera*).

Response to Finding No. 849:

Complaint Counsel's finding number 849 is incomplete and utterly misleading. The PE production line was installed for Microporous in Piney Flats in 2000. (RFOF 334; Gilchrist, Tr. 320; Gaugl, Tr. 4533-34). {

} (PX0590 (Gaugl, Dep. at 52-53), *in camera*). At most, only fourteen (14) months passed from the beginning of construction of the line to the successful 24-hour acceptance test. (Gaugl, Tr. 4534; PX0590 (Gaugl, Dep. at 52-53), *in camera*). Any suggestion to the contrary is untenable.

850. Even with all his experience, Mr. Gaugl testified that the Piney Flats line encountered a number of problems that he only discovered after he had completed the project and went back to Austria. (Gaugl, Tr. 4588, 4595). The Piney Flats line that Gaugl installed had machine failures because the equipment was underdesigned. (Gaugl, Tr. 4590). {
} (PX0905 (Gaugl, Dep. at 40), *in camera*). In some cases the problems with the Piney Flats line were identified months after the 24-hour test run. (Gaugl, Tr. 4594-95).

Response to Finding No. 850:

Complaint Counsel's finding number 850 is incomplete and misleading. Although some electrical problems were encountered with the Piney Flats line several months after the 24-hour acceptance test, Microporous was "producing good material" on the line prior to experiencing the electrical issues. (Gaugl, Tr. 4595). The problems encountered with the equipment on the Piney Flats line occurred because the line was designed to produce standard PE product,

pursuant to the terms of the agreement between Jungfer and Microporous. (Gaugl, Tr. 4589-90). The equipment problems occurred only after Microporous began producing CellForce on the standard PE line. (Gaugl, Tr. 4590). If Jungfer had known that Microporous was going to manufacture CellForce on the line, the specifications for the equipment would have been different. (Gaugl, Tr. 4590).

851. In mid-2001, Mr. Gaugl left Jungfer and became employed by Microporous. (Gaugl Tr. 4534). {

} (PX0905 (Gaugl, Dep. at 39), *in camera*). Most of the problems Mr. Gaugl encountered at the installation in Piney Flats for Microporous were new problems that Mr. Gaugl had not encountered at any of the other installations he was involved in. (Gaugl Tr. 4600).

Response to Finding No. 851:

For its response to Complaint Counsel's finding number 851, Respondent incorporates its reply to finding number 850.

852. For example, the Piney Flats line had electrical problems that were not obvious at the time of the 24-hour test. (Gaugl, Tr. 4595). And while the line was producing good material when it was working, the electrical failures prevented the line, at times, from producing any material at all. (Gaugl, Tr. 4595).

Response to Finding No. 852:

For its response to Complaint Counsel's finding number 852, Respondent incorporates its reply to finding number 850.

853. Some of the problems that Mr. Gaugl discovered with the new line installed at Piney Flats occurred after the one year warranty period given to Microporous by Jungfer. (Gaugl, Tr. 4596-97, 4599).

Response to Finding No. 853:

For its response to Complaint Counsel's finding number 853, Respondent incorporates its reply to finding number 850.

854. The new line at Piney Flats also encountered problems with the extraction system that caused the PE material to wrinkle, which only appeared after the line was operating on a day-to-day basis, and after the warranty period. (Gaugl, Tr. 4597, 4599). Wrinkled material is a problem for battery producers. (Gaugl, Tr. 4597). It is also a problem for

Microporous, because wrinkled PE material results in scrap material. (Gaugl, Tr. 4597). Scrap material leads to higher production costs because the PE line has less throughput. (Gaugl, Tr. 4598-99).

Response to Finding No. 854:

Complaint Counsel's finding number 854 improperly cites a portion of Gaugl's trial testimony for the proposition that "[w]rinkled material is a problem for battery producers." At trial, the Court sustained Respondent's counsel's objection to Complaint Counsel's question inquiring about the effect of wrinkled material on battery manufacturers. (Gaugl, Tr. 4597-98). Therefore, this finding improperly cites a "fact" despite a sustained objection, and no answer from the witness, and it should be disregarded.

As a further response to finding number 854, Respondent incorporates its reply to finding number 850.

855. The line Mr. Gaugl installed at Piney Flats had a solvent recovery problem, which he learned about two or three years after operating the new PE line. (Gaugl, Tr. 4599). That resulted in a higher solvent loss than acceptable by the environmental authorities. (Gaugl, Tr. 4599).

Response to Finding No. 855:

For its response to Complaint Counsel's finding number 855, Respondent incorporates its reply to finding number 850.

856. {

(PX0905 (Gaugl, Dep. at 43), *in camera*).

}

Response to Finding No. 856:

For its response to Complaint Counsel's finding number 856, Respondent incorporates its replies to finding numbers 847, 849 and 850.

857. Beginning in early 2001, Mircroporous began producing CellForce on the new production line at its Piney Flats facility. (Gilchrist, Tr. 321-22). The determination of whether the PE material from a new PE production line is "in-spec" does not include

testing the separator in a battery. (Gaugl, Tr. 4620). The battery maker makes the decision about testing a separator in a battery. (Gaugl, Tr. 4620).

Response to Finding No. 857:

Complaint Counsel's finding number 857 is incomplete and misleading. According to Gaugl, the battery performance of the new PE separator material produced in Piney Flats was already proven due to the fact that the PE material produced by Jungfer, using the same process and with the same specifications, was successfully being used in batteries. (Gaugl, Tr. 4620). There is only a very small risk that PE separator material made with the same raw materials and the same specifications would not perform well in a battery. (Gaugl, Tr. 4620).

858. Interested customers tested the product from Microporous's new PE/CellForce line before purchasing commercial quantities. It took more than a year for Hawker/EnerSys, the first CellForce customer to complete its testing and approval process and began buying commercial quantities. Trojan, the second CellForce customer, began buying commercial quantities in 2002. (Gilchrist, Tr. 321-23, 325).

Response to Finding No. 858:

Complaint Counsel's finding number 858 is incomplete and misleading. There is contradictory evidence showing that the first commercial sales of CellForce occurred in 2001. (McDonald, Tr. 3790). Given Gilchrist's lack of credibility, the Court should disregard his testimony on this issue. Moreover, there is no evidentiary basis to explain the reason the Hawker/EnerSys process took over a year, and any reason is speculative.

859. The CellForce approval process at Trojan, the second CellForce customer, was delayed by one year due to shrinkage issues with the product. (Gilchrist, Tr.358-361). Trojan began testing CellForce in mid-1999 and qualified it in March 2001, but experienced shrinkage issues with the product and stopped ordering it until at least May 2002. Trojan began buying commercial quantities of CellForce in 2002 for deep-cycle applications. (Gilchrist, Tr. 321-323, 325; PX0450 at 005).

Response to Finding No. 859:

Respondent's only response to Complaint Counsel's finding number 859 is to clarify that shrinkage is an issue for separators used in golf cart applications, but it is not an issue for separators used in motive and automotive applications. (Gilchrist, Tr. 360).

860. Microporous began making profits on its investment in CellForce in 2004, which was three years after it began selling commercial quantities of CellForce to Hawker/EnerSys, its first customer. (Gilchrist, Tr. 393).

Response to Finding No. 860:

Complaint Counsel's finding number 860 is without any evidentiary basis to explain timing or the reasons for the timing and testing and, therefore, should be rejected.

2. MPLP expansion in Austria took longer than two years as well

861. Planning for and developing a new separator plant in a new country takes more than two years. The expansion undertaken by Microporous was difficult and required "a very significant effort" by Microporous. (Trevathan, Tr. 3650-3660). Microporous began planning to build a new plant in Europe in early 1999. (Gilchrist, Tr. 329-30).

Response to Finding No. 861:

Complaint Counsel's finding number 861 is inaccurate. Although Complaint Counsel cites Trevathan's testimony, none of his testimony supports the claim that planning and constructing a new separator plant takes more than two years. Indeed, the overwhelming evidence shows that planning and constructing a new separator plant takes less than two years. For example, Daramic built a greenfield production facility in Prachinburi, Thailand with a capacity of 15 million square meters in approximately 16 months. (RFOF 1070; Hauswald, Tr. 1111-12). Microporous installed a greenfield PE production line and Daramic began commercial production from that facility in Austria { } after installation was started. (FOF 1072; RX01045, *in camera*).

Furthermore, even though Microporous entertained some preliminary thoughts as early as 1999 about possibly putting a production line in Europe, Microporous was not serious about any such efforts at that time. (Gilchrist, Tr. 329-30).

862. Discussions with Exide concerning Microporous expanding to meet its requirements had begun prior to the negotiations with JCI concerning that expansion opportunity. (Trevathan, Tr. 3609).

Response to Finding No. 862:

Complaint Counsel's finding number 862 is inaccurate and misleading. The evidence demonstrates that after meetings in the late-spring and summer of 2007, Microporous sent an MOU and contract draft to Exide. (RFOF 382; Trevathan, Tr. 3611). By its own terms, the MOU expired on August 31, 2007. Exide did not sign and return the non-binding MOU to Microporous until late September of 2007, long after it had expired by its own terms on August 31, 2007. (RFOF 382; PX0056; Gilchrist, Tr. 474-76, *in camera*; RX00399). Exide never returned or commented on the contract draft sent by Microporous. (RFOF 382; McDonald, Tr. 3835; Trevathan, Tr. 3612, 3626, 3724). Through the fall 2007, no progress was made on an agreement with Exide. (RFOF 382; McDonald, Tr. 3834). Exide's behavior was consistent with its past conduct. {

} (RFOF 382; Gilchrist Tr. at 487-90; *in camera*; RX01331; RX00748). In fact, the Microporous Board questioned the viability of Exide as a customer as negotiations went nowhere. (RFOF 408; PX2301 (Heglie, Dep. at 133); Trevathan, Tr. 3610).

As part of their ruse, Microporous Management became intent on securing a renewal of the expired MOU with Exide. (RFOF 414; McDonald, Tr. 3841-42; PX1052; Gilchrist, Tr. 448, *in camera*). Microporous was concerned that Daramic would see through Microporous' "smoke screen," and in a November 27, 2007 email, Trevathan stated "the greatest flaw we have right now in our ruse is that the Exide MOU has expired and we have no evidence of progress on a contract." (RFOF 414; RX00402 at 001). {

}

(RFOF 414; Gilchrist, Tr. 471-72, 476, *in camera*).

On February 14, 2008, only weeks before the sale of Microporous to Daramic and the date the most sensitive information was to be made available to Polypore, Exide finally signed a renewal letter for the MOU. (RFOF 415; Gilchrist, Tr. 448, 476, *in camera*; RX00403; RX01200 at 001). Aside from signing the non-binding renewal later, which only extended the MOU 45 days (RFOF 415; RX00403), Exide signed the MOU after Microporous told Exide that it would accept “an updated MOU by February 14th,” “or redline of the original contract,” and a commitment contract ready at the meeting on the 27th” in lieu of a price increase. (RFOF 415; RX01033). Exide made no other commitments to Microporous, and delegated negotiations to newcomer, Alberto Perez. (RFOF 415; McDonald, Tr. 3836-38, 3845-46; Trevathan, Tr. 3640).

Microporous Management became increasingly and appropriately wary of Exide. (RFOF 416; RX00285; Gilchrist, Tr. 515. *in camera*). In a February 15, 2008, email (RX00285 at 001), questioning Perez’s truthfulness and Exide’s sincerity, and in response to Perez’s promise of returning the MOU extension and red-line contract draft, McDonald wrote, “that and a \$1.50 will buy you a cup of coffee.” (RFOF 416; RX00285 at 001). As shown by Exide’s internal communications, the MOU was only signed to delay a price increase. (RFOF 416; RX00010).

Microporous and Exide had two insignificant meetings during early 2008. (RFOF 417; McDonald, Tr. 3835-3840, 3844). The first was a brief technical meeting in Paris, France, in January 2008. Steve McDonald, Roger Berger, Rick Wimberly, and George Brilmyer attended the meeting on behalf of Microporous. (RFOF 417; McDonald, Tr. 3840). Despite the significant expense and time commitment to attend the meeting, Exide did not even allow Microporous to finish its prepared presentation. (RFOF 417; McDonald, Tr. 3839). This meeting constituted little more than a technical overview for Exide personnel in Europe and a meet and greet for Alberto Perez. (RFOF 417; McDonald, Tr. 3837-38). Microporous was disappointed by the meeting. (RFOF 417; McDonald, Tr. 3839).

A second meeting took place at Exide's facilities in Alpharetta, Georgia on February 27, 2008, to discuss the intent of Exide going forward. (RFOF 418; McDonald, Tr. 3844, Trevathan, Tr. 3844). Mike Gilchrist, Larry Trevathan, Steve McDonald, and Roger Berger attended the meeting on behalf of Microporous. (RFOF 418; Trevathan, Tr. 3639). Only Alberto Perez attended on behalf of Exide despite expectations that Douglas Gillespie and Pradeep Menon, two key decision makers, would attend. (RFOF 418; McDonald, Tr. 3844-45; Trevathan, Tr. 3640). When Perez met the group from Microporous, he told them that he had actually forgotten all about the meeting and needed to find a room to meet in. (RFOF 418; McDonald, Tr. 3846). The parties met in an unheated, back room, and the meeting lasted less than an hour. (RFOF 418; Trevathan, Tr. 3640). The parties had little discussion about a future relationship between Microporous and Exide and no contract drafts were exchanged or discussed. (RFOF 418; Trevathan, Tr. 3640; McDonald, Tr. 3846-47).

Following the meeting, attendees from Microporous had little confidence in Exide's commitment to Microporous. (RFOF 419; McDonald, Tr. 3847). Steve McDonald questioned Exide's sincerity stating, "I had quite a few conversations with Exide, and it seemed like we never got anything accomplished." (RFOF 419; McDonald, Tr. 3847). He also questioned whether Exide was actually committed to Microporous or whether a supply agreement would ever be reached between Exide and Microporous. (RFOF 419; McDonald, Tr. 3847).

Exide's actions show that it had no intent to move forward with any business relationship with Microporous, and this finding should be rejected.

863. "At the time discussions with JCI terminated, [Microporous] had had several meetings with Exide, and we had provided a copy of an MOU for signature, and the terms of the MOU involved expansion to supply sufficient volume or a volume that equated to roughly 22 million square meters, that would require an expansion similar in size and scope as what we were discussing with JCI." (Trevathan, Tr. 3610).

Response to Finding No. 863:

Complaint Counsel's finding number 863 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 862.

864. Microporous's Austrian expansion was still ongoing at the time it was acquired by Daramic on February 29, 2008. (Gilchrist, Tr. 300). The acquisition by Daramic did not change the timing in which the Austrian facility would begin producing product. (Gaugl, Tr. 4626).

Response to Finding No. 864:

Complaint Counsel's finding number 864 is incomplete and misleading. Although Microporous had a "partial commitment" from EnerSys for one of the two Feistritz lines, it had absolutely no commitment or signed contract for the Feistritz SLI line. (RFOF 395; Trevathan, Tr. 3631; Gilchrist, Tr. 502, *in camera*). Due to the lack of commitments, Microporous had serious concerns about when it could begin selling SLI product from Austria had the acquisition not occurred. (Gaugl, Tr. 4626-27).

865. The expansion in Austria resulted in two additional lines; one for EnerSys, and the second for producing mainly automotive separators. (Gaugl, Tr. 4559-60). Each of the two lines had approximately 11 million square meters of capacity. (Gaugl, Tr. 4533; Gilchrist, Tr. 312-313). The cost of building an 11 million square meter line is approximately \$9 million. (Gaugl, Tr. 4547).

Response to Finding No. 865:

Complaint Counsel's finding number 865 is incomplete and misleading. Microporous had only a "partial commitment" from EnerSys for one of the two Feistritz lines, and with respect to the Feistritz SLI line, Feistritz had no commitment or signed contract for that line. (RFOF 395; Trevathan, Tr. 3631). As a further response to this finding, Respondent incorporates its reply to finding number 864.

866. The Austrian expansion was a greenfield project in which Mr. Gaugl was responsible for the detailed design of the equipment, the installation and the startup. (Gaugl, Tr. 4536-37).

Response to Finding No. 866:

Respondent has no specific response.

867. The process for manufacturing PE separators is “a complicated yet continuous process.” (PX0611 at 003). The process requires 15 to 18 different pieces of equipment. (Gaugl, Tr. 4610). One cannot call a machine supplier and order a complete PE battery separator line. (Gaugl, Tr. 4610-11).

Response to Finding No. 867:

Complaint Counsel’s finding number 867 is entirely inaccurate and grossly misrepresents Gaugl’s trial testimony. Complaint Counsel misrepresents the truth regarding ordering a complete PE battery separator line. Contrary to Complaint Counsel’s assertion in this finding, Gaugl testified at trial that any company could call James Kung, Herwig Winkler or himself to order a complete PE battery separator line. (RFOF 1069; Gaugl, Tr. 4610-11). In addition,

{

} (RFOF 1069; RX00058, *in camera*).

In addition, the equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (RFOF 1068; Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (RFOF 1068; Gaugl, Tr. 4547).

868. Before he ordered the equipment for Microporous’s Austrian expansion, Mr. Gaugl had to design the specifications of the equipment for the line. (Gaugl, Tr. 4608-09). Mr. Gaugl designed the equipment to be installed in Austria in 2005. (Gaugl, Tr. 4609).

Response to Finding No. 868:

Again, Complaint Counsel’s finding number 868 misrepresents Gaugl’s trial testimony. Contrary to Complaint Counsel’s claim, Gaugl testified that the discussions regarding an expansion began in December 2005, and at that time, Microporous did not know if the production facility would be located in Austria. (Gaugl, Tr. 4609). Therefore, it is inaccurate to state that Gaugl designed the equipment to be installed in Austria in 2005.

869. For the Microporous expansion in Austria, Mr. Gaugl designed all the connection points and controls between the individual machines and drew up blueprints specifying how the various components would be connected together. (Gaugl, Tr. 4610).

Response to Finding No. 869:

Respondent has no specific response.

870. {

} (PX0611;

PX0905 (Gaugl, Dep. at 128-29), *in camera*).

Response to Finding No. 870:

Respondent has no specific response.

871. One of the reasons for choosing Austria for the expansion was so that Microporous could hire former Jungfer employees that were familiar with PE battery separator production. (Gaugl, Tr. 4606). Hiring skilled employees can shorten the start-up period for a new PE battery separator production facility by six months. (Gaugl, Tr. 4606). Mr. Gaugl testified that hiring skilled employees gave Microporous a jump start and cut down the start-up period by a few months. (Gaugl, Tr. 4606).

Response to Finding No. 871:

Respondent has no specific response.

872. Microporous had ordered the long lead time items for its new lines in December of 2006 including the equipment for a third PE line. These long lead time items for a PE line are those pieces of equipment that take from ten to twelve months to arrive. (Trevathan, Tr. 3600). The long lead time items included the dryers, extruders, and the calender systems. (Trevathan, Tr. 3600).

Response to Finding No. 872:

Complaint Counsel's finding number 872 is incomplete and misleading. Although Microporous began making purchases of "long-lead" equipment for three lines initially (two in Austria and one in Piney Flats), consideration of adding the "third" line in Piney Flats was based on conversations first with { } for the production of SLI material in the US. (RFOF 1147). Ultimately, however, { } terminated its interests in purchasing product from Microporous and entered into an agreement with { }, in May or June 2007, at which time the equipment purchase was put "on hold." (RX00047; RFOF 1147). Despite various discussions with { } the equipment orders were never resumed and no work was done by Microporous for any US expansion for { }. (RFOF 1147). The equipment that had already been purchased was put in boxes and, as of June 2009, it was still sitting in those boxes

located in Feistritz and Piney Flats. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615; RFOF 1147; RPT Brief at 65-66). No decision was ever made regarding where a third line would be installed. (Gaugl, Tr. 4562-64).

873. The construction of the plant building began in February 2007. Prior to the construction, Microporous spent 9-10 months obtaining approvals for the plant from local government authorities and environmental agencies. Additionally, it spent time obtaining financial incentives from the Austrian government. (Gilchrist, Tr. 329-31). After the building was completed, the manufacturing equipment was installed and tested. In the first week of March 2008 (i.e., the week after the acquisition), one of the two production lines became operational. (Gilchrist, Tr. 334-335).

Response to Finding No. 873:

Respondent has no specific response.

874. The Austrian facility began producing commercial product in March 2008, over two years after Microporous began the plans for such an expansion. (Gaugl, Tr. 4603; PX0611). However, the Austrian facility did not reach optimum efficiency and did not operate on a regular schedule until June 2008. (Gaugl, Tr. 4603).

Response to Finding No. 874:

Complaint Counsel's finding number 874 is inaccurate and misleading. This finding ignores evidence that a PE separator production line can be completely installed and begin commercial operation in { } (RFOF 1061; Gaugl, Tr. 4543; PX0907 (Kung, Dep. at 27-29, 43), *in camera*)). On average, it takes { } (RFOF 1061; Gaugl, Tr. 4543; Hauswald, Tr. 873-75, 880, 883, *in camera*). This finding also ignores numerous real-world examples which show that a new PE line can be constructed and begin producing commercial product in less than 2 years, including:

- Daramic built a greenfield production facility in Prachinburi, Thailand with a capacity of 15 million square meters in approximately 16 months. (RFOF 1070; Hauswald, Tr. 1111-12).
- When Daramic moved two production lines from Austria to Thailand, it took { } to reassemble the lines and begin producing product. (RFOF 1070; Hauswald, Tr. 873-75, *in camera*; RX00699 at 032, *in camera*).

- Daramic built a 30 million square meter line and began producing PE separators on that line { } (RFOF 1070; Hauswald, Tr. 880, 883, *in camera*).
- { } (RFOF 1071; Weerts, Tr. 4496, *in camera*).
{ } (RFOF 1071; Weerts, Tr. 4496, 4516-17, *in camera*).
- { } (RFOF 1073; Gaugl, 4543-44, 4550; RX01029, *in camera*; RX01045, *in camera* { }; RX01046, *in camera*).
- James Kung { }. (RFOF 1074; PX0907 (Kung, Dep. at 27-28), *in camera*).
- Additionally, Kung { }. (RFOF 1074; PX0907 (Kung, Dep. at 43), *in camera*).
- { } (RFOF 1075; RX00032, *in camera*).

875. In its Austrian expansion, Microporous implemented the modifications it made at Piney Flats in order to avoid the problems it had earlier encountered at Piney Flats. (Gaugl, Tr. 4601). Notwithstanding the modifications it made to the Austrian facility to avoid the problems it previously encountered at Piney Flats, the Austrian facility had problems producing separators as late as September 2008. (Gaugl, Tr. 4622-23).

Response to Finding No. 875:

Complaint Counsel's finding number 875 is vague and misleading. In general, Microporous implemented modifications in Austria which it learned from producing material in Piney Flats. Contrary to Complaint Counsel's assertion, Gaugl testified that Microporous experienced a very small issue with the babana-curve shape at the beginning of producing separators for EnerSys in Austria, but he does not recall the exact date of that issue. (Gaugl, Tr.

4622-23). Furthermore, Complaint Counsel's use of the term "problems" on numerous occasions in this finding renders the entire finding vague and unclear. This finding should therefore be rejected.

876. Mr. Gaugl testified that as of January 2009, the Austrian facility was still going through a learning curve: "You go through a learning curve all the time, so it's continuous improvement." (Gaugl, Tr. 4605). According to Mr. Gaugl, PE battery separator plants make continuous improvements in efficiency and quality. (Gaugl, Tr. 4605). A PE battery separator producer that has gone through several steps of continuous improvement will be definitely better than a firm just starting up into the production of PE battery separators. (Gaugl, Tr. 4605).

Response to Finding No. 876:

Respondent has no specific response.

3. Development of a new separator is a lengthy, and not always successful process

877. Daramic development of HD took much longer than two years. (PX0950 at 064). Daramic began testing different additives for its new deep-cycle separator as early as 1999. (Whear, Tr. 4777-4778). But it was not until 2005 that Daramic made its first commercial sales. (Whear, Tr. 4778).

Response to Finding No. 877:

Complaint Counsel's finding number 877 is incomplete and misleading. This finding omits Whear's explanation that back in 1999, the latex project (which later became Daramic's HD product) "had a totally different concept than what is currently being used." (Whear, Tr. 4777-78). Moreover, in its discovery responses, Respondent states {

}.

(PX0950 at 064, *in camera*). Thus, it is inaccurate and unfair to characterize the development of HD as Complaint Counsel has done, since the concept changed over time and the evidence shows that cannot ascertain the time spent developing HD. For these reasons, this finding should be rejected.

878. In the late 1990s, U.S. Battery had discussions with Daramic about Daramic developing a deep-cycle battery separator. (Qureshi, Tr. 2014-15). U.S. Battery engaged Daramic in these discussions because U.S. Battery was looking for a lower cost separator and there

was no other competition to Microporous. (Qureshi, Tr. 2017-18). Nawaz Qureshi helped Daramic develop a deep-cycle battery separator. (Qureshi, Tr. 2015). He gave some technical suggestions, and built test batteries for Daramic that contained Daramic separators and Flex-Sil separators, which both Daramic and U.S. Battery tested at their own facilities. (Qureshi, Tr. 2015-16, 2017-18).

Response to Finding No. 878:

Respondent has no specific response.

879. In its internal documents, Daramic has recognized U.S. Battery as “a key development partner in approving both DC and HD separators.” (PX0326 at 001; *see also* PX0681 at 001 (“a valuable partner in the qualification of Daramic products in the past– notably Daramic DC and Daramic HD.”))

Response to Finding No. 879:

Respondent has no specific response.

880. {

} (PX0916 (Dauwe, Dep. at 46-47)). {
} (PX0916 (Dauwe, Dep. at 157-158), *in camera*). {

} (PX0916 (Dauwe, Dep. at 47)).

Response to Finding No. 880:

Respondent has no specific response.

C. Customer switching times are barriers to entry

1. General

881. The testing requirements to gain customer approvals add significantly to the amount of time it takes to enter any of the markets for PE separators. In 2006, Mr. Hauswald expressed {

} (PX2267 at 4, *in camera*). This delay was due to the fact that {

} (PX2267 at 4, *in camera*).

Response to Finding No. 881:

Complaint Counsel’s finding number 881 should be rejected because it is based on hearsay and contrary to other credible evidence. The overwhelming evidence in this case shows

that a PE separator production line can be completely installed and begin commercial operation in { }. (RFOF 1061; Gaugl, Tr. 4543; PX0907 (Kung, Dep. at 27-29, 43), *in camera*). On average, it takes { }. (RFOF 1061; Gaugl, Tr. 4543; Hauswald, Tr. 873-75, 880, 883, *in camera*). A battery separator manufacturer does not need to complete construction of a new PE separator line before it can begin testing products from that line. Rather, much of the required testing { }. (RFOF 1076; RX01045 at 001, *in camera*).

Moreover, Guy Dauwe testified about PX2267 at his deposition. (PX0916 (Dauwe, Dep. at 165-68), *in camera*). PX2267 purports to be notes written by Dauwe and/or Jean-Marie Martin at some point following the BCI convention in 2007 (PX0916 (Dauwe, Dep. at 165-66), *in camera*). The portions of PX2267 cited by Complaint Counsel purport to be statements made by Hauswald at the 2007 BCI convention concerning the relationship between EnerSys and Microporous. (PX0916 (Dauwe, Dep. at 165-67), *in camera*). However, Dauwe testified {

}. (PX0916 (Dauwe, Dep. at 166-67), *in camera*). There is no evidence to substantiate these alleged statements attributed to Hauswald, and in fact, the evidence presented at trial contradicts the statements in PX2267. Therefore, this finding should be rejected by the Court.

882. Battery manufacturers generally provide customers with a warranty against material, workmanship and manufacturing defects for a period of time, *e.g.*, five years. If a battery has a bad component such as a separator, the warranty may require the manufacturer to replace the defective battery with a new battery. (Benjamin, Tr. 3505).

Response to Finding No. 882:

Complaint Counsel's finding number 882 is misleading and should be rejected. Although Bulldog Battery warrants its motive power batteries for five years (Benjamin, Tr. 3505), not all

battery manufacturers provide such lengthy warranties. For example, U.S. Battery provides a one-year warranty, the longest warranty it provides, on its premium batteries, and only a six-month warranty on its economy line of batteries. (Wallace, Tr. 1965). Moreover, this finding ignores evidence showing that {

} (PX0923 (Hauswald, IHT at 109-10), *in camera*).

883. Typically, separator customers do not purchase a new separator product until they have tested, validated and approved the separator. Mr. Seibert in an email to Mr. Whear said “skipping qualification steps always makes me a little nervous; in part because I have had the unpleasant experience of approving quality claims that amounted to hundreds of thousands of dollars.” (PX0320).

Response to Finding No. 883:

Although Complaint Counsel accurately quotes PX0320, that exhibit does not support the proposition set forth in the first sentence of finding number 883. To the contrary, there are examples of battery manufacturers purchasing new separators without testing and approving the separator. For example, {

} (RFOF 958; Weerts, Tr. 4496-97, *in camera*). Furthermore, {

} in 2006. (RFOF

1085; RX00342 at 020, *in camera*).

In addition, this finding is incomplete and misleading because it ignores evidence demonstrating that testing and approval can be completed in a few weeks to a couple of months. (RFOF 1077-79).

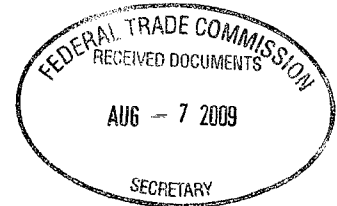
884. Even when a battery manufacturer switches the backweb thickness of a separator, new testing and qualification is required. (Leister, Tr. 4025).

Response to Finding No. 884:

For its response to Complaint Counsel’s finding number 884, Respondent incorporates its reply to finding number 883.

ORIGINAL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**



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

Docket No. 9327

PUBLIC

**RESPONDENT'S RESPONSES TO COMPLAINT COUNSEL'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

VOLUME III of III

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885. Based on Microporous's experience in selling its CellForce product, this internal customer process can take four to five years. (Gilchrist, Tr. 618).

Response to Finding No. 885:

Complaint Counsel's finding number 885 is inaccurate and misleading, and it ignores a substantial amount of evidence showing that testing of a new separator takes less than 2 years.

The evidence in this case demonstrates that {

} (RFOF 1077; RX01137, *in camera*;

RX01139; RX01140; RX01141, *in camera*; RX01142; RX01144, *in camera*; RX01145, *in camera*; RX01146; RX01147, *in camera*; RX01148 at 002 {

}, *in camera*; RX01149 at 002 {

}, *in camera*; RX01150 at 003 {

}, *in camera*; RX01151 ("testing will take 6 months); RX01153;

RX01155 at 002, *in camera*; RX01156 ("BMW's requirement is 12 weeks on tests"). (Whear, Tr. 4788-4789). Customers can {

(RFOF 1077; Gagge, Tr. 2507, *in camera*; Gillespie, Tr. 2975-2976; RX00321). {

}. (RFOF 1077; Gagge, Tr. 2508, *in camera*). For example, life cycle testing and production testing { } (RFOF 1077; Gagge, Tr. 2507-08, *in camera*).

Battery manufacturers can also send batteries to outside firms for testing, often resulting in shorter testing times. (RFOF 1078; RX00007). For instance, Exide determined that complete life cycle testing would take less than six and a half months if the testing was conducted by an outside firm. (RFOF 1078; RX00007).

Although Complaint Counsel relies on Gilchrist's testimony to support this finding, Gilchrist's own testimony demonstrates that testing of a separator product can take as little as a

couple of months. (RFOF 1079; Gilchrist, Tr. 567). In fact, testing the basic functionality of a separator can be accomplished in a few weeks. (RFOF 1079; Gilchrist, Tr. 567-68). The testing process for an automotive separator typically lasts less than a year. (RFOF 1079; Gilchrist, Tr. 567; RX00014 at 001). This contradictory testimony is another example of the biased nature of Gilchrist's testimony.

Complete testing and final acceptance of a new separator by a customer typically takes less than one to two years. (RFOF 1079; PX2300 (Heglie, IHT at 127); RX00243 at 007; RX00014 at 001). EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year. (RFOF 1080; RX00243 at 007). Nawaz Qureshi, the Vice President of Engineering and Technology at U.S. Battery, testified that a separator can be qualified for commercial use in less than one year. (RFOF 1082; Qureshi, Tr. 2067-68). Trojan Battery completed testing and qualified Daramic's HD product in its Pacer battery in a total of nine months. (RFOF 1083; Godber, Tr. 170-71).

Moreover, the Technical Requirements outlined in Exide's Global PE Separator RFQ state that the testing and validation process will take up to 1 year and 9 months for transportation (SLI) separators and up to 2 years for industrial separators. (RFOF 1086; RX00013 at 009). According to Exide, these validation times include both life cycle and field testing. (RFOF 1086; RX00013 at 009).

Finally, {
}, (RFOF 1087; Hall, Tr. 2814, *in camera*; RX01161 ("According to Dr. Johns the qualification process will take 6 months from time of receipt of samples")), and {
} (RFOF 1087; RX00076, *in camera*; RX00043 at 003, *in camera*).

As an additional response to this finding, Respondent incorporates its reply to finding number 883.

886. At EnerSys the process for testing and validating a new separator product involves preliminary material tests of separator samples, which are typically made in a laboratory, and final tests of production samples in actual batteries. The preliminary tests involve testing the separator material in puncture, shrinkage and electrical resistance tests, as well as analyzing its brittleness and composition, *i.e.*, particularly oil. (Gagge, Tr. 2484-85, 2487). If the separator samples pass these preliminary tests, EnerSys will request the potential supplier to provide production samples, *i.e.*, separators made on the supplier's production line. (Gagge, Tr. 2484-86).

Response to Finding No. 886:

Complaint Counsel's finding number 886 is incomplete and misleading. It ignores evidence which shows that in a complaint filed by EnerSys against Daramic in October 2006, which was verified by Larry Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year. (RFOF 1080; RX00243 at 007). In addition, Axt's admission comports with what was summarized in a Microporous call report with him in October 2006. (RFOF 1081; RX01162 at 002 ("6-12 months period for qualification/acceptance of new product")). For additional context, Respondent refers to its reply to finding number 885.

887. After receiving production samples from a potential separator supplier, EnerSys builds test batteries with the new separators. These test batteries undergo performance and battery life tests. The performance tests essentially analyze whether the battery with the new separator will generate the electrical current specified for the battery. The battery life tests are time-consuming because they are designed to determine whether the battery will perform well for the duration of the battery's warranty period. These tests involve placing the test batteries in a box which has an elevated temperature. (Gagge, Tr. 2484-2487, 2488-89). The elevated temperature helps age the battery. (Gagge, Tr. 2489).

Response to Finding No. 887:

For its response to Complaint Counsel's finding number 887, Respondent incorporates its reply to finding number 886.

888. Qualifying a separator to meet the performance specifications is not the only step that is required before the separator can be sold in commercial batteries. (Gillespie, Tr. 2935-2936). After a separator is qualified, a battery manufacturer must make sure the separator

is runnable in the battery manufacturing facilities. (Gillespie, Tr. 2936; *see also* Gagge, Tr. 2488). Use of a new separator requires the battery manufacturer to understand and tweak the battery manufacturing machines to be able to run a different type of product. (Gillespie, Tr. 2936).

Response to Finding No. 888:

Respondent refers to its replies to finding numbers 885 and 886 for context.

i) Testing for motive and UPS

889. Testing for traction batteries takes up to 3 years. (Whear, Tr. 4798; PX0568; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*).

Response to Finding No. 889:

Complaint Counsel's finding number 889 is incomplete and misleading, and it misrepresents the evidence. Contrary to Complaint Counsel's suggestion, Whear testified that a customer would have an indication of the results of testing traction batteries in 18 months. (Whear, Tr. 4798). In PX0568, an email from 2005 when Daramic's HD product was first being offered to customers, Whear explained that testing HD for use in a Bulldog traction battery could take 2-3 years of full testing because "the goal is to show that HD will *increase* life cycle." (PX0568, emphasis added). If a separator manufacturer is not attempting to show that a new separator will increase life cycle, there is no evidence indicating that testing will take this long. In fact, the majority of evidence demonstrates that battery testing takes less than 2 years. For a further response to this finding, Respondent incorporates its replies to finding numbers 885 and 886.

890. Testing for motive power and stationary is a very long-term process that takes about two years to complete. (Whear, Tr. 4801, (PX0842 "Testing industrial cells is a very long term process (~2 years). . .")). When C&D began testing HD for use in motive batteries, Daramic understood that it would take two years to qualify the separator at C&D. (PX0806 at 003).

Response to Finding No. 890:

For its response to Complaint Counsel's finding number 890, Respondent incorporates its replies to finding numbers 885, 886 and 889.

891. Motive battery separators undergo cycle testing for a period of 2.5 years at EnerSys. (Gagge, Tr. 2490). From beginning to end the testing process takes “upwards of three years, a six-month development cycle for production tooling, et cetera, and then the two and a half years of testing would follow.” (Gagge, Tr. 2492).

Response to Finding No. 891:

For its response to Complaint Counsel’s finding number 891, Respondent incorporates its replies to finding numbers 885, 886 and 889.

892. Even though EnerSys had experience with CellForce through its acquisition of Hawker, it still took a long time to approve CellForce in the remainder of EnerSys’s facilities. (Axt, Tr. 2127-28). Mr. Axt explained that this is because

each plant uses different profiles of polyethylene or of CellForce, so you just -- there's a long development period and approval period to get qualified. It's just not because you use the product in one facility it's already approved in another.

(Axt, Tr. 2128).

Response to Finding No. 892:

Complaint Counsel’s finding number 892 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 885, 886 and 889. In addition, this finding ignores evidence showing that the testing time is shortened significantly when a battery manufacturer is qualifying a separator for use in another facility. EnerSys’ own actions demonstrate this point. For example, during the strike at Daramic’s Owensboro facility, EnerSys accepted battery separators manufactured at the Feistritz location for use in EnerSys’ facility in Monterrey, Mexico, after, at most, five months of testing. (RFOF 713; Burkert, Tr. 2400-01). In addition, {

}

(RFOF 715; RX00717, *in camera*).

Moreover, battery manufacturers often require shorter testing times when qualifying new separators which are produced using familiar technology. For instance, {

}

(RFOF 499; RX00048, *in camera*; RX00049; RX00076, *in camera*; Hall, Tr. 2853-54, *in camera*).

a. PVC testing takes two years

893. {

} (PX0916 (Dauwe, Dep. at 132)). {

} (PX0916 (Dauwe, Dep. at 163-164))

Response to Finding No. 893:

For its response to Complaint Counsel’s finding number 893, Respondent incorporates its replies to finding numbers 885 and 886.

894. If { } obtains the appropriate calendar roll, it would take { } before EnerSys could begin ordering product from them. (Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). It is not possible to accelerate the testing. (Gagge, Tr. 2508-2509, *in camera*). EnerSys is currently in discussions with {

{ } (Gagge, Tr. 2499-2500, *in camera*). {

}

(Gagge, Tr. 2515-16, *in camera*). If { } could actually supply EnerSys with product. (Burkert, Tr. 2360, *in camera*; see also Gagge, Tr. 2500, *in camera*).

Response to Finding No. 894:

Complaint Counsel’s finding number 894 is incomplete and misleading. This finding ignores evidence showing that {

{ } (RFOF 992; Axt, Tr. 2218, *in camera*). Additionally,

{

{ } (RFOF 993; Burkert, Tr. 2388, *in camera*). Furthermore, {

} (RFOF 994; Gagge, Tr. 2500, *in camera*).

This finding also ignores evidence demonstrating that {

} (RFOF 1024; Axt, Tr. 2219, *in*

camera). In fact, {

} (RFOF 1025; Axt, Tr. 2272-73, *in camera*).

{

} (RFOF 1026; Axt, Tr. 2272-73, *in camera*). {

} (RFOF 1027; Burkert, Tr. 2388, *in camera*).

895. Exide expects testing of motive power and stationary separators to take a minimum of two years. (Gillespie, Tr. 2973-2974; RX00013 at 009; PX1090 at 004 (Exide timeline indicating a 26 month timeframe for industrial product validation and testing)).

Response to Finding No. 895:

Complaint Counsel's finding number 895 is incomplete and misleading. The Technical Requirements outlined in Exide's Global PE Separator RFQ state that the testing and validation process could take up to 2 years for industrial separators. (RFOF 1086; RX00013 at 009). According to Exide, these validation times include both life cycle and field testing. (RFOF 1086; RX00013 at 009). Moreover, battery manufacturers, including Exide, can send batteries to outside firms for testing, often resulting in shorter testing times. (RFOF 1078; RX00007 (internal Exide email discussing testing by outside firm)). For instance, Exide determined that complete life cycle testing would take less than six and a half months if the testing was conducted by an outside firm. (RFOF 1078; RX00007 (internal Exide email discussing testing by outside firm)).

Furthermore, the evidence in this case raises significant credibility questions about Exide's intent and Gillespie's testimony (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

2. Deep-cycle testing

896. Life-cycle tests are conducted a few different ways. The Battery Council International sets testing standards for the rate of discharge. Life-cycle testing in the lab involves putting the battery on a discharge machine in a laboratory that runs automatically so that the batteries cycle every day. (Godber, Tr. 159-60). Because you barely get more than a cycle in a given day, it takes a while to for the battery to reach the end of its life of six or seven hundred cycles. (Godber, Tr. 159).

Response to Finding No. 896:

Complaint Counsel's finding number 896 is inaccurate. For its response to this finding, Respondent incorporates its replies to finding numbers 885 and 886. In addition, Nawaz Qureshi, the Vice President of Engineering and Technology at U.S. Battery, which holds itself out to the world as the leading manufacturer of deep-cycle batteries, testified that a separator can be qualified after 750 cycles. (RFOF 222, 1082; Qureshi, Tr. 2068; Wallace, Tr. 1955). During testing, a battery can be cycled 2-4 times per day. (RFOF 1082; Qureshi, Tr. 2067-68). Thus, a separator can be fully qualified for commercial use in less than one year. (RFOF 1082; Qureshi, Tr. 2067-68). In fact, Trojan Battery completed testing and qualified Daramic's HD for its Pacer battery in a total of nine months. (RFOF 1083; Godber, Tr. 170-71).

897. Testing and qualification of deep-cycle battery separators typically takes between 18 and 24 months. (Gillespie, Tr. 2934). Exide manufactures deep-cycle batteries at its Salina and Bristol manufacturing plants. (Gillespie, Tr. 2999, *in camera*). Qualification of Daramic's HD separators took well over a year for use Exide's Salina facility. (Gillespie, Tr. 2935). HD separators only received approval a year or so later for use in Exide's Bristol manufacturing facility. (Gillespie, Tr. 2935).

Response to Finding No. 897:

For its response to Complaint Counsel's finding number 897, Respondent incorporates its reply to finding number 896.

898. Trojan tests separators for use in their batteries in order to understand the life-cycle characteristics due to original equipment warranty requirements and to protect their brand. (Godber, Tr. 158).

Response to Finding No. 898:

Respondent has no specific response.

899. In addition to life-cycle testing in the lab, Trojan will conduct field testing. (Godber, Tr. 159). In field testing, Trojan will build a battery with a particular separator and then will go to a golf course and put the batteries in the golf carts at the course and follow the batteries during the course of their life. (Godber, Tr. 160). A field test for a separator generally is a two-year time frame to understand how the battery is going to perform in the field. (Godber, Tr. 163). On a severe hilly course, field testing may be done in 18 months because the discharge of the battery will be faster and the battery will degrade sooner. (Godber, Tr. 163).

Response to Finding No. 899:

Respondent refers to its replies to finding numbers 885, 886 and 896 for context.

900. Because field testing is expensive, Trojan does not typically run field testing and laboratory testing concurrently. (Godber, Tr. 164). Laboratory testing is typically performed before field testing to see if the laboratory numbers are good enough to merit the more expensive field testing. (Godber, Tr. 164).

Response to Finding No. 900:

Complaint Counsel's finding number 900 is incomplete and misleading. At trial, Godber testified that Trojan does not typically conduct life cycle (laboratory) and field testing concurrently. (Godber, Tr. 164). However, he also testified that Trojan has conducted consecutive life cycle and field testing "in a couple cases." (Godber, Tr. 164). This testimony is inconsistent and should be disregarded.

For additional context, Respondent refers to its replies to finding numbers 885, 886 and 896.

901. Trojan began testing the CellForce separator in June of 1999 for approval for a lower capacity golf cart, the T-605, and for a marine battery line. (Godber, Tr. 166). These two product lines were for aftermarket products. (Godber, Tr. 166). The field test was started after the life-cycle testing began, once Trojan began seeing good results in the lab. The qualification process finished in March of 2001. (Godber, Tr. 166-67).

Response to Finding No. 901:

For its response to Complaint Counsel's finding number 901, Respondent incorporates its replies to finding numbers 885, 886, 896 and 900.

902. Notwithstanding the extensive testing on CellForce, Trojan ran into a shrinkage problem with CellForce on the marine product lines, shortly after it began selling the product. (Godber, Tr. 167-68). Trojan had not sold many batteries at the point it discovered the problem and decided to pull products with CellForce separators from the market. (Godber, Tr. 168). Microporous was able to resolve the shrinkage problem, and after some additional testing, Trojan reapproved the CellForce for the marine line in 2003. (Godber, Tr. 168-69).

Response to Finding No. 902:

Complaint Counsel's finding number 902 is inconsistent with finding number 859, and it should therefore be disregarded.

903. Trojan has tested CellForce for aftermarket floor scrubber, scissor lift and boom lift batteries; the testing for those applications ran around 20 to 22 months. (Godber, Tr. 169-70).

Response to Finding No. 903:

For its response to Complaint Counsel's finding number 903, Respondent incorporates its replies to finding numbers 885, 886, 896 and 900.

904. Daramic's decision to switch HD production to Piney Flats from Owensboro was made in the spring of 2008. Yet qualification of HD material made in Piney Flats took until the spring of 2009 to be achieved. (Trevathan, Tr. 3715-16). Even with the trained work force that was sent from Owensboro to train the Piney Flats staff how to establish the line and make the product the qualification took a year. (Trevathan, Tr. 3716).

Response to Finding No. 904:

Complaint Counsel's finding number 904 is incomplete, misleading and unreliable. Daramic HD from Piney Flats was first qualified by a customer in February or March of 2009. (Trevathan, Tr. 3715-16). Complaint Counsel misrepresents Trevathan's testimony concerning the training of the work force in Piney Flats. Daramic did not send a "trained work force" to Piney Flats. (Trevathan, Tr. 3716). Rather, some engineers from Owensboro visited the Piney Flats facility. (Trevathan, Tr. 3716). There is no evidence demonstrating the amount of time the

engineers spent in Piney Flats or the efforts they undertook to “train” the work force at that facility.

Moreover, {

} (RFOF 1077; Gagge, Tr. 2508, *in camera*), the

Court must consider customers’ motivation in approving HD from Piney Flats given the timing of the acquisition. Because the HD qualification process took place shortly after the acquisition, and many customers were upset with Daramic due to the acquisition, the evidence concerning how long it took HD to be qualified is unreliable.

3. SLI testing

905. Exide’s testing of MPLP’s PE SLI separators was scheduled to take 18-24 months to complete. (Gillespie, Tr. 2973; RX00013 at 009 (test sequence for automotive separators “expected to take 9 months for life cycle and 1 year for field test”); PX1090).

Response to Finding No. 905:

Respondent refers to its replies to finding numbers 885 and 886 for context. Significantly, Exide determined that complete life cycle testing would take less than six and a half months if the testing was conducted by an outside firm. (RFOF 1078; RX00007 (internal Exide email discussing testing by outside firm)).

i) Daramic documents recognize long testing time

906. While Daramic was actively trying to grow HD’s market share, Daramic also understood that battery manufacturers would require testing and qualification of the new separator before HD was widely accepted for commercial use. (PX0262 at 003). Daramic expected customer qualification of HD for use in deep-cycle batteries to take 18 months of testing or longer. (PX0262 at 003).

Response to Finding No. 906:

Complaint Counsel’s finding number 906 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 885, 886, 889 and 896.

907. Daramic recognized that testing separators in deep-cycle applications at Trojan would take approximately two years. In a May 24, 2006 email responding to the announcement that Trojan was adding another deep-cycle battery plant, Pierre Hauswald wrote Bob

Toth, { } (PX2248 at 001, *in camera*). Less than one year later, Daramic put together an { } (PX0263 at 008, *in camera*).

Response to Finding No. 907:

Complaint Counsel's finding number 907 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 885, 886, 889 and 896. Despite the statements in Daramic's documents, which turned out to be incorrect, Trojan Battery completed testing and qualified Daramic's HD for its Pacer battery in a total of nine months. (RFOF 1083; Godber, Tr. 170-71).

908. High switching costs provide Daramic with an important advantage over other suppliers. Daramic's { } for Daramic in sales to large customers. (RX01497 at 001, *in camera*). According to Mr. Roe, the costs associated with switching suppliers is "much higher" for customers purchasing industrial (motive or stationary) separators than it is for customers purchasing automotive separators. (PX0482 at 003).

Response to Finding No. 908:

Complaint Counsel's finding number 908 is false and misrepresents the evidence in this case. When he was asked about PX0482 during his deposition, Roe testified that { } (PX0911 (Roe, Dep. at 216-17), *in camera*). He further testified that { } (PX0911 (Roe, Dep. at 217), *in camera*). Complaint Counsel never showed the slide to Roe, and it is entirely improper to now cite Roe's comment in PX0482 as a "fact" when Complaint Counsel failed to obtain Roe's agreement with their view of this issue.

Furthermore, this finding completely ignores the real-world examples of large customers switching separator suppliers. In fact, although Respondent disagrees, Complaint Counsel's position in this case seems to be that all of the battery manufacturers in North America were

going to switch to Microporous but for the acquisition. (See, e.g., Complaint Counsel's Finding Nos. 670-694). {
} (RFOF 475, 491). {
} (RFOF 590, 597-98, 600, 667, 672, 674-77, *in camera*).

Complaint Counsel's finding number 908 is untenable because it is inconsistent with the behavior of customers and Complaint Counsel's own position.

- D. The PE separator manufacturing process is complicated and requires special know how
909. The equipment needed to manufacture polyethylene separators includes an extruder, extractor, calender rolls, mixer, dryer and bulk handling equipment. (Gilchrist, Tr. 591-593).

Response to Finding No. 909:

Respondent has no specific response.

910. The manufacturing process for separators is highly automated. For example, Microporous has only two or three people monitoring the equipment on each of its production lines. (Gilchrist, Tr. 601-602). Consequently, labor is not a huge constituent of the cost of making a battery separator. (Gilchrist, Tr. 601).

Response to Finding No. 910:

Complaint Counsel's finding number 910 is incomplete and misleading, and it misrepresents the evidence. First, {
}. (RFOF 245; Riney, Tr. 4958-59, *in camera*; RX01401, *in camera*). Additionally, this finding ignores uncontroverted evidence showing that {
} (RFOF 253; Riney, Tr. 4933, *in camera*).

Moreover, this finding omits testimony by Gilchrist showing that in addition to the individuals who run a production line, a separator manufacturer must also employ supervisors, laboratory backup personnel, a maintenance crew, and other non-direct employees who support each line. (Gilchrist, Tr. 602).

911. Because different product formulas require different conditions of the die which lead to extraction, the employees working on the production lines for separators have unique skills. To meet customer product specifications, the employees on the lines must know how to set the proper conditions of pressure, temperature and speed on the equipment. (Gilchrist, Tr. 394-395).

Response to Finding No. 911:

Complaint Counsel's finding number 911 is inaccurate and misleading. At trial, Gaugl testified that it takes approximately six months to fully train a workforce in the art of PE separator manufacturing. (Gaugl, Tr. 4606-07). However, a workforce is able to produce quality battery separators in a much shorter time frame. (Gaugl, Tr. 4606-07). Additionally, this finding ignores the evidence in this case demonstrating that numerous separator manufacturers have built PE lines or increased capacity, including BFR, NSG, Anpei, Separindo, Sebang, Baotou, Epoch, M-Arrow and Genius. (RFOF 977-1051). This finding further ignores trial testimony by Pierre Hauswald that {

}. (RFOF 1050; Hauswald, Tr. 932-33, *in camera*). Moreover, PE separators have been manufactured for over fifty (50) years and the manufacturing technology for such separators is well known. (RFOF 1063; Hauswald, Tr. 957-59; Gilchrist, Tr. 564).

912. Manufacturers of separators have special know-how obtained in a learning-by-doing fashion. For example, Microporous "learned a lot of lessons, painful lessons, expensive lessons" when initially manufacturing CellForce at Piney Flats. These "expensive lessons" were incorporated into its new production lines in Feistritz. (Gilchrist, Tr. 395-396).

Response to Finding No. 912:

For its response to Complaint Counsel's finding number 912, Respondent incorporates its reply to finding number 911. Moreover, this finding ignores evidence showing that Peter Gaugl

installed his first PE separator line in 1995, after working only one year in the PE separator industry. (Gaugl, Tr. 4531-32 (Gaugl began working for Jungfer in 1994 and had no prior experience with PE separators)). In fact, Gaugl had absolutely no experience installing PE separator lines before he installed the line in 1995. (Gaugl, Tr. 4534).

913. Microporous's manufacturing lines for CellForce use PE technology that it obtained from Jungfer. (Gilchrist, Tr. 563). Depending on the type of calender rolls attached to the line, these manufacturing lines can produce separators for either SLI applications or industrial applications. (Gilchrist, Tr. 562, 569-570).

Response to Finding No. 913:

Respondent has no specific response.

1. Lack of experience is a barrier to entry:

914. Customers are unlikely to sponsor entry by firms without appropriate flooded lead acid separator experience. {

} (Axt, Tr. 2305-2306, *in camera*).

Response to Finding No. 914:

Complaint Counsel's finding number 914 is inaccurate and misleading. First, this finding ignores the evidence in this case demonstrating that numerous separator manufacturers have built PE lines or increased capacity, including BFR, NSG, Anpei, Separindo, Sebang, Baotou, Epoch, M-Arrow and Genius. (RFOF 977-1051). This finding further ignores trial testimony by Pierre Hauswald that {

}. (RFOF 1050; Hauswald, Tr. 932-33, *in camera*).

In addition, this finding ignores evidence showing that numerous separator manufacturers across the globe produce PE separators which are on par with the quality and price of Daramic's separators, and Daramic competes with those companies every day. For example:

- { } (RFOF 986; Hauswald, Tr. p. 1034).

Daramic has lost business to BFR, and that the business "goes back and forth." (RFOF 987; Hauswald, Tr. 1034; Thuet, Tr. 4331, 4348, 4445). Using its access to competitive material, Daramic has tested BFR's PE separators and has found them to be comparable to Daramic's product, with no significant difference in the material. (RFOF 988; Thuet, Tr. 4335-36). JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RFOF 985; RX00051; RX00055). In addition, {

} (RFOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*; RX00026, *in camera*; RX00027, *in camera* {
};
RX00061, *in camera*; RX00062, *in camera*).

- Daramic considers { } to be one of its primary competitors. (RFOF 1000; Thuet, Tr. 4330; PX0522, *in camera*). {
} (RFOF 1006; PX0923 (Hauswald, IHT at 267-68), *in camera*). Since the joint venture between Daramic and NSG was consummated, Daramic has continued to test NSG's competitive product from Japan, and has continued to find NSG's separators to be comparable to its own separators. (RFOF 1009; Thuet, Tr. 4335-36; PX0194, *in camera*).
- {
} Anpei produces high quality PE separators which are used in OEM applications. (RFOF 1021; Hauswald, Tr. 1037). In fact, Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (RFOF 1023; Thuet, Tr. 4336, 4349). {
} (RFOF 1020; RX00342 at 072, *in camera*).
- Daramic has tested Separindo separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1032; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Sebang separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1040; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Baotou material and found it to be comparable to Daramic material, with no significant difference in the quality of the material. (RFOF 1043; Thuet, Tr. 4336, 4349).

- Daramic considers Epoch to be very aggressive in the global separator market. Today, Daramic faces competition from Epoch in China, as well as exports from Epoch in other areas of the world, including Europe. (RFOF 1047; Thuet, Tr. 4333; Hauswald, Tr. 1035-36; RX00195; PX0994, *in camera*; RX00551 at 004, *in camera*; RX01003 at 007, *in camera*).

Moreover, because the EnerSys witnesses were coached by FTC lawyers, their testimony is not credible. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

915. { } (PX0265 at 012, *in camera*). EnerSys believes that a viable supplier needs to be a reputable company with financial stability, technical innovation, research capabilities, customer service and support. (Gagge, Tr. 2484).

Response to Finding No. 915:

Complaint Counsel's finding number 915 is irrelevant, false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 914.

916. Reputation is an important component for entry into any North American PE market. EnerSys was willing to try MPLP's CellForce product only after acquiring Hawker and learning from its European operations about MPLP's reputation and stellar customer focus. (Axt, Tr. 2127).

Response to Finding No. 916:

Complaint Counsel's finding number 916 is irrelevant, false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 914.

917. Customers care about their separator suppliers' reputations for financial stability, technical expertise, manufacturing capabilities, and leadership capabilities. (Axt, Tr. 2107-2108). Technical expertise is important for innovation, weekly support, and monthly support. (Axt, Tr. 2110; *see also* Hauswald, Tr. 784-785, *in camera*).

Response to Finding No. 917:

Complaint Counsel's finding number 917 is irrelevant, false and misleading. First, the citation to Hauswald's testimony does not support the proposition set forth by Complaint Counsel. Hauswald testified that {

}. (Hauswald, Tr. 784-85, *in camera*). {

} (Hauswald, Tr. 784-85,

in camera).

For a further response to this finding, Respondent incorporates its reply to finding number 914.

918. { } (Gillespie, Tr. 3127, *in camera*).

Response to Finding No. 918:

Complaint Counsel's finding number 918 is irrelevant, incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 914. Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

E. Entek is not likely to enter the deep-cycle, motive or UPS markets

919. Dr. Simpson noted that { } does not currently make deep-cycle or motive battery separators and thus would need { } before it could have a significant effect on these markets as a supplier. (Simpson, Tr. 3195-3196, *in camera*). Specifically, Dr. Simpson explained that to enter the deep-cycle battery separator market at a level sufficient to restore the pre-acquisition competitive environment, { } would need to develop a reliable product, modify its production line, get qualified by customers, and then gain the learning by doing necessary to be efficient. (Simpson, Tr. 3408, *in camera*).

Response to Finding No. 919:

Complaint Counsel's finding number 919 is incomplete and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. {

} (RFOF 1220; Simpson, Tr. 3343,

in camera). {

} (RFOF 1220; Simpson,

Tr. 3344, *in camera*). {

} (RFOF 1220; Simpson, Tr. 3344, *in camera*). {

} (RFOF 1220; Simpson, Tr.

3344, *in camera*).

{

} (Leister, Tr. 3985, *in camera*). {

} (RFOF 810; Balcerzak, Tr. 4130-31, 4138-

39). {

}

(RFOF 810; Balcerzak, Tr. 4138-39). In fact, {

} (RFOF 1237; Simpson, Tr. 3348, 3364, *in*

camera).

{

} (RFOF 963, 964, 966, 968). In fact, {

} (RFOF 968; Weerts, Tr. 4489, *in camera*). {

} (RFOF 968; Weerts, Tr. 4522-23, *in camera*).

920. Entek is unlikely to develop a separator for the deep-cycle market because it was unsuccessful in developing a competitive product for this market in 1996. (Gilchrist, Tr. 363). Moreover, Entek's separators are based on polyethylene material which is inert and has no effect on inhibiting the antimony transfer process. (Gilchrist, Tr. 365, 389-390).

Response to Finding No. 920:

Complaint Counsel's finding number 920 is false and misleading. {

} (RFOF 810; Balcarzak, Tr. 4130-31, 4138-39). {

} (RFOF 810; Balcarzak, Tr. 4138-39). In

fact, {

} (RFOF 1237;

Simpson, Tr. 3348, 3364, *in camera*).

Additionally, the evidence raises significant credibility questions about Gilchrist's testimony in this proceeding (RFOF 396, 402, 403, 409, 581), and Gilchrist's testimony on this issue should be disregarded.

921. Entek is unlikely to develop separators for motive batteries because in the past it has refused to supply separators for this application despite a request to do so by Bulldog Batteries. (Benjamin, Tr. 3519). Based on its conversation with Entek about a supply relationship, Bulldog Batteries concluded that Entek was simply not interested in supplying industrial battery applications with separators. After Entek told Bulldog Batteries that it was "not interested in getting into the industrial. We don't want to manufacture the material that you're using, and we're quite happy with the market that we have. So, we're going to stay there." Bulldog took Entek off its supplier list and no longer pursued them as a supplier of motive battery separators. (Benjamin, Tr. 3520-3521). Entek has never approached Bulldog Battery in an effort to supply its motive separator needs. (Benjamin, Tr. 3521).

Response to Finding No. 921:

Complaint Counsel's finding number 921 is false and misleading. {

} (RFOF 970; Gillespie, Tr. 3037, *in camera*).

{

} (RFOF 969; Weerts, Tr. 4494, *in camera*). {

} (RFOF 963;

Gillespie, Tr. 3021, *in camera*).

{

} (RFOF 968; Weerts, Tr. 4489, *in*

camera). {

} (RFOF 968; Weerts, Tr. 4522, *in camera*). {

} (RFOF 968; Weerts, Tr. 4522-23, *in camera*).

{

} (RFOF 964; Weerts, Tr. 4488-99, *in*

camera). {

} (RFOF

964; RX00114 at 008, *in camera*). {

} (RFOF 964; Weerts,

Tr. 4489, *in camera*).

{

} (RFOF 972; Weerts, Tr. 4487-88, *in camera*).

{

} (RFOF 972; Weerts, Tr. 4488, *in camera*).

922. Entek has chosen to focus solely on the SLI separator market. Its only industrial separators are UPS gel-type separators, a legacy product made solely for C&D Dynasty. (Gilchrist, Tr. 429-30). Entek does not have a significant position in the motive market. (PX0402 at 009-011).

Response to Finding No. 922:

Complaint Counsel's finding number 922 is false. For its response to this finding, Respondent incorporates its replies to finding numbers 919, 920 and 921.

923. Exide understands that { } does not currently manufacture motive power or stationary separators. (Gillespie, Tr. 3037, *in camera*). Mr. Gillespie testified that he believed that {

} (Gillespie, Tr. 3037-3038, *in camera*).

Response to Finding No. 923:

Complaint Counsel's finding number 923 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Furthermore, Gillespie's testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

924. In the past, Exide repeatedly asked { } for quotations on Exide's industrial (motive and stationary) separator business, and "the answer was continually, no, no, no." (Gillespie, Tr. 3129, *in camera*). Only in November 2008 did, {

} (Gillespie, Tr. 3129, *in camera*; Weerts, Tr. 4509, *in camera*; PX1902 at 001, *in camera*). According to Mr. Gillespie, from Exide's perspective, the { } (Gillespie, Tr. 3129-3130, *in camera*). Exide does not believe that { } is enthusiastic about manufacturing industrial separators. (Gillespie, Tr. 3040, *in camera*).

Response to Finding No. 924:

Complaint Counsel's finding number 924 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Furthermore, Gillespie's testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

925. To date, { } has not provided Exide a pricing estimate for potential supply of motive or stationary separators. (Gillespie, Tr. 3040, *in camera*; Weerts, Tr. 4507-4509, *in camera*). {

} (Weerts, Tr. 4527, *in camera*). { } has indicated to Exide that it should be prepared for "sticker shock" on { } pricing for motive and or stationary separators. (Gillespie, Tr. 3040, *in camera*; Weerts, Tr. 4509, *in camera*).

{ } (PX1902 at 001, *in camera*). The fact that { } for Exide. (Gillespie, Tr. 3130, 3136-3137, *in camera*).

Response to Finding No. 925:

Complaint Counsel's finding number 925 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Significantly, {

} (RFOF 968; Weerts, Tr. 4522-23, *in camera*).

Furthermore, Gillespie's testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

926. {

(Gillespie, Tr. 3040, *in camera*; PX1902 at 001, *in camera*). {

}
} (Gillespie,

Tr. 3126-3127, *in camera*). In order to meet Exide's needs, {
} (Gillespie, Tr. 3137-3138, *in camera*).

Response to Finding No. 926:

Complaint Counsel's finding number 926 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Furthermore, Gillespie's testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

927. {

(Gillespie, Tr. 3129-3130, *in camera*; PX1902 at 001, *in camera*). {

} (Gillespie, Tr. 3130, 3134-3135, *in camera*).

{

} (Gillespie, Tr. 3136, *in camera*).

Response to Finding No. 927:

Complaint Counsel's finding number 927 is false and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Furthermore, Gillespie's

testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

928. Even if Exide and { } can resolve the pricing and black scum issues, Exide will { } In order for Exide to make a decision to purchase motive or stationary separators from { } it would first have to test and qualify those separators. Such testing will take at least { } was able to acquire the proper tooling and manufacture a sufficient quantity for Exide's testing needs. (Gillespie, Tr. 3038-3039, *in camera*). { }

{ } (Weerts, Tr. 4489, *in camera*).

Response to Finding No. 928:

Complaint Counsel's finding number 928 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 921. Significantly, { }

{ } (RFOF 963;

Gillespie, Tr. 3021, *in camera*). Moreover, { }

{ } (RFOF 964; RX00114 at 008, *in camera*).

Furthermore, Gillespie's testimony about this issue is inconsistent with other substantial evidence in this case, and it is another example of why his testimony is not credible and should be disregarded.

929. EnerSys has continued to seek an alternative to Daramic since the acquisition of MPLP in February of 2008. Mr. Burkert met a representative of { } at the BCI Conference in 2008, and provided { } in hopes of engaging discussions. (Burkert, Tr. 2351-52, *in camera*). EnerSys never received a { } (Burkert, Tr. 2352, *in camera*). When Mr. Burkert approached an { } representative in another industry conference in Europe, he got the impression { } wanted no part of him. (Burkert, Tr. 2353, *in camera*).

Response to Finding No. 929:

Complaint Counsel's finding number 929 is false and misleading. First, because all of the EnerSys witnesses were heavily coached by FTC lawyers, their testimony is not credible. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

{
}
(RFOF 681; Burkert, Tr. 2311; Burkert, Tr. 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*).

{
} (RFOF 682; Burkert, Tr. 2448, *in camera*).

{
} (RFOF 683;
Burkert, Tr. 2448, *in camera*). EnerSys acknowledged that {

} (RFOF 684; Gagge, Tr. 2514, *in camera*).

Moreover, this finding ignores evidence demonstrating that {

} (RFOF 685; RX00239, *in camera*;
RX00193; RX00203, *in camera*). {

} (RFOF 685; RX01203, *in camera*). EnerSys also gave
consideration to PT Separindo located in India (RX00194) and Epoch located in China (RFOF
685; RX00195).

BFR, which produces battery separators for JCI, the world's largest manufacturer of
automotive batteries, has advised EnerSys that it is capable of producing industrial PE separators
for EnerSys. (RFOF 687; RX00225). {

} (RFOF 991; RX00059, *in camera*; RX00060, *in
camera*; RX00025, *in camera*; RX00026, *in camera*; RX00027, *in camera* {

}; RX00061, *in camera*;
RX00062, *in camera*). In fact, {

} (RFOF 689; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*). { } (RFOF 689; RX00238; Axt, Tr. 2270, *in camera*). {

} (RFOF 992; Axt, Tr. 2218, *in camera*).

Additionally, {

} (RFOF 690; Axt, Tr. 2272, *in camera*). {

} (RFOF 691; RX00222, *in camera*). {

} (RFOF 692; RX00197, *in camera*). {

} (RFOF 693; Burkert, Tr.

2445, *in camera*).

930. Mr. *Burkert* felt that while { } was polite to him, it was not interested in doing business with EnerSys. (Burkert, Tr. 2353, *in camera*; *see also* Gagge, Tr. 2500-2501, *in camera*). As a result of these conversations, EnerSys will not be placing any orders with { } (Burkert, Tr. 2357, *in camera*).

Response to Finding No. 930:

For its response to Complaint Counsel's finding number 930, Respondent incorporates its reply to finding number 929. EnerSys witnesses' testimony is not credible and should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

931. If EnerSys received preproduction samples of { } material today, it would do { } preliminary testing. (Gagge, Tr. 2522, *in camera*). If those samples worked EnerSys would get production samples and test those on the motive side for { } (Gagge, Tr. 2522, *in camera*).

Response to Finding No. 931:

For its response to Complaint Counsel's finding number 931, Respondent incorporates its reply to finding number 929. EnerSys witnesses' testimony is not credible and should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

In addition, this finding ignores evidence showing that complete testing and final acceptance of a new separator by a customer typically takes less than one to two years. (RFOF 1079; PX2300 (Heglie, IHT at 127); RX00243 at 007; RX00014 at 001). In fact, in a complaint filed by EnerSys against Daramic in October 2006, which was verified by Larry Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year. (RFOF 1080; RX00243 at 007). In addition, Axt's admission comports with what was summarized in a Microporous call report with him in October 2006. (RFOF 1081; RX01162 at 002 ("6-12 months period for qualification/acceptance of new product"))).

932. JCI pursued discussions with Entek about possible supply of deep-cycle separators. JCI {
 } (PX1515 at 006, *in camera*). JCI discussed
{
 } (PX1515 at 006, *in camera*).

Response to Finding No. 932:

Complaint Counsel's finding number 932 is false and misleading. {

} (RFOF 810; Balcarzak, Tr. 4130-31, 4138-39). {

} (RFOF 810; Balcerzak, Tr. 4138-39). In

fact, { } (RFOF 1237;

Simpson, Tr. 3348, 3364, *in camera*). {

} (RFOF 475, 480). In addition, {

} (RFOF 491, 501; RX00061, *in camera*).

F. Amer-Sil is unlikely to enter any of the North American markets for PE or deep-cycle separators

933. Amer-Sil has {

} (PX0916 (Dauwe, Dep. at 115, 117, *in camera*)). Amer-Sil has been approached by {

} (PX0916 (Dauwe, Dep. at 89-90, *in camera*)). {
} According to Amer-Sil's Managing Director, {

} (PX0916 (Dauwe, Dep. at 94-95), *in camera*). Amer-Sil's owners thought {
} (PX0916 (Dauwe, Dep. at 94), *in camera*).

Response to Finding No. 933:

Complaint Counsel's finding number 933 is incomplete and misleading. This finding ignores evidence showing that {

} (RFOF 699; Burkert, Tr. 2451, *in camera*; PX1262). Amer-Sil's documents, which are in evidence, also demonstrate that it has considered starting to produce PE separators. For example, RX01620 is {

}
(RX01620, *in camera* {

} RX01621 is {

} (RX01621, *in camera*).

{
} (RFOF 700; Gagge, Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280). EnerSys has considered using Amer-Sil PVC separators. (RFOF 700; PX1283). {

} (RFOF 701; RX00199, *in camera*; RX00239, *in camera*; Burkert, Tr. 2456, *in camera*). {

} (RFOF 702; RX00215, *in camera*). {

} (RFOF 701; Burkert, Tr. 2356, *in camera*).

934. Mr. Burkert met with { } at the BCI Conference in 2008. (*Burkert, Tr. 2356, in camera*). Mr. Burkert met with { } representatives again at their headquarters in { } and came away with the belief that { } had no intention of entering the market for PE separators. (*Burkert, Tr. 2355-56, in camera*). As a result of these conversations, EnerSys will not be placing any orders with { } (*Burkert, Tr. 2357, in camera*).

Response to Finding No. 934:

For its response to Complaint Counsel's finding number 934, Respondent incorporates its reply to finding number 933. In addition, the EnerSys witnesses' testimony is not credible and should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2).

G. Regional separator manufacturers are not likely to begin supplying battery manufacturers in North America

935. Exide believes that supply from { } would carry significant risks. These companies are unable to provide the quality, reliability and technology that Exide requires from a separator supplier. For example, { } which is "pretty bad" according to Mr. Gillespie. (*Gillespie, Tr. 3027, in camera; RX00306 at 004, in camera*). { } have the technological capabilities to manufacture six millimeter backweb separators. The very fact that these companies lack the technological capabilities to produce the most common PE SLI separators is of concern to Exide. (*Gillespie, Tr. 3025-3026, in camera*).

Additionally, Mr. Gillespie's experience shows that it is very risky to attempt to {
(Gillespie, Tr. 3025-3026, *in camera*).

Response to Finding No. 935:

Complaint Counsel's finding number 935 is false and misleading. First, it is telling that {

} (RFOF 601; Gillespie, Tr. 3026, *in camera*). Mr. Gillespie's credibility on this issue is questionable and should be disregarded.

In addition, this finding ignores evidence showing that numerous separator manufacturers across the globe, including Baotou and Epoch, produce PE separators which are on par with the quality and price of Daramic's separators, and Daramic competes with those companies every day. For example:

- {
} (RFOF 986; Hauswald, Tr. p. 1034). Daramic has lost business to BFR, and that the business "goes back and forth." (RFOF 987; Hauswald, Tr. 1034; Thuet, Tr. 4331, 4348, 4445). Using its access to competitive material, Daramic has tested BFR's PE separators and has found them to be comparable to Daramic's product, with no significant difference in the material. (RFOF 988; Thuet, Tr. 4335-36). JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RFOF 985; RX00051; RX00055). In addition, {
} (RFOF 991; RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*; RX00026, *in camera*; RX00027, *in camera* {
};
RX00061, *in camera*; RX00062, *in camera*).
- Daramic considers { } to be one of its primary competitors. (RFOF 1000; Thuet, Tr. 4330; PX0522, *in camera*). {

} (RFOF 1006; PX0923 (Hauswald, IHT at 267-68), *in camera*). Since the joint venture between Daramic and NSG was consummated, Daramic has continued to test NSG's competitive product from Japan, and has continued to find NSG's separators to be comparable to its own separators. (RFOF 1009; Thuet, Tr. 4335-36; PX0194, *in camera*).

- {
} Anpei produces high quality PE separators which are used in OEM applications. (RFOF 1021; Hauswald, Tr. 1037). In fact, Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (RFOF 1023; Thuet, Tr. 4336, 4349). {
} (RFOF 1020; RX00342 at 072, *in camera*).
- Daramic has tested Separindo separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1032; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Sebang separators and has found them to be "quite good" and comparable to Daramic's separators with no significant difference between the products. (RFOF 1040; Thuet, Tr. 4335-36; 4542-43).
- Daramic has tested Baotou material and found it to be comparable to Daramic material, with no significant difference in the quality of the material. (RFOF 1043; Thuet, Tr. 4336, 4349).
- Daramic considers Epoch to be very aggressive in the global separator market. Today, Daramic faces competition from Epoch in China, as well as exports from Epoch in other areas of the world, including Europe. (RFOF 1047; Thuet, Tr. 4333; Hauswald, Tr. 1035-36; RX00195; PX0994, *in camera*; RX00551 at 004, *in camera*; RX01003 at 007, *in camera*).

936. {

} (Axt, Tr. 2218, *in camera*). EnerSys is working to locate a source of {
} (Burkert, Tr. 2360, *in camera*). When {
} could actually supply EnerSys with product. (Burkert, Tr. 2360, *in camera*; see also Gagge, Tr. 2500, *in camera*).

Response to Finding No. 936:

Complaint Counsel's finding number 936 is false and misleading. First, the EnerSys witnesses' testimony is not credible and should be disregarded. (RFOF 725; Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2). Moreover, {

} (RFOF 690; Axt, Tr.

2272, *in camera*). {

} (RFOF 691;

RX00222, *in camera*). {

} (RFOF 692;

RX00197, *in camera*). {

} (RFOF 693; Burkert, Tr. 2445, *in camera*). {

} (RFOF 694; Axt, Tr. 2273, *in camera*; Burkert, Tr. 2445, *in camera*).

In addition, this finding ignores evidence showing that complete testing and final acceptance of a new separator by a customer typically takes less than one to two years. (RFOF 1079; PX2300 (Heglie, IHT at 127); RX00243 at 007; RX00014 at 001). In fact, in a complaint filed by EnerSys against Daramic in October 2006, which was verified by Larry Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year. (RFOF 1080; RX00243 at 007). In addition, Axt's admission comports with what was summarized in a Microporous call report with him in October 2006. (RFOF 1081; RX01162 at 002 ("6-12 months period for qualification/acceptance of new product")).

H. None of the { } manufacturers will be a significant supplier to Exide in the next two years

937. Exide has "extensively look around the world" for alternative suppliers of automotive battery separators. (Gillespie, Tr. 2962). Exide's search for alternate suppliers has included the hiring of a third party to help find potential suppliers in Asia, issuing a request for proposal (RFP), and trips by Exide personnel around the world. (Gillespie, Tr. 2962, 3022-3023, *in camera*).

Response to Finding No. 937:

Respondent has no specific response.

938. Exide identified the { } most promising Asian suppliers that could potentially supply PE SLI separators to Exide in the future; { } (Gillespie, Tr. 3023, 3041, *in camera*). Exide has conducted some preliminary tests on swatches of material produced by the { } Asian suppliers it identified as potential suppliers. Based on that testing, Exide narrowed the list down to { } (Gillespie, Tr. 3023, *in camera*).

Response to Finding No. 938:

Respondent refers to its reply to finding number 935 for context.

939. Exide has not found any manufacturers in { } that could make the motive and stationary separators that Exide needs for its flooded lead acid batteries. (Gillespie, Tr. 3041, 3049, *in camera*).

Response to Finding No. 939:

Complaint Counsel's finding number 939 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 935. Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

940. { } for testing and battery builds. (Gillespie, Tr. 3023-3024, *in camera*). Exide has to { } samples before it could determine whether the material would work for Exide, expecting it { } Exide has some indication on whether it could be put into production. (Gillespie, Tr. 3024, 3041, *in camera*).

Response to Finding No. 940:

Complaint Counsel's finding number 940 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 935. In addition, this finding ignores evidence that {

} (RFOF 599; Gillespie, Tr. 3034, *in camera*). This finding further ignores evidence demonstrating that complete testing and final acceptance of a new separator by a

customer typically takes less than one to two years. (RFOF 1079; PX2300 (Heglie, IHT at 127); RX00243 at 007; RX00014 at 001). In fact, Exide determined that complete life cycle testing would take less than six and a half months if the testing was conducted by an outside firm. (RFOF 1078; RX00007).

Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

941. Even if the { } samples qualify for use at Exide, there are many other issues that Exide would have to overcome before using { } (Gillepsie, Tr. 3024-3025, *in camera*). { }
(Gillepsie, Tr. 3024-3025, *in camera*).

Response to Finding No. 941:

Complaint Counsel's finding number 941 is incomplete and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 935 and 940. In addition, this finding omits evidence showing that {

} (RFOF 983; Hall, Tr. 2844-45, *in camera*). {

} (RFOF 983; RX00057, *in camera*). BFR also believes that it will continue to become more price competitive. (RFOF 984; RX00056).

Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

942. Exide is also reluctant to buy from a supplier that is partly owned by a competitor. Exide considers it a risk that { } Exide considers { } as adding risk to the supply chain. (Gillespie, Tr. 3024-3025, *in camera*).

Response to Finding No. 942:

Complaint Counsel's finding number 942 is incomplete and misleading because it ignores evidence showing that JCI intends to "make [BFR] a world class separator supplier to JCI and *other battery manufacturers.*" (RFOF 493; RX00055, emphasis added). Because JCI has a { } (RX00032, *in camera*), JCI is incentivized to grow BFR's sales and supply other battery manufacturers, including Exide.

Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

943. Additionally, Exide is concerned that { } (Gillespie, Tr. 3024-3025, *in camera*).

Response to Finding No. 943:

Although Complaint Counsel's finding number 943 accurately cites Gillespie's testimony, Respondent refers to its replies to finding numbers 935, 940 and 942 for context. In addition, the evidence raises significant credibility questions about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

944. Exide does not believe that it will be buying { } in the next two years. (Gillespie, Tr. 3025, *in camera*).

Response to Finding No. 944:

Although Complaint Counsel's finding number 944 accurately cites Gillespie's testimony, Respondent refers to its replies to finding numbers 935, 940 and 942 for context. In addition, the evidence raises significant credibility questions about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

945. Exide's analysis shows that supply from the Asian suppliers would be {
} for supply of separators. (Gillespie, Tr. 3029-3031, *in camera*).

Response to Finding No. 945:

Complaint Counsel's finding number 945 is inaccurate and misleading. Respondent refers to its replies to finding numbers 935, 940, 941 and 942 for context. Additionally, this finding ignores uncontroverted evidence in this case which shows that Asian suppliers have lower labor costs than suppliers in other regions of the world. (RFOF 254, 285). The lower labor costs are factored into the final pricing of separators. In fact, {

} (RFOF 995; Thuet, Tr. 4434; RX00677, *in camera*).

BFR will not be a supplier to EnerSys in the next two years

946. Dr. Simpson explained that { } would not be considered a market participant in any of the four North American markets at issue. (Simpson, Tr. 3461-3462, *in camera*).

Response to Finding No. 946:

Complaint Counsel's finding number 946 is false and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. {

} (RFOF 1213; Simpson, Tr. 3444-45, *in camera*). Moreover, this finding ignores the evidence that JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers." (RFOF 493; RX00055). In fact, {

} (RFOF 493; RX00050 at 11, *in camera*).

947. Mr. Hall has had some conversations about the possibility of BFR supplying motive power separators to { } (Hall, Tr. 2849-2850, *in camera*). { } (PX0907 (Kung, Dep. at 262), *in camera*). { } such discussions will not take place until a separator has been qualified. (Hall, Tr. 2881-2882,

in camera; PX0907 (Kung, Dep. at 291, *in camera*)). However, Mr. Hall has communicated to {

} (Hall, Tr. 2881-2882, *in camera*).

Response to Finding No. 947:

Complaint Counsel's finding number 947 is incomplete and misleading. {

} (RFOF 991;

RX00059, *in camera*; RX00060, *in camera*; RX00025, *in camera*; RX00026, *in camera*;

RX00027, *in camera* {

}; RX00061, *in camera*; RX00062, *in camera*). {

} (RFOF 991; RX00061, *in*

camera). {

} (RFOF 992; Axt, Tr. 2218, *in camera*). Significantly, {

}

(RFOF 993; Burkert, Tr. 2388, *in camera*). {

} (RFOF 994; Gagge, Tr. 2500, *in camera*).

Moreover, {

} (RFOF 995; Hall,

Tr. 2846-47, *in camera*). Furthermore, {

} (RFOF 995; Thuet Tr. at 4353, *in camera*). {

} (RFOF 995; Hall, Tr. 2846-47, 2880, *in camera*). {

} (RFOF 995; Hall, Tr. 2894, *in camera*). {

} (RFOF 995; Thuet, Tr. 4434;

RX00677, *in camera*).

948. BFR manufactures PE separators for use in automobiles, motorcycles and trucks. (PX0672 at 002, *in camera*; PX0907 (Kung, Dep. at 85-86, *in camera*)). To date, BFR has not { } (Hall, Tr. 2880, *in camera*). Mr. Hall is not aware of any instance in which { } (Hall, Tr. 2880, *in camera*). The BFR board has { } (Hall, Tr. 2881, *in camera*). Nor has the BFR board approved { } (Hall, Tr. 2881, *in camera*).

Response to Finding No. 948:

Complaint Counsel's finding number 948 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 947. In addition, it is important to note that BFR currently operates four production lines (RFOF 980; Hauswald, Tr. 1034) with a total of { } (RFOF 980; RX00032, *in camera*; Hall, Tr. 2769, 837-38, 2860, *in camera*; PX0922 (Roe, IHT at 328), *in camera*). As evidenced by the BFR Board's decision to build a fourth production line, BFR's Board has approved expansion plans in a very short timeframe. (RFOF 981).

949. { } (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*). Even if { } had the appropriate calendar roll, it would still be { } before { } could begin ordering product from them. (Burkert, Tr. 2362, *in camera*; Gagge, Tr. 2498-2499, *in camera*). { } (Gagge, Tr. 2508-2509, *in camera*).

Response to Finding No. 949:

Complaint Counsel's finding number 949 is incomplete and misleading. For its response to this finding, Respondent incorporates its reply to finding number 947. Additionally, this finding omits evidence showing that {

} (RFOF 1017). {

} (RFOF 1024; Axt, Tr. 2219, *in*

camera). {

} (RFOF 1025; Axt, Tr. 2272-73, *in camera*).

{

} (RFOF 1026; Axt, Tr. 2272-73, *in camera*). {

} (RFOF 1027; Burkert, Tr. 2388, *in camera*).

With respect to testing product from BFR and Anpei, this finding ignores evidence showing that complete testing and final acceptance of a new separator by a customer typically takes less than one to two years. (RFOF 1079; PX2300 (Heglie, IHT at 127); RX00243 at 007; RX00014 at 001). In fact, in a complaint filed by EnerSys against Daramic in October 2006, which was verified by Larry Axt as EnerSys' Vice President, Global Procurement, EnerSys admitted that obtaining replacement separators and qualifying an alternate supplier takes less than a year. (RFOF 1080; RX00243 at 007). In addition, Axt's admission comports with what was summarized in a Microporous call report with him in October 2006. (RFOF 1081; RX01162 at 002 ("6-12 months period for qualification/acceptance of new product")).

950. BFR has not had { } (Hall, Tr. 2880-
2881, *in camera*). { }
(PX0907 (Kung, Dep. at 283, *in camera*)).

Response to Finding No. 950:

Complaint Counsel's finding number 950 is incomplete and misleading, and it misrepresents Hall's testimony. More specifically, Hall testified {
 } (Hall, Tr. 2880-81, *in camera*). Contrary to Complaint Counsel's assertion, Hall did not testify that BFR has had no commercial sales of deep cycle separators. Moreover, this finding ignores substantial evidence in this case demonstrating that {

} (RFOF 991; RX00061, *in camera*).

I. Epoch and Baotou are less likely to supply to Exide in North America than BFR

951. In Daramic's discussions with { } Daramic learned that { } was having financial difficulties. Daramic had multiple meetings with { } to discuss possible business ventures. (PX0903 (Thuet, Dep. at 58-60, *in camera*). After the most recent meetings between Daramic and { } in { } Daramic felt that { } was chasing Daramic in order to get into a partnership with Daramic because { } was having financial issues. (Thuet, Tr. 4413-4414, *in camera*).

Response to Finding No. 951:

Complaint Counsel's finding number 951 is misleading and implies that Epoch is not viable competitor. Daramic, in fact, considers Epoch to be a very aggressive competitor in the global separator market. Today, Daramic faces competition from Epoch in China, as well as exports from Epoch in other areas of the world, including Europe. (RFOF 147; Thuet, Tr. 4333; Hauswald, Tr. 1035-36; RX00195; PX0994, *in camera*; RX00551 at 004, *in camera*; RX01003 at 007, *in camera*). Furthermore, Epoch is currently producing and selling separators, and Daramic continues to meet Epoch in the competitive market every day. (RFOF 1048; Thuet, Tr. 4333). {

} (RFOF 1049; Thuet, Tr. 4411, *in camera*).

Additionally, Complaint Counsel is quick to point out the financial troubles of Epoch but ignores the previous financial troubles of Exide and the financial straits Microporous was in at the time of the acquisition. (PX0078 at 021; Gilchrist, Tr. 549).

952. { } (PX0907 (Kung, Dep. at 113, *in camera*)). { } (PX0907 (Kung, Dep. at 113, *in camera*)). { } (PX0907 (Kung, Dep. at 113, 123), *in camera*). { } (PX0907 (Kung, Dep. at 132), *in camera*).

Response to Finding No. 952:

Complaint Counsel's finding number 952 is incorrect. Mr. Thuet testified that Epoch is currently producing and selling separators, and Daramic continues to meet Epoch in the competitive market every day. (RFOF 1048; Thuet, Tr. 4333).

James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung { } (PX0184 at 002; PX0273 at 009, *in camera*; PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155), *in camera*).
- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/Microporous] acquisition." (sic) (RX00022).
- Kung { } (PX1521 at 002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- { } (PX1510 at 002, *in camera*). {

002, *in camera*). } (PX1510 at

- Kung { }
(PX1521 at 002, *in camera*).

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* (“We have no chance to make this material. So we don’t need to discuss that.”)). In direct contradiction of Kung’s testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

953. Exide believes that supply from { } would carry significant risks. (Gillespie, Tr. 3027, *in camera*; RX00306 at 004, *in camera*). These companies are unable to provide the quality, reliability and technology that Exide requires from a separator supplier. (Gillespie, Tr. 3027, *in camera*; RX00306 at 004, *in camera*). For example, { } which is “pretty bad” according to Mr. Gillespie. (Gillespie, Tr. 3027, *in camera*; RX00306 at 004, *in camera*). { } have the technological capabilities to manufacture six millimeter backweb separators. The very fact that these companies lack the technological capabilities to produce the most common PE SLI separators is of concern to Exide. (Gillespie, Tr. 3025-3026, *in camera*). Additionally, Mr. Gillespie’s experience shows that it is very risky to attempt to { } (Gillespie, Tr. 3025-3026, *in camera*).

Response to Finding No. 953:

Complaint Counsel's finding number 953 is misleading and inaccurate. The real evidence clearly supports that {

} (Thuet, Tr. 4335-36, *in camera*; RX00115 at 007, *in camera*; Weerts, Tr. 4465, *in camera*; RX01003, *in camera*). First, while Complaint Counsel contends that Epoch had a defective rate of 5% in support of its position that Asian separator manufacturers are "unable to provide the quality, reliability, and technology Exide requires", Complaint Counsel conveniently ignores Baotou's defective rate of only 1.5% which proves otherwise. (RX00307 at 004). In fact, Daramic tested Baotou's PE separators and found them to be comparable to Daramic's own products, and found the products quality sufficient enough that it made an offer to purchase Baotou. (Thuet, Tr. 4335-36; RFOF 200; Hauswald, Tr. 1109). Second, Complaint Counsel ignores the fact that not even Daramic can produce the perfect 6 mil separator that Mr. Gillespie expects from Epoch and Baotou. For example, a typical 8-mil SLI separator could end up with a backweb as thin as 6.5 mil or as large as 9.5 mil. (Whear, Tr. 4690-91). Third, Gillespie's credibility unmistakes Complaint Counsel's position. While {

} (RFOF 601; Gillespie, Tr. 3026, *in camera*).

{

} (RFOF 601;

RX00306 at 5, *in camera*).

J. NSG is not an option for supply of PE separators to customers in North America

954. NSG is a separator manufacturer located in Japan. (Gillespie, Tr. 2963). In July 2006, NSG expressed interest in supplying PE separators to Exide, noting that the opportunity was “most interesting to NSG, and be assured we will take this most seriously.” (PX1073 at 001).

Response to Finding No. 954:

Respondent has no specific response.

955. Subsequently, NSG refused to quote on Exide’s RFP due of NSG’s new relationship with Daramic, despite previous assurances that it wanted to bid on Exide’s PE business. (Gillespie, Tr. 2963-2964; PX1079 at 001-003). In July 2007, NSG informed Exide that it had sold the majority interest of its Tianjin, China facility to Daramic, and suggested that Exide contact Daramic for a quote on supply from Tianjin because according to NSG, “Daramic has the management authority to decide product mix and customer pricing.” (PX1079 at 003). NSG also informed Exide that it did not have the capacity to service new PE separator customers from its manufacturing facility in Japan. (PX1079 at 003). Subsequently, NSG has not approached Exide about possible supply of PE separators. (Gillespie, Tr. 2965).

Response to Finding No. 955:

Complaint Counsel’s finding number 955 is misleading and tainted due to Mr. Gillespie’s questionable credibility and bias in this matter. First, NSG simply did not submit a quote because it did not have capacity at its Japanese facility, not because of its “new relationship with Daramic” as Complaint Counsel suggests. (PX1079; Gillespie, Tr. 2953). Furthermore, the evidence raises questions of credibility about Exide’s intent and Gillespie’s testimony in this proceeding (RFOF 550, 601), and Gillespie’s testimony on this issue should be disregarded.

K. Asian entry would not be sufficient to replace MPLP

956. {
(Gilchrist, Tr. 423-434, *in camera*). }

Response to Finding No. 956:

Complaint Counsel’s finding number 956 is entirely false and contrary to the weight of the evidence in the record. Mr. Gilchrist distorted and inflated the facts in making this statement. Microporous was not even a competitor in SLI at the time of the acquisition. In fact, Microporous only commercially produced SLI separators one time in 2004 with no intention of

making any further sales at that time. (RFOF 336; McDonald, Tr. 3796-98; PX0921 (McDonald IHT at 34-37), *in camera*). And while Microporous later explored the possibility of supplying SLI-type separators, Microporous had no contracts or agreements with any battery manufacturer for the supply of SLI-type separators and the Board of Directors had explicitly forbidden a “pure PE growth strategy.” (RFOF 377, 383, 384, 391,408). On the other hand, separator manufacturers in Asia consistently produce and sell SLI-type separators, and {

} (RFOF 1052; RX00115 at 007, *in camera*; Weerts, Tr. 4465, *in camera*; RX01003, *in camera*).

Mr. Gilchrist’s testimony is an example of his lack of understanding and is unreliable. For example, among many things, IGP Board members had multiple discussions with Gilchrist “disagreeing with his general assessment of the competitive landscape of the market.” (RFOF 402; PX2301 (Heglie, Dep. at 91)). IGP’s Board members also questioned the credibility of Gilchrist because they “would hear one thing one day, and a different thing the next day.” (RFOF 402; PX2301 (Heglie, Dep. at 164)). “Mike [Gilchrist] frequently blew comments out of proportion.” (RFOF 402; PX2300 (Heglie, IHT at 84)).

957. Asian manufacturers do not have the same engineering know how gained from learning and doing as North American companies like Daramic and Microporous. {

} PX0913 at 45-46, *in camera*). For example, in assessing a small SLI battery separator manufacturer in { } Daramic noted that: {

} (PX0216 at 1, *in camera*; PX0217 at 2-3, *in camera* (Trip report describing { })).

Response to Finding No. 957:

Complaint Counsel’s finding number 957 contains statements not in evidence and thus should be stricken from the record. Complaint Counsel references the Deposition of Kevin

Whear, PX0913, as evidence for the statement {

} (*See above*). In his deposition, however, Mr. Whear does not even discuss test results of separators from Asia or South America. (*See generally* PX0913 (Whear Dep.), *in camera*). Accordingly, this finding is not supported by the evidence cited.

This finding should be disregarded because it is misleading. Complaint Counsel's broad, inaccurate statements about the quality of separators from both Asia and South America is based on one narrow example from Caushasol, where Daramic observed a poor-quality separator, and ignores the weight of the evidence. Daramic has, in fact, tested separators from across the globe, finding the quality of these separators to be comparable to the quality of Daramic's own separators. Daramic tested separators from Anpei, BFR. Epoch, Separindo, Baotou, and NSG, and found their quality to be comparable to Daramic separators. (Thuet, Tr. 4335-36). In fact, GS Yuasa, the major battery producer in Asia, has standards that are "much tighter and much more demanding compared to the Daramic specification" and many separator manufacturers in Asia produce separators to conform to the GS Yuasa standard. (Thuet, Tr. 4336-37).

958. No Asian suppliers have ever supplied PE separators to North America. (Roe, Tr. 1236).

Response to Finding No. 958:

Complaint Counsel's finding number 958 is misleading in that it ignores substantial evidence of the potential of Asian separator manufacturers. Those manufacturers have sought to sell PE separators to customers located in North America. (RFOF 201). First, East Penn obtained a quote for the sale of PE separators from Anpei. (RFOF 201; Leister, Tr. 3992). East Penn also obtained PE samples from Anpei. (RFOF 201; Leister, Tr. 3992; RX00079). Second, {

}

(RFOF 201; Hall, Tr. 2862, *in camera*; RX00037 at 03, *in camera*). {

}, *in camera*; RX00043 at 03,05, *in camera*; RX00048 at 02 {
 }, *in camera*; RX00066 at 07, *in camera*; RX00074 at 06, *in camera*.) Third, {
 } (RFOF 201; Burkert, Tr. 2360-61, *in camera*; RX00023, *in camera*; RX00193; RX00198; RX00199, *in camera*; RX00203, *in camera*; RX00204; RX00225; RX00237; RX00239, *in camera*). {
 }
 (RFOF 201; Burkert, Tr. 2450, *in camera*; RX00223, *in camera*). Fourth, {
 } (RRFOF 201; RX00303, *in camera*, RX00304; RX00305; RX00306; RX00307).

Additionally, Asian separator manufacturers currently compete with Daramic in North America through indirect channels. For example, NSG markets and sells AGM separators throughout North America for SLI applications. (RRFOF 1013). Also, Leoch, a Chinese battery manufacturing company, is producing batteries for industrial applications and shipping them directly for use in North America. (Thuet, Tr. 4347-48).

959. BFR and Global Industrial are regional separator firms that have not aspired to become a global separator manufacturer on the order of magnitude of Daramic, Entek or Microporous. (Gilchrist, Tr. 308, 424).

Response to Finding No. 959:

Complaint Counsel's finding number 959 is inaccurate and based upon the testimony of a witness with questionable credibility, little understanding of the competitive landscape, and no first hand knowledge of competition in Asia. First, both BFR and Sebang (formerly "Global Industrial") are equivalent in "magnitude" to the former Microporous. For example, Sebang

currently has 15 million square meters of PE separator production capacity with plans to add an additional 12 million square meters, which would result in a total production capacity of approximately 27 million square meters. (RRFOF 1034, 1035). BFR operates 4 production lines and has 22.4 million square meters of capacity. (RRFOF 980). JCI expects that BFR will become more efficient over time and that BFR's capacity will gradually increase. (RRFOF 983). At the time of the acquisition, Microporous only had one line producing PE separators with a capacity of approximately 10 million square meters. (RRFOF 1090; PX0174 at 102, *in camera*). Second, BFR is already a global supplier and likely will become an even greater presence on the global competitive landscape due to the help and support of JCI. BFR currently supplies battery separators to South America, and JCI intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers," and its operations could expand outside of Asia. (RRFOF 985). Third, as previously mentioned, Mr. Gilchrist is a witness of questionable. (RRFOF 402). For example, Eric Heglie, a member of the Microporous Board of Directors, previously disagreed Mike Gilchrist's opinion that the only competitors in the industrial market were MPLP and Daramic. (PX2300 (Heglie, IHT at 57); PX1104). When Complaint Counsel asked Mr. Heglie why he did not agree with Mr. Gilchrist's opinion, Mr. Heglie said "[b]ecause I think there are more suppliers and over the course of getting to know Mike Gilchrist over the course of our investment, I've noted that he speculates on his views of the market frequently which aren't always based on facts." (PX2300 (Heglie, IHT at 57)).

960. None of the { } separator suppliers that Exide has evaluated are on equal footing competitively with what Exide knew MPLP to be before it was acquired by Daramic. (Gillespie, Tr. 3028-3030, *in camera*). MPLP was better situated than all of the potential { } suppliers in terms of { } (Gillespie, Tr. 3028-3036, *in camera*).

Response to Finding No. 960:

Complaint Counsel's finding number 960 is inaccurate and based solely on the self-serving statements of Mr. Gillespie. Testimony and documents show that several Asian separator manufacturers are considered to be equal to their North American counterparts in terms of quality, technology and capability. (RRFOF 977-1052). Many Asian products have been globally approved and have already been qualified by North American battery makers. (RRFOF 1074-75, 1029, 993, 989). The facts also illustrate that Microporous had an infinitesimal "competitive presence" in PE separators in North America with only {

} (RX01120, *in camera*).

961. According to Exide, { } is not on equal footing with MPLP. (Gillespie, Tr. 3033-3034, *in camera*).

Response to Finding No. 961:

Complaint Counsel's finding number 961 is inaccurate, based on the self-serving opinions of Mr. Gillespie, and contrary to the evidence on the record regarding JCI's decision not only to purchase separators from BFR but also invested in the company. Mr. Gillespie's biases are manifest in the record. (Gillespie, Tr. 2980, 3151-53). Second, JCI, the largest battery manufacturing company in the world, { } and { } (RRFOF 438, 491; Hall, Tr. 2662-2663; RX00034 at 012; RX00032, *in camera*; Hall, Tr. 2817, *in camera*). JCI, however, refused to invest in MPLP and declined to enter into a contract for the supply of separators with MPLP in 2006. (RRFOF 489, 322; RX00047; Gilchrist, Tr. 504, *in camera*; Trevathan, Tr. 3592).

962. The length of the supply chain is an important reason why MPLP was advantaged over any Asian suppliers. A lengthy supply chain involves risk. {

}.
(Gillespie, Tr. 3029-3036, *in camera*). {

}. (Gillespie, Tr. 3035-3036, *in camera*).

Response to Finding No. 962:

Complaint Counsel's finding number 962 is misleading and again based on the self-serving statements of Mr. Gillespie. There is ample evidence on the record that battery separator manufacturers are capable of servicing customers from some distance with little risk of supply disruption. {

} (RRFOF 933; Weerts Tr. 4450-51). {

} (RFOF 936; RX00117, *in camera*; Weerts Tr. 4465-4466, *in camera*).

{

} (RFOF

937; Weerts, Tr. 4466-67, *in camera*). Second, {

} (Gillespie, Tr. 3122-27, 3037, *in camera*). Third,

from 1996 up until the merger between Daramic and Microporous, EnerSys purchased separators from Microporous' Piney Flats, Tennessee facility and shipped those separators to EnerSys' plants located in Europe and China. (RFOF 661; Burkert, Tr. 2377, 2379). Less than 10% of the separators purchased by EnerSys from Microporous remained in the United States. (RFOF 662; Burkert, Tr. 2380, 2381). Finally, despite the importance Mr. Gillespie puts on location of a supplier, twice he failed to recall where Microporous's principle manufacturing facility was located despite having visited the plant on a prior occasion. (Gillespie, Tr. 3029, 3064).

963. Exide typically compensates for the risk of a lengthy supply chain by seeking cost savings from offshore suppliers. Exide has a general rule that it will only outsource supply offshore if it can get the outsourced product for { } than local

supply. The { } compensates Exide for the “risk or headache that you have to go through by elongating that supply chain.” (Gillespie, Tr. 3036, *in camera*). The Asian suppliers { } (Gillespie, Tr. 3029-3031, *in camera*).

Response to Finding No. 963:

Complaint Counsel’s finding number 963 is inaccurate. Complaint Counsel in fact ignores evidence on the record finding that the cost of manufacturing separators in Asia { }. (RFOF 1111; Thuet, Tr. 4357-58, *in camera*). For example, it costs { } a typical SLI separator in Asia compared to Europe. (RFOF 1111; Thuet, Tr. 4357, *in camera*). And, likewise, the cost of manufacturing separators in the U.S. { } the cost of producing in Asia. (RFOF 1111; Thuet, Tr. 4357-58, *in camera*).

964. MPLP had some of the lowest defect rates on their separators, in contrast to the { } (Gillespie, Tr. 3027-3029, *in camera*).

Response to Finding No. 964:

Complaint Counsel’s finding number 964 is entirely false and contrary to the weight of evidence on the record. At the time of the Acquisition, Exide had not started working with Microporous on testing or approving Microporous’ industrial PE material. (Gillespie, Tr. 2974). And prior to the RFP Exide had never even tested Microporous’ SLI separators. (Gillespie, Tr. 3083). Exide has no basis for comparing MPLP’s products to those of Asian competitors. The real evidence supports that {

} (Thuet, Tr. 4335-36, *in camera*; RX00115 at 007, *in camera*; Weerts, Tr. 4465, *in camera*; RX01003, *in camera*).

965. The { } from a manufacturing operations perspective. It has been Mr. Gillespie's experience that the { } than US separator manufacturers. (Gillespie, Tr. 3031-3032, *in camera*). According to Mr. Gillespie, the majority of separators manufactured in Asia are manufactured for the Chinese market, { } (Gillespie, Tr. 3032, *in camera*).

Response to Finding No. 965:

Complaint Counsel's finding number 965 is false and based on Gillespie's self-serving testimony. Complaint ignores ample evidence in the record proving that Asian manufacturers not only produce high quality separators but that Americans consumers already drive cars, golf carts, and industrial vehicles powered by batteries shipped to the United States from Asia containing separators manufactured in Asia. For example, Daramic has, in fact, tested separators from across the globe, finding the quality of these separators to be comparable to the quality of Daramic's own separators. Daramic tested separators from Anpei, BFR. Epoch, Separindo, Baotou, and NSG, and found their quality to be comparable to Daramic separators. (Thuet, Tr. 4335-36). GS Yuasa, the major battery producer in Asia, has standards that are "much tighter and much more demanding compared to the Daramic specification" and many separator manufacturers in Asia produce separators to conform to the GS Yuasa standard. (Thuet, Tr. 4336-37). Furthermore, batteries separators produced in Asia are already {

} (Gillespie, Tr. 3032, *in camera*). For example, NSG markets and sells AGM separators throughout North America for SLI applications. (RFOF 1013). Also, Leoch, a Chinese battery manufacturing company, is producing batteries for industrial applications and shipping them directly for use in North America. (Thuet, Tr. 4347-48).

966. EnerSys does not consider { } to be on the same footing as MPLP was prior to the acquisition. As Mr. Burkert testified, "I think they're both shaky at best as far as options." (Burkert, Tr. 2363, *in camera*). In addition, { } is not a domestic supplier,

which raises concerns about having stock, interruptions in shipments, weather delays and other interruptions in supply. (*Burkert*, Tr. 2365, *in camera*).

Response to Finding No. 966:

Complaint Counsel's finding number 966 misleading and is based solely on hearsay. First, Mr. Burkert's opinion is based primarily upon { } (Burkert, Tr. 2363-64, *in camera*). Burkert's statement is hearsay which is unreliable and should be disregarded by the Court. Second, EnerSys has purchased and shipped separators between continents for years without problems or delay. From 1996 up until the merger between Daramic and Microporous, EnerSys purchased separators from Microporous' Piney Flats, Tennessee facility and shipped those separators to EnerSys' plants located in Europe and China. (RFOF 661; Burkert, Tr. 2377, 2379). Furthermore, due to the fact EnerSys has been a vocal opponent to the Daramic-Microporous merger, the Court should disregard the self-serving statements of Burkert. (RFOF 733).

967. Asian firms do not compare favorably to the former Microporous. {

} (Axt, Tr. 2221, *in camera*). Microporous's motive product was approved at EnerSys { } (Axt, Tr. 2222, *in camera*). Because { } are located in { } technical visits are more difficult and time consuming, as well as additional transportation costs and times, duties, and extra inventory. (Axt, Tr. 2223, *in camera*). { }

(Axt, Tr. 2223, *in camera*).

Response to Finding No. 967:

Complaint Counsel's finding number 967 is false. First, Mr. Axt, who is in charge of procurement for EnerSys, is not even aware of the differences between motive, UPS, and deep cycle batteries. (Axt, Tr. 2234-35). Axt thus has no basis for comparing the expertise of MPLP to Anpei or BFR. Second, MPLP could not have been {

} (Axt, Tr. 2221-2222, *in camera*). Third, EnerSys is well under way in

approving both Anpei and BFR separators for industrial applications. {
} (RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*). {

} (RX00238; Axt, Tr. 2270, *in camera*). {

} Fourth, EnerSys complains about the hassle of technical visits, transportation costs, and time required to ship separators from China to the United States. However, prior to the Acquisition, EnerSys had plans to ship MPLP motive product from the United States to China which would involve the same transportation costs, time, and technical difficulties. (Axt, Tr. 2240-41). Furthermore, the evidence raises questions about Axt's credibility and truthfulness. For example, Axt's testimony is inconsistent with that of other EnerSys employees and is further undermined by his past conduct. (RFOF 730, 732). The Court should therefore disregard Axt's testimony.

968. Mr. Kung believes {
} (PX0907 (Kung, Dep. at 79), *in camera*).

Response to Finding No. 968:

Complaint Counsel's finding number 968 is misleading. {
} (PX0907 (Kung, Dep. at 78), *in camera*). {

} (RFOF 1021; Hauswald, Tr. 1037). Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (RFOF 1023; Thuet, Tr. 4336, 4349). Also, East Penn has tested and approved the Anpei separators, and if the PE separator industry were to change such that East Penn could not obtain supply from its current

PE suppliers, it would consider Anpei to be an alternative supplier. (RFOF 1028, 1030; Leister, Tr. 3993, 4032-33).

James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung { } (PX0184 at 002; PX0273 at 009, *in camera*; PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155), *in camera*).
- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/Microporous] acquisition." (sic) (RX00022).
- Kung { } (PX1521 at 002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- { } (PX1510 at 002, *in camera*). { } (PX1510 at 002, *in camera*).
- Kung { } (PX1521 at 002, *in camera*).

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* ("We have no chance to make this material. So we don't need to discuss that.")). In direct contradiction of Kung's testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall,

Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

969. EnerSys believes that an important engineer at { } is likely to retire soon. (*Burkert*, Tr. 2363, *in camera*). { } has the expertise in making separators and setting up lines. { } is a risky supplier without { } because without him there will be nobody of his caliber to handle technical issues. (*Burkert*, Tr. 2364, *in camera*).

Response to Finding No. 969:

Complaint Counsel's finding number 969 is misleading and based solely on rumors and speculation. Clearly, JCI, the largest battery manufacturer in the world, is comfortable sourcing its separators from BFR and they have even affirmed that commitment by making a financial investment in the company. (RFOF 979, 990; RX00032, *in camera*; Hall, Tr. 2825, *in camera*, 2838-39, *in camera*). Even if Kung were to retire, {

} (RFOF 1069;

RX00058, *in camera*).

Kung is demonstrably not truthful. (*See* Response to CCFOF 968.)

970. EnerSys does not consider { } to be on the same footing as MPLP was prior to the acquisition. As Mr. *Burkert* testified, "I think they are shaky at best as far as options." (*Burkert*, Tr. 2363, 2366, *in camera*). In addition, { } has language barrier issues, the same logistics concerns, is unable even to estimate what its prices will be, and is unable to locate a manufacturer of calender rolls on its own. (*Burkert*, Tr. 2366, *in camera*).

Response to Finding No. 970:

Complaint Counsel's finding number 970 is entirely false and based on the opinions of EnerSys personnel which are not supported by the facts. First, {

} (Burkert, Tr. 2445, *in camera*). Second, {

} (RX00222, *in camera*). Third, as previously mentioned, EnerSys' logistical concerns are unwarranted. Prior to the Acquisition, EnerSys had plans to ship MPLP motive product from the United States strait to China which would involve the same logistical concerns as shipping from China to the United States. (Axt, Tr. 2240-41). Finally, any hesitation EnerSys may have had over Anpei's ability to procure a calendar roll is a moot issue. For when Respondent suggested that EnerSys tell Anpei where to find a calendar roll, since they are widely available, Burkert responded, {

}

(Burkert, Tr. 2444-45, *in camera*).

971. {

}.
}

Burkert, Tr. 2366-67, in camera).

Response to Finding No. 971:

Complaint Counsel's finding number 971 is entirely false and unsupported by the evidence in the record. {

} (Burkert, Tr. 2311; Burkert, Tr. 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*). {

}

(Gagge, Tr. 2514, *in camera*). Moreover, while many separator manufacturers have capabilities equal to Daramic and the former MPLP, {

} (Craig, Tr. 2629-30, *in camera*, 2631-32, *in camera*).

Furthermore, due to the fact EnerSys has participated in this proceeding for purposes of obtaining advantages for EnerSys and that EnerSys' employees offered their testimony in effect to achieve those purposes. Accordingly, the Court cannot credit any of the EnerSys witnesses. (RFOF 733).

972. In general, Asian PE producers { } to service battery manufacturers in Europe and North America. (PX0907 (Kung, Dep. at 87), *in camera*). { }
(PX0907 (Kung, Dep. at 87, *in camera*)).

Response to Finding No. 972:

Complaint Counsel's finding number 972 is entirely false. Kung stated that {

} (PX0907 (Kung, Dep. at 86), *in camera*). {

} (PX0907 (Kung, Dep. at 86), *in camera*).

Daramic's primary competitors in Asia have the following current capacities: NSG (33 million square meter capacity), BFR (30 million square meter capacity), Anpei (22 million square meter capacity), Separindo (17 million square meter capacity), Sebang (15 million square meter capacity) and Epoch (6 million square meters capacity). (RFOF 1105; Thuet, Tr. 4330-32). Furthermore, Asian competitors such as Anpei, BFR, Sebang, and Separindo, are quickly expanding and building new lines often doubling or tripleing their available capacities. (RFOF 981-82, 1017, 1033, 1035). Also, there are currently 50 million square meters per year of excess PE separator production capacity in Asia. (Thuet, Tr. 4329-30).

973. Scale economies are a "major issue" that differentiates { }
}. With mass production on its "very big" PE lines, { }
(Kung, Dep. at 189, *in camera*)). (PX0907

Response to Finding No. 973:

Complaint Counsel's finding number 973 is misleading. Complaint Counsel implies that Asian PE manufacturers are not viable competitors because they do not have the same scale as Daramic, yet Complaint Counsel repeatedly asserts that MPLP was a viable competitor despite its obvious lack of scale. (See CITE). At the time of the Acquisition, MPLP only had 11 million square meters of PE capacity and tripling its capacity by adding an additional 22 million square meters of PE capacity in Fiestritz, Austria. (Gaugl, Tr. 4546-47, 4569). MPLP's projected capacity of 33 million square meters is equal to or only slightly greater than that of NSG (33 million square meter capacity), BFR (30 million square meter capacity), and Anpei (22 million square meter capacity).

974. {

(Kung, Dep. at 117, *in camera*)).

} (PX0907

Response to Finding No. 974:

Complaint Counsel's finding number 974 is unsupported by the evidence in the record. BFR, in fact, received a huge influx of capital from JCI when JCI acquired a 40% interest in the company in February of 2007. (RFOF 1116). Furthermore, Complaint Counsel has repeatedly suggested that profit margins on separators are "just huge." (Robertson, Tr. 15, 50-51).

Kung is demonstrably not truthful. (See Response to CCFOF 968.)

975. {

} (PX0907 (Kung, Dep. at 110, *in camera*)). In addition, { } was not organized, and it had an old PE line in a dirty facility. (PX0907 (Kung, Dep. at 110, *in camera*)). Mr. Kung has been to { }.
(PX0907 (Kung, Dep. at 119, *in camera*)).

Response to Finding No. 975:

Complaint Counsel's finding number 975 is implies that the quality of separators from Bautou is subpar and is contrary to the weight of the evidence. Daramic has in fact tested

Baotou material and found it to be comparable to Daramic material, with no significant difference in the quality of the material. (RFOF 1043; Thuet, Tr. 4336, 4349). Further, at the time that Mr. Gaugl installed the line at Baotou, he was responsible for testing the material that came off the line and ensuring that it was within certain specifications outlined in the agreement between Jungfer and Baotou. The specifications constituted the industry standards at that time for separators sold by all competitors. (RFOF 1044; Gaugl, Tr. 4538). {

} (RFOF 1045; Gaugl, Tr. 4541-42).

Kung is demonstrably not truthful. (See Response to CCFOF 968.)

976. { } several years ago about purchasing them. (PX0907 (Kung, Dep. at 120, *in camera*)). At such time, Mr. Kung examined their financials and saw they were { }. (PX0907 (Kung, Dep. at 119-20, *in camera*)).

Response to Finding No. 976:

Complaint Counsel's finding number 976 is misleading, based solely on unreliable hearsay, and is tainted due to Mr. Kung's questionable credibility and therefore should be disregarded in its entirety by the Court. Complaint Counsel is quick to point out the financial difficulties of Baotou implying that they are not a viable competitor, but ignores MPLP's own mounting debt and financial difficulties. Prior to the Acquisition, Microporous had tremendous debt of approximately \$46,139,000. (RFOF 1043; PX0078 at 021; Gilchrist, Tr. 549). Furthermore, revenues were below the estimated projections, and MPLP was not generating a return on capital for many of its products. (RFOF 400).

Kung is demonstrably not truthful. (See Response to CCFOF 968.)

977. { } (PX0907 (Kung, Dep. at 42, *in camera*)). { } does not have sufficient quantity and quality on its engineering team to meet the standards of American PE separator companies. (PX0907 (Kung, Dep. at 49-50, *in camera*)).

Response to Finding No. 977:

Complaint Counsel's finding number 977 is false and contrary to the weight of evidence on the record as well as tainted due to Kung's questionable credibility. {

} (RFOF

1021; Hauswald, Tr. 1037). Daramic has tested Anpei material and found it to be comparable to its own separators, with no significant difference in the quality of the material. (RFOF 1023; Thuet, Tr. 4336, 4349). As well, Anpei separators have met the standards of American battery manufacturers and been qualified. East Penn and { } have tested and approved the Anpei separators. (RFOF 499, *in camera*, 1029; Leister, Tr. 3993, 4032-33). {

} (RFOF 1027; Burkert, Tr. 2388, *in camera*).

Kung is demonstrably not truthful. (*See* Response to CCFOF 968.)

978. Mr. Kung knows a lot about the capabilities and operations of { }. (PX0907 (Kung, Dep. at 51-53, 279, *in camera*)). He built their PE line, and he maintains contact with the engineers that he trained at {

} (PX0907 (Kung,

Dep. at 42-43, 51-53, *in camera*)).

Response to Finding No. 978:

Complaint Counsel's finding number 978 is misleading and should be disregarded by this court due to Kung's questionable credibility and bias. Complaint Counsel implies that Kung has inside information about the capabilities, technology, and future plans of Anpei due to these relationships. Kung built the first line at Anpei over 10 years ago, and since that time Anpei has added three additional lines without Kung's assistance. (RFOF 1017; PX0907 (Kung, Tr. 42), *in camera*). There is ample evidence on the record that when building a PE separator line, the engineers learn through experience and often improve upon past technology or capabilities. (Gaugl, Tr. 4587-88). Furthermore, the Asian PE separator market is highly competitive (Thuet,

Tr. 4342-43), and Respondent seriously doubts that BFR or Kung are privy to specifics about Anpei's technological capabilities or future plans.

Kung is demonstrably not truthful. (See Response to CCFOF 968.)

979. { (PX0907 (Kung, Dep. at 277-278, *in camera*)). {
(PX0907 (Kung, Dep. at 278, *in camera*)). }

Response to Finding No. 979:

Complaint Counsel's finding number 979 is contrary to the weight of evidence on the record and should be disregarded due to Kung's questionable credibility and bias. As explained in Response to finding number 978, Respondent has serious doubts about the reliability of Kung's information regarding Anpei's technological capabilities. Additionally, there is evidence that engineers constructing PE lines learn by doing and build on their knowledge base with each additional complication they encounter. (Gaugl, Tr. 4587-88). There is even evidence of Anpei advancing technology {

} (RFOF 1026). {

} (RFOF

1027; Burkert, Tr. 2388, *in camera*).

Kung is demonstrably not truthful. (See Response to CCFOF 968.)

980. { }. (PX0907 (Kung dep. at 69-71, *in camera*)). {

116-117, *in camera*)). } (PX0907 (Kung, Dep. at

Response to Finding No. 980:

Complaint Counsel's finding number 980 is misleading and should be disregarded due to Jung's questionable credibility and bias. First, Complaint Counsel mistakenly equates scale with the volume produced off a single PE line instead of properly considering the aggregate

capacities of many Chinese and Asian battery separator manufacturers. For example, BFR, Kung's own company, has 30 million square meters of total production capacity in China. (RFOF 1105). Daramic currently maintains 67 million square meters of capacity at its plant in Prachinburi, Thailand. (RFOF 258-60). NSG has approximately 33 million square meters of capacity at its facilities in Japan and China, and Anpei has 22 million square meters of capacity at its facility in Taiwan. (RFOF 999; 1105). Second, Complaint Counsel ignores the fact that many battery manufacturers headquartered in the United States and Europe are already purchasing or considering purchasing large volumes of separators for use in Asia and abroad. (RFOF 990, 993, 1030). For example, JCI already purchases separators from BFR. (RFOF 990, 993). {

} (PX0907 (Kung, Dep. at 85-86), *in camera*).

{

} (PX0907 (Kung, Dep. at 86), *in camera*). Also, Mr. Leister from East Penn testified that if the PE separator industry were to change such that East Penn could not obtain supply from its current PE suppliers, it would consider Anpei to be an alternative supplier. (RFOF 1030; Leister, Tr. 3993).

Kung is demonstrably not truthful. (*See* Response to CCFOF 968.)

981. Asian manufacturers of separators for SLI batteries supply their local markets only. (Gilchrist, Tr. 307-08, 430). Many of their production lines (i.e., those designed by James Kung) are { } (Gilchrist, Tr. 390-91, 505, *in camera*).

Response to Finding No. 981:

Complaint Counsel's finding number 981 is entirely false and based solely on Gilchrist assessment of competition within Asia which is very unreliable. Mr. Gilchrist is ill equipped to speculate about the capabilities of Asian competitors or the quality of the separators they produce. For example, Mr. Heglie, an owner and member of MPLP's Board of Directors, stated

that “over the course of getting to know Mike Gilchrist over the course of our investment, I’ve noted that he speculates on his views of the market frequently which aren’t always based on facts.” (PX2300 (Heglie, IHT at 57)). IGP Board members additionally had multiple discussions with Gilchrist “disagreeing with his general assessment of the competitive landscape of the market.” (RFOF 402; PX2301 (Heglie, Dep. at. 91)). Gilchrist even admitted to his own limited understanding of the Asian market during his investigational hearing. Gilchrist testified that {

} (PX0920 (Gilchrist, IHT at 181), *in camera*). Furthermore, while Gilchrist may find {

} (RFOF 978-79; RX00053, *in camera*; RX00052, *in camera*; Hall, Tr. 2715-16; Hall, Tr. 2820-21, *in camera*; RX00032, *in camera*; Hall, Tr. 2825, *in camera*).

982. EnerSys made several attempts to contact a company { } by mail, email, and phone, to determine its interest in supplying EnerSys, but never received any response from the company. (*Burkert*, Tr. 2359, *in camera*). EnerSys will not be doing business with { } (*Burkert*, Tr. 2360, *in camera*).

Response to Finding No. 982:

Complaint Counsel’s finding number 982 is inaccurate. First, *Burkert* never testified that he attempted to contact Separindo by phone. (*Burkert*, Tr. 2359, *in camera*). Second, *Burkert* testified that {

} (*Burkert*, Tr. 2359, *in camera*). Finally, if EnerSys really wanted to get in touch with Separindo it could find appropriate contact information through an individual such as Mr. Kung. This is further evidence of the lack of any serious effort on EnerSys’ part to find a supplier of PE separators despite ample opportunities to do so. (RFOF 704-10).

1. { }

983. { } (Hall, Tr. 2771-2773, *in camera*). Even at its current production capacity, BFR has { } (Hall, Tr. 2771-2776, *in camera*).

Response to Finding No. 983:

Complaint Counsel's finding number 983 is misleading. {

} (Hall, Tr. 2776, 2839, *in camera*). Furthermore, Hall acknowledges that {

} (Hall, Tr. 2839-40, *in camera*). {

} (RFOF 983; Hall, Tr. 2844-45, *in camera*). {

} (RFOF 983; RX00057, *in camera*). Despite any quality

issues with regards to the fourth line, JCI's still intends to "make [BFR] a world class separator supplier to JCI and other battery manufacturers," and possible expand its operations outside of Asia. (RX00051; RX00055).

984. Material produced on the {

(Hall, Tr. 2771-2772, *in camera*). {

} (Hall, Tr. 2772, *in*

camera). {

} (Hall, Tr. 2774-2776, *in camera*). JCI's Shanghai production facility

also {

} (Hall, Tr. 2774, *in camera*). Mr. Hall described BFR's {

} (Hall, Tr.

2776-2777, *in camera*).

Response to Finding No. 984:

For its response to Complaint Counsel's finding number 984, Respondent incorporates its reply to finding number 983.

985. { } (Hall, Tr. 2772-2773,
in camera). { } (Hall,
Tr. 2772, *in camera*).

Response to Finding No. 985:

For its response to Complaint Counsel’s finding number 985, Respondent incorporates its reply to finding number 983. Additionally, Complaint Counsel’s finding number 985 is misleading because it misstates the evidence in the record. Hall did not testify that there were necessarily “long lead times” implying a difficulty in shipping product from China to India as suggested by Complaint Counsel. Hall rather testified that there was “some lead time” due to having “the right material available” since the plant in China was not currently producing separators for JCI specifications.

986. According to Mr. Hall, { } (Hall, Tr. 2772-2773, *in camera*). Mr. Hall believes that { } (Hall,
Tr. 2773-2774, *in camera*). { }
(Hall, Tr. 2776-2777, *in camera*).

Response to Finding No. 986:

For its response to Complaint Counsel’s finding number 986, Respondent incorporates its reply to finding number 983. Additionally, finding number 986 is misleading and implies that Amara Raja may stop ordering material from BFR. In fact, Hall testified that {

{ } (Hall, Tr. 2774, *in camera*). Moreover, Hall indicated that {

{ } (Hall, Tr. 2777, *in camera*).

i) Daramic documents recognize that barriers to entry exist

987. {

} (PX0265 at 004, *in camera*). {

} (PX0265 at 011, *in camera*).

Response to Finding No. 987:

Complaint Counsel's finding number 987 is misleading and inaccurate. As Mr. Hauswald explained {

} (Hauswald, Tr. 802, 931, *in camera*). The evidence actually indicates that it is quite easy for companies to enter the PE separator industry. A PE separator production line can in fact be completely installed and begin commercial operation in { } and for less than }. (Gaugl, Tr. 4543; PX0907 (Kung, Dep. at 27-29, 43), *in camera*); Hauswald, Tr. 881, *in camera*). Also, several individuals in the battery separator industry know how to install a PE separator line. (Gaugl, Tr. 4547-48). For example, James Kung, Dr. Herwig Winkler, a former Jungfer employee, and Hans-Peter Gaugl, who is not under a non-compete with Daramic, know how to install a PE line. (Gaugl, Tr. 4547-48, 4611; PX907 (Kung Dep. at 10), *in camera*). { }

(RX00058, *in camera*). Furthermore, there are no patents or intellectual property restricting entry into the market. The patent on the polyethylene separator expired in the mid-1980s, and thereafter, the information necessary to manufacture polyethylene separators was publicly available. (Whear, Tr. 4679; Toth, Tr. 1626). Consequently, there are no patent barriers which would prevent any individual or company from manufacturing a polyethylene separator. (Toth, Tr. 1626).

988. Mr. Graff, chairman of the board of Polypore, was a member of the Warburg Pincus team that conducted the due diligence to determine whether to invest in Polypore. (Graff, Tr. 4851). {

} (Graff, Tr. 4900; PX0746 at 002, *in camera*).

Response to Finding No. 988:

Complaint Counsel's finding number 988 is misleading and inaccurate. Mr. Graff's reference to {

} (Graff, Tr. 4895-96, *in camera*). {

} (Graff, Tr. 4896-97, *in camera*). {

} (Graff, Tr. 4896-97, *in camera*). {

} (Graff, Tr. 4895-96, *in camera*). {

} (Graff, Tr. 4895-96, *in camera*).

989. In order to get money to fund the acquisition of Polypore, Mr. Graff and other managing directors from Warburg Pincus went to banks and various credit rating agencies such as Standard & Poors and Moodys. (Graff, Tr. 4900-01, *in camera*). At the presentations made to the credit rating agencies, Mr. Graff and the other Warburg directors are attributed with providing the "Sponsor Remarks and Investment Considerations" where they stated that "High barriers to entry due to significant upfront capital costs, industry/technical expertise, and high customer switching costs" are among the "[f]avorable market dynamics" that should be considered. (PX0982 at 002, 008; PX1720 at 002, 008; PX1722 at 002, 006).

Response to Finding No. 989:

For its response to Complaint Counsel's finding number 989, Respondent incorporates its reply to finding number 988. Again, Mr. Graff and his associates were speaking about all of

Polypore, not just Daramic, the one division {
} (Graff, Tr. 4900, *in camera*).

990. Similar to Warburg Pincus's findings prior to its investment into Polypore, IGP determined that flooded lead acid battery separator markets are characterized{
}.. A document prepared by IGP prior to its investment in Microporous gives an "Executive Summary" of Microporous's including an assessment of its strengths. (PX1124; PX2300 (Heglie, IHT at 119), *in camera*). Under "strengths," the document states

{
} {
□ {
□ {
□ {

}.
}

(PX1124 at 001, *in camera*).

Response to Finding No. 990:

Complaint Counsel's finding number 990 is false and misleading. Mr. Heglie, in fact, found that barriers to entry were not as high as IGP originally thought. For example, with respect to the assertion that it takes 1-2 years to "complete the design-in, full testing, and final acceptance of a new separator," Mr. Heglie stated that "it probably does not take quite that long." (PX2300 (Heglie, IHT at 127)). Furthermore, Mr. Heglie believes that "a lot of the points here (PX1124) that are probably more subjective in nature" were "opinions" of Microporous management and there is "not a lot of discernable proof" of these points." (PX2300 (Heglie, IHT at 128)). Mr. Heglie also previously questioned management, and particularly Mike Gilchrist, views of the market stating "over the course of getting to know Mike Gilchrist over the course of our investment, I've noted that he speculates on his views of the market frequently which aren't always based on facts." (PX2300 (Heglie, IHT at 57)).

991. Polypore's CEO recognizes that barriers to entry exist in Daramic's business. {
} (PX1715, *in camera*; Toth, Tr. 1415, 1458-1459, *in camera*). {

e-mail was sent on February 26, 2007 at 11:26 pm. (PX1715 at 001-003, *in camera*;
Toth, Tr. 1459, *in camera*). } The

Response to Finding No. 991:

Complaint Counsel's finding number 991 is misleading. While Mr. Toth does recognize that barriers to entry exists in each of Polypore's business units, he clarified in his testimony that not all of these barriers are significant. (Toth, Tr. 1429). As he explained to the Court, "I mean a door is a barrier to me going outside, but I can open the door. These are barriers, but on a relative basis, not very significant." (Toth, Tr. 1429).

992. Mr. Dossani's told Mr. Toth that {

} (PX1715 at 002, *in camera*; Toth, Tr. 1464, *in camera*).

Response to Finding No. 992:

Complaint Counsel's finding number 992 is misleading and taken out of context. Mr. Toth actually told Complain Counsel that {

} (Toth, Tr. 1464, *in camera*). {

} (PX1715, *in camera*).

{

} (Toth, Tr. 1464, *in camera*). {

} (Toth, Tr. 1595, *in*

camera). {

} (Toth, Tr. 1597, *in*

camera).

993. Mr. Toth responded to Mr. Dossani on February 27, 2007. (PX1715 at 001, *in camera*). Mr. Toth stated that that he was meeting with his staff that morning and would provide { } (PX1715 at 001, *in camera*; Toth, Tr. 1467-68, *in camera*).

Response to Finding No. 993:

Complaint Counsel's finding number 993 is misleading. {

} (PRX1715, *in camera*; Toth, Tr. 1464, *in camera*).

994. That same day, Polypore held a senior leadership team ("SLT") meeting. Mr. Toth's notes on the agenda for the SLT meeting are { }:
"Be clear that price was out in front and consistent with cost escalation ... no more price erosion;" "Barriers to entry – 'technology' – global scale/infrastructure, low-cost, grades/product development, and low cost %, but functional." (Toth, Tr. 1421; PX0485 at 001). Mr. Toth testified that he { } (Toth, Tr. 1463-65, *in camera*).

Response to Finding No. 994:

Complaint Counsel's finding number 994 is misleading. First, as noted by the quotations,

{

} (Toth, Tr. 1597, *in camera*). {

} (Toth, Tr. 1597, *in camera*). {

} (PX0485 at 001). Furthermore, while Mr. Toth generally found

{

} (PX1715, *in camera*; Toth, Tr. 1464, *in camera*).

995. Polypore had a deck with the title "Initial Public Offering" which Polypore used with a variety of investors in June 2007. (Toth, Tr. 1424-25; PX3015, *in camera*). Investors were able to look at this deck, and Mr. Toth understood that it was very important to be as accurate as possible to investors. (Toth, Tr. 1427-28). {

} (Toth, Tr. 1428-29; PX3015 at 017, *in camera*).

} (RX00058, *in camera*). Second, it can costs as little as { } to construct a new PE line. (RFOF 1095; Hauswald, Tr. 881, *in camera*). Finally, the market has proven Daramic wrong about its assessment that “reputation and brand” are barriers to entry in the flooded-lead acid battery separator market. Currently, competitors in Asia who have only recently entered the market have been successful despite the lack of an established reputation in the industry or brand recognition. For example, BFR was founded in 2000, and has already managed to secure business from JCI and is seriously talking to Enersys about supply industrial separators. (RFOF 977, 990, 991).

2. MPLP also recognized barriers to entry

997. Mr. Heglie testified that high barriers to entry and the size of the market are important to IGP because “the fewer competitors in a market, the higher potential profitability is.” (PX2300 (Heglie, IHT at 126-27), *in camera*). Likewise, he testified that the long time it takes to design in and test a product is an important consideration to IGP because “it would delay . . . a new competitor to get into the market.” (PX2300 (Heglie, IHT at 127), *in camera*).

Response to Finding No. 997:

Complaint Counsel’s finding number 997 is misleading. Mr. Heglie, in fact, found that barriers to entry were not as high as IGP originally thought. For example, with respect to the assertion that it takes 1-2 years to “complete the design-in, full testing, and final acceptance of a new separator,” Mr. Heglie stated that “it probably does not take quite that long.” (PX2300 (Heglie, IHT at 127)). Furthermore, Mr. Heglie believes that “a lot of the points” in the document Complaint Counsel was questioning him about [PX1124] “are probably more subjective in nature” and were “opinions” of Microporous management. (PX2300 (Heglie, IHT at 128)). Mr. Heglie stated that there is “not a lot of discernable proof” of these points.” (PX2300 (Heglie, IHT at 128)). Especially since Mr. Heglie previously questioned managements’ views of the market stating “over the course of getting to know Mike Gilchrist

over the course of our investment, I've noted that he speculates on his views of the market frequently which aren't always based on facts." (PX2300 (Heglie, IHT at 57)).

Furthermore, IGP and Mr. Heglie were evaluating MPLP's business which was focused on the niche separator market utilizing rubber technology. MPLP's specific products were "proprietary and differentiated" creating significant barriers to entry for competitors. (PX2300 (Heglie, IHT at 119)). In fact, Mr. Thoth, Polypore's CEO, even stated that the only way Daramic was even able to break into the rubber separator market was by purchasing Micorporous. (Toth, Tr. 1422-23). These significant barriers to entry are unique to MPLP's business and are not present in the larger PE separator market. (RFOF 1061-1122).

998. IGP viewed Micorporous's CellForce as proprietary and differentiated. (PX2300 (Heglie, IHT at 119), *in camera*; PX1124 at 001). Micorporous's patent protection for CellForce until 2019, and Micorporous's significant know-how and process intellectual property in the production of all its products, was viewed by IGP as one of the company's strengths when it evaluated acquiring the company. (PX1124 at 001).

Response to Finding No. 998:

Respondent has no specific response.

999. Micorporous's management believed that its significant capital investment and strong employee base creates formidable barriers to entry into the markets in which it competed. (Trevathan, Tr. 3665; RX00741 at 048-049).

Response to Finding No. 999:

Complaint Counsel's finding number 999 is misleading as Complaint Counsel intentionally misquotes the evidence in the record. The Harris Report specifically refers to the markets in which MPLP competed as "niche markets." Respondent wholeheartedly agrees with Complaint Counsel that there are significant "formidable barriers" such as patents and proprietary technology which prevent entry into the "niche" markets which MPLP competed in. (PX1124 at 001). Respondent, however, disputes that either the strength of MPLP's employee base or the capital investment MPLP made are barriers to entry. First, there is ample evidence on the record that after purchasing MPLP, IGP had some concerns about the strength of MPLP's

“employee base” particularly its President and CEO, Mike Gilchrist. (PX2300 (Heglie, IHT at 57)). Second, at the time the Harris Report was written in 2006, the only significant capital investment was the \$5.4 million paid to Jungfer in 1999 to purchase a PE line to produce CellForce at Piney Flats. (RFOF 1096).

i) Risk of acquisition by Daramic is a barrier to entry.

1000. Even if a customer sponsors entry into one of the PE separator markets, it still faces the risk that the entrant could be acquired by Daramic. With Respect to NSG (“Nippon”), EnerSys related its own experience in this regard:

{

}

(Axt, Tr. 2305, *in camera*).

Response to Finding No. 1000:

Complaint Counsel’s finding number 1000 is misleading and driven by EnerSys’ bias in this matter. First, Complaint Counsel incorrectly implies that EnerSys is no longer exploring the option of sourcing separators from Anpei. This is contrary to Axt’s own testimony that {

} (Axt, Tr. 2219, *in camera*). In fact, {

} (Axt, Tr. 2273, *in camera*; Berkert, Tr. 2445, *in camera*).

Second, Axt’s remark is tainted by EnerSys’s bias with respect to the Acquisition and this proceeding before the FTC. EnerSys has been a vocal opponent to the Daramic-Microporous merger, and is the company primarily responsible for driving this proceeding. (RFOF 726).

1001. Daramic is involved in a joint venture with NSG with regards to a PE separator manufacturing plant in Tianjin, China. (Thuet, Tr. 4324). Daramic holds 60% of the capital in the Tianjin joint venture. (Thuet, Tr. 4324). Along with the majority ownership in the Tianjin joint venture, Daramic has the final decision on the pricing of PE separators that are manufactured in the Tianjin facility. (Thuet, Tr. 4402).

Response to Finding No. 1001:

individual or company from manufacturing a polyethylene separator. (Toth, Tr. 1626). Additionally, the equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). To the contrary, there are “a lot of people” who know the process. (Gaugl, Tr. 4547).

1004. Daramic claims that the Jungfer process is a Daramic trade secret. (Hauswald, Tr. 1153).
{

} (Hauswald, Tr. 1153-54; PX2241 at 7, *in camera*). Daramic considers every aspect of the technology and equipment that Daramic bought from Jungfer to be a Daramic trade secret. (Hauswald, Tr. 1155).

Response to Finding No. 1004:

Complaint Counsel’s finding number 1004 is misleading. The general process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). The Jungfer technology has unique features related to solvent consumption and extraction, which Daramic purchased from Jungfer and implements at its facilities around the world today. (Hauswald, Tr. 1153). Other separator manufacturers around the world produce separators without implementing the unique features of Jungfer’s technology with great success. (Hauswald, Tr. 1184-85). {

} (Hauswald, Tr. 1184-85).

1005. Daramic was {

} (PX0246, *in camera*; Hauswald, Tr. 831-32, *in camera*).

Response to Finding No. 1005:

Complaint Counsel’s finding number 1005 is misleading. Complaint Counsel falsely suggests that Daramic was trying to wrongfully “interfere” with MPLP’s opening of a plant in Europe. Daramic’s only motivation in the suit was to protect those parts of the Jungfer process which Daramic purchased and considers proprietary, such as the unique features related to solvent consumption and extraction. (Hauswald, Tr. 1153).

1006. Daramic owns 18 active patents, which is more than any other battery separator manufacturer. (PX2074).

Response to Finding No. 1006:

Complaint Counsel's finding number 1006 is misleading. While Daramic does own several patents, these patents are specifically related to niche products or services, such as CellForce and Clean Oil. (PX2161; Whear, Tr. 4711). The evidence on the record shows the general technology and know-how required to manufacture a PE separator is not a secret or proprietary to Daramic. The patent on the polyethylene separator expired in the mid-1980s, and thereafter, the information necessary to manufacture polyethylene separators was publicly available. (Whear, Tr. 4679; Toth, Tr. 1626).

1007. Daramic has a patent on HD. (Gilchrist, Tr. 382; PX2166).

Response to Finding No. 1007:

Complaint Counsel's finding number 1007 is incomplete. Daramic does have a patent on HD. However, this patent will expire in 2 years, which will allow the entire battery separator industry access to this technology. (Gilchrist, Tr. 382; Whear, Tr. 4801).

1008. Microporous has a patent on CellForce, a battery separator which can be used for deep-cycle, industrial and SLI battery applications. The patent relates to the ingredients used to make the separator. (Gilchrist, Tr. 335; PX2161). The CellForce patent is valid until 2017 or 2018. (Gilchrist, Tr. 382). The validity of the CellForce patent has never been challenged in patent litigation. (PX0920 (Gilchrist, IHT 40), *in camera*). CellForce is still a patent protected technology, and its specific formulation is intellectual property that MPLP, and now Daramic, protect. (Trevathan, Tr. 3716-3717).

Response to Finding No. 1008:

Respondent has no specific response.

- iii) Battery separator manufacturing equipment and experienced personnel are not readily available

1009. {
} (Weerts, Tr. 4498, *in camera*). {

} (Weerts, Tr. 4498-4499, *in*

camera).

Response to Finding No. 1009:

Respondent has no specific response.

1010. The Technology for Producing PE Separators is Confidential. Microporous considers the specifications it gives its machine suppliers proprietary to Microporous. (Gaugl, Tr. 4612; PX0905 (Gaugl, Dep. at 77), *in camera*). Microporous had its machine suppliers sign non-disclosure agreements that prevent the machine suppliers from giving the specifications of the machines that it was ordering to Microporous's competitors. (Gaugl, Tr. 4612).

Response to Finding No. 1010:

Complaint Counsel's finding number 1010 is false and contrary to the weight of evidence on the record. The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (Gaugl, Tr. 4547). The process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). As Mr. Gaugl explained the only reason for having its machine suppliers sign non-disclosure agreements is not that the process for constructing a PE line is a secret, but rather Microporous did not "want the competitor to know what size line we are putting in, because if they know the ... extruder size, they could make an easy calculation what would be the maximum capacity ... of the designed line." (Gaugl, Tr. 4612).

1011. {

} (PX0590 (Gaugl, Arb. Dep. at 158-59 *in camera*)).

Response to Finding No. 1011:

Complaint Counsel's finding number 1011 is misleading. Mr. Gaugl only considers the specifications and blue prints for the MPLP PE line confidential because if competitors had access to this information "they could make an easy calculation what would be the maximum capacity ... of the designed line." (Gaugl, Tr. 4612). MPLP carefully guarded this information

in the arbitration with Daramic, because knowing the line specifications could have alerted Daramic to MPLP's future plans and possible customers. (PX0036 at 002).

1012. Daramic protects its PE line equipment specifications and considers these specifications Daramic's intellectual property. (PX0924 (Jensen, Dep. at 24-25, *in camera*)).

Response to Finding No. 1012:

Complaint Counsel's finding number 1012 is misleading. Daramic does not consider the process of manufacturing PE separators a secret. (Gaugl, Tr. 4547). Daramic, like MPLP, seeks to protect the specifications for particular pieces of equipment so that competitors will not know the capacity for the line under construction or be able to calculate rates of solvent consumption or extraction, which Daramic considers to be unique to the Daramic/Jungfer process. (Gaugl, Tr. 4612; Hauswald, Tr. 1153).

1013. While he worked for Jungfer, Peter Gaugl considered the Jungfer PE battery separator process to be confidential. (Gaugl, Tr. 4630; PX0590 (Gaugl, Arb. Dep. at 158-59, *in camera*)).

Response to Finding No. 1013:

Complaint Counsel's finding number 1013 is misleading. Mr. Gaugl only testified that "they did not go out to everybody and tell everybody how it worked." (Gaugl, Tr. 1013). Mr. Gaugl's statement does not imply that he did or did not consider the process to be confidential, but rather simply shows Jungfer's good business sense of not sharing the details of its business with its competitors.

1014. {
at 453, *in camera*)). } (PX0919 (Riney, IHT

Response to Finding No. 1014:

Complaint Counsel's finding number 1014 is misleading. While Daramic does acknowledge "its people" as one of its "strengths," there are "a lot of people" in the industry that are skilled and knowledgeable about the PE manufacturing process. (Gaugl, Tr. 4547). Several

individuals in the battery separator industry know how to install a PE separator line. (RFOF 1069; Gaugl, Tr. 4547-48). For example, James Kung, Dr. Herwig Winkler, a former Jungfer employee, and Hans-Peter Gaugl, who is not under a non-compete with Daramic, knows how to install a PE line. (RFOF 1069; Gaugl, Tr. 4547-48, 4611; PX907 (Kung Dep. at 10), *in camera*).

{

} (RFOF 1069; RX00058, *in camera*).

1015. Mr. Gaugl testified that the manufacturing process for making PE separators “is not available to everybody.” (Gaugl, Tr. 4547). However, he did identify James Kung, two former Jungfer employees – Dr. Winkler and Mr. Duya – and “certain people at Daramic as well as at Entek” that he believed could put together and design a line. (Gaugl, Tr. 4642).

Response to Finding No. 1015:

Respondent has no specific response.

1016. Daramic planned to install a Jungfer style line for its planned Brazilian expansion. (PX0653 at 002; PX0924 (Jensen, Dep. at 112, *in camera*)). Even though Mr. Jensen’s duties included purchasing and installing production line equipment, Daramic intended to have Dr. Winkler the former head of Jungfer, order, install and start-up the line. (PX0653 at 002). {

}

(PX0924 (Jensen, Dep. at 114, *in camera*)).

Response to Finding No. 1016:

Complaint Counsel’s finding number 1016 is misleading. Daramic never “exploited” Dr. Winkler, an employee of Daramic, nor did Mr. Jensen intend to shirk his duties to oversee the installation of the line in Brazil in 2002 as Complaint Counsel suggests. {

} (PX0924 (Jensen, Dep. at 114, *in camera*)). {

} (PX0924 (Jensen, Dep. at 114, *in camera*)).

1017. {

(PX2237 at 002, *in camera*). {

}

} (PX0533 at 003, *in camera*).

Response to Finding No. 1017:

Complaint Counsel's finding number 1017 is misleading. The general process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). The Jungfer technology has unique features related to solvent consumption and extraction, which Daramic purchased from Jungfer and implements at its facilities around the world today. (Hauswald, Tr. 1153). Other separator manufacturers around the world produce separators without implementing the unique features of Jungfer's technology with great success. (Hauswald, Tr. 1184-85). {

} (Hauswald, Tr. 1184-85).

1018. {

} (PX0907 (Kung, Dep. at 92, *in camera*)).

Response to Finding No. 1018:

Complaint Counsel's finding number 1018 is misleading and colored by Mr. Kung bias with regards to this proceeding. Kung's credibility is inherently suspect. BFR is courting business from both JCI and EnerSys and seeking to remain or gain their good favor. (RFOF 990, 991). James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung {
} (PX0184 at 002; PX0273 at 009, *in camera*;
PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155),
in camera).
- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/Microporous] acquisition." (sic) (RX00022).
- Kung {
} (PX1521 at
002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- {

} (PX1510 at 002, *in camera*). {
} (PX1510 at
002, *in camera*).

- Kung {
(PX1521 at 002, *in camera*). }

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* (“We have no chance to make this material. So we don’t need to discuss that.”)). In direct contradiction of Kung’s testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

Even if Kung were to retire, {
} (RX00058, *in camera*).

1019. Daramic Purchased Jungfer in 2001, acquiring its two production lines in Austria at the time. (PX0924 (Jensen, Dep. at 7, *in camera*)). Daramic operated those lines in Austria until 2005 when both were transferred to Prachinburri, Thailand as part of the Rama II project. (PX0924 (Jensen, Dep. at 7-8, 12, *in camera*)).

Response to Finding No. 1019:

Respondent has no specific response.

1020. {

PX0924 (Jensen, Dep. at 45, *in camera*)).

} (PX0641 at 012;

Response to Finding No. 1020:

Respondent has no specific response.

1021. When Daramic decided to relocate the Jungfer lines from Austria to Thailand, it sent former Jungfer personnel from Austria who were familiar with the equipment and had experience setting up PE lines of that type. (PX0924 (Jensen, Dep. at 20, *in camera*)).
{

21, *in camera*)).

} (PX0924 (Jensen, Dep. at

Response to Finding No. 1021:

Respondent has no specific response

1022. {

} (PX2124 at 002, *in camera*)).

Response to Finding No. 1022:

Complaint Counsel's finding number 1022 is inaccurate. There is no reliable evidence that Daramic purchased Jungfer for any reason other than to increase the number lines it operated, and because Jungfer was for sale. (RPT Brief at 56). Daramic did not "immediately shut it down" but operated the Jungfer facility in Austria for five years before moving the machinery to Asia, where its needs were greater. (PX904 (Gaugl Dep. at 69), *in camera*; PX0533 at 002).

1023. The process Mr. Gaugl installed at Piney Flats for Microporous was basically the Jungfer process. (Gaugl, Tr. 4627). {

} (PX2237 at 006, *in camera*)).

Response to Finding No. 1023:

Complaint Counsel's finding number 1023 is very misleading. Daramic never challenged the installation of the Jungfer-style PE line in the United States at MPLP's Piney Flats facility as Complaint Counsel implies. The arbitration demand was only in response to Microporous' installation of a Jungfer-style PE line in Austria, where contractual provisions bargained for by Jungfer and assumed by Daramic remained in effect. (PX2237 at 004).

1024. {

} (PX2236 at 031, *in camera*).

Response to Finding No. 1024:

Complaint Counsel's finding number 1024 is misleading. Daramic merely sought to protect the unique features specific to the Jungfer technology purchased by Daramic and at issue in the arbitration. The general process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). The Jungfer technology has unique features related to solvent consumption and extraction, which Daramic purchased from Jungfer and implements at its facilities around the world today. (Hauswald, Tr. 1153). Other separator manufacturers around the world produce separators without implementing the unique features of Jungfer's technology with great success. (Hauswald, Tr. 1184-85). {

(Hauswald, Tr. 1184-85).

1025. {

} (PX2237 at 006, *in camera*). {

} (PX2237 at 007, *in camera*)

Response to Finding No. 1025:

Complaint Counsel's finding number 1025 is misleading. Complaint Counsel contends that Daramic considers the process of manufacturing a PE separator a secret. The evidence clearly indicates that the general process of manufacturing PE separators is not a secret. (Gaugl, Tr. 4547). The Jungfer technology, at issue in the arbitration referenced by Complaint Counsel, has unique features related to solvent consumption and extraction, which Daramic purchased from Jungfer and implements at its facilities around the world today. (Hauswald, Tr. 1153). Other separator manufacturers around the world produce separators without implementing the unique features of Jungfer's technology with great success. (Hauswald, Tr. 1184-85). {

} (Hauswald, Tr. 1184-85).

1026. {

} (PX2237 at 003, *in camera*).

Response to Finding No. 1026:

Complaint Counsel's finding number 1026 is misleading. While Daramic does expect its employees to keep certain proprietary information confidential, it does not consider the process for constructing a PE line proprietary or a secret. (Gaugl, Tr. 4547). In fact, Peter Gaugl, a former Jungfer employee and expert at building PE lines, is not under an employment contract with Daramic nor was he ever asked to sign an employment contract with Daramic which would prevent him from building a PE line for a competitor. (Gaugl, Tr. 4637).

1027. {

003, *in camera*).

} (PX0533 at

Response to Finding No. 1027:

For its response to Complaint Counsel's finding number 1028, Respondent incorporates its reply to finding number 1027.

1028. {

camera).

} (PX2235 at 009, *in*

Response to Finding No. 1028:

Complaint Counsel's finding number 1028 is misleading. Daramic merely sought to protect the names of its customers and the aspects of the Jungfer process which Daramic considers to be unique. (PX2235 at 003, *in camera*; Hauswald, Tr. 1153). Again, Daramic does not consider the process for constructing a PE line proprietary or a secret. (Gaugl, Tr. 4547).

1029. {

(PX2238, *in camera*).

Response to Finding No. 1029:

For its response to Complaint Counsel's finding number 1029, Respondent incorporates its reply to finding number 1027 and 1028.

3. Scale is required for sufficient entry

1030. For entry to be sufficient, it must replace the competition lost through the merger or acquisition. (Simpson, Tr. 3204, *in camera*; Merger Guidelines §3.4). Dr. Simpson explained that since this acquisition eliminated Microporous as a competitor, sufficient entry would need to replace Microporous as a competitor to be sufficient. (Simpson, Tr. 3205, *in camera*).

Response to Finding No. 1030:

Complaint Counsel's finding number 1030 is not supported by the evidence in the record. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Moreover, {

} (Simpson, Tr. 3408-09; 3410-11, *in camera*). {

} (Simpson, Tr. 3359, 3410-12, *in camera*).

Accordingly, the only issue in this geographic region is Microporous' single PE manufacturing line producing approximately 10 million square meters of PE separators in Piney Flats, Tennessee. Entry to replace this small PE line is easy, as shown by the many companies with similar or larger lines around the world (including Anpei, BFR, Separindo) and the fact that Microporous was able to install this PE line in approximately { } (Respondent's Post Trial Br. at p. 4, 33-47; RFOF 1061-1122).

1031. At a July 2007 corporate strategy workshop for the senior leadership team of Polypore, the Daramic group concluded that "{

}"
(Hauswald, Tr. 802, *in camera*; PX0194 at 018, *in camera*). For scale-based benefits, Mr. Hauswald agreed that the { } (Hauswald, Tr. 804-05, *in camera*; PX0194 at 025, *in camera*). At the time of the corporate strategy workshop, Mr. Hauswald acknowledged that { } (Hauswald, Tr. 934, *in camera*).

Response to Finding No. 1031:

Complaint Counsel's finding number 1031 is entirely false and unsupported by the evidence on the record. As Mr. Hauswald explained, {

} (Hauswald, Tr. 802, 931, *in camera*). Mr. Hauswald never suggested that Microporous has the type of scale which was discussed during the strategy audit and only acknowledged that { } (Hauswald, Tr. 934, *in camera*). While Microporous did supply Enersys, one of the largest battery manufacturers, Microporous only had 10 million square meters of capacity at the time of the

merger compared to the over 300 million square meters of capacity possessed by Daramic. (Hauswald, Tr. 802, *in camera*, 931, *in camera*, 1108; Thuet, Tr. 4323). Microporous is clearly not of the scale contemplated by Mr. Hauswald or Daramic at the time they discussed barriers to entry during the corporate strategy audit.

1032. Daramic's manufacturing facility in Thailand is far and away the largest PE battery separator manufacturing facility in Asia with four manufacturing lines and a total production capacity approaching 80 million square meters a year. (Thuet, Tr. 4320-4023, 4425). Daramic's Thai facility also has the two largest PE separator manufacturing lines in Asia. (Thuet, Tr. 4400).

Response to Finding No. 1032:

Respondent has no specific response

1033. {

} (RX01497 at 01, *in camera*).{

}. (PX0919 (Riney, IHT at 420-421, *in camera*)).

Response to Finding No. 1033:

Complaint Counsel's finding number 1033 is inaccurate and misleading. While Daramic acknowledges that its scale is one of its competitive advantages, it is not necessary for a company to have such scale to compete successfully in the market. Competitors can add additional capacity at a reasonable cost. For example, James Kung {

} (PX0907 (Kung, Dep. at

27, 34-35), *in camera*). Additionally, Kung {

} (PX0907 (Kung, Dep. at 54, 61), *in camera*).

Also, competitors can tweak existing lines for very little costs in order to produce industrial-type separators. For example, calendar rolls, which allow a producer to switch between automotive and industrial separators, cost between \$20,000 and \$50,000. (Gaugl, Tr. 4553; Weerts, Tr. 4488-89). Furthermore, battery manufacturers are often the driving force behind research and development, not necessarily the battery separator manufacturers themselves. For example,

EnerSys was the driving force behind Project LENO, and the success of the project is largely dependant upon EnerSys' testing and drive to qualify the new product. (RFOF 355-361). Also, JCI was previously very active in testing CellForce for use in SLI. (RFOF 366). JCI's lack of enthusiasm, rather than MPLP's own lack of resources or expertise in R&D, is what halted the success of the project. (RFOF 366).

1034. Daramic represented to EnerSys in May 2006 that it was {

} (PX1201 at 001, *in camera*).

Response to Finding No. 1034:

Complaint Counsel's finding number 1034 is misleading. Complaint Counsel implies that in 2006, Daramic was the only company able to adequately supply EnerSys. Clearly, that was not the case in 2006 nor is it true today. Today, there are a variety of other separator manufacturers which can adequately meet EnerSys's supply needs, just as well as Daramic.

{

} (RFOF 680, 685,

699).

1035. One of Daramic's strategies has been to {
} (RX01498 at 001, *in camera*). {

(RX01497 at 01-02, *in camera*).

Response to Finding No. 1035:

Complaint Counsel's finding number 1036 is misleading. {

} (Weerts, Tr. 4460,

in camera; RX0115 at 002, *in camera*). {

} (Weerts, Tr. 4460, *in camera*). {

} (Weerts, Tr. 4460, *in*

camera).

1036. { }

(RX01497 at 01, *in camera*). The large capacity {

} (RX01497 at 01, *in camera*).

Response to Finding No. 1036:

For its response to Complaint Counsel's finding number 1037, Respondent incorporates its reply to finding number 1036.

L. Battery manufacturers are not likely to vertically integrate into separator manufacturing

1037. It is not practical for battery manufacturers to manufacture their own separators. Manufacturers such as Bulldog Battery do not have the know-how needed to manufacture separators, including knowledge of the compounds used and the methodologies for controlling porosity and curing the separator material. Additionally, a single manufacturer such as Bulldog Battery does not have sufficient volume requirements to run a separator line. Finally, the equipment and tooling needed to manufacture separators would require a big investment which would be difficult to justify. (Benjamin, Tr. 3527-3529).

Response to Finding No. 1037:

Complaint Counsel's finding number 1037 is misleading. Bulldog Battery has never given serious thought to vertical integration and they have only "joked about it." (Benjamin, Tr. 3527). It is therefore unlikely that Bulldog or Benjamin has a grasp on the costs or know-how associated with vertical integration, and Benjamin's statements are no more than pure speculation. Should Bulldog decided to seriously consider vertical integration, it is likely that their volume requirements would not be prohibitive. For example, {

} (Seibert, Tr. 4263-65, *in camera*). {

} (RFOF 1034). {

} (Seibert, Tr. 4264-65, *in camera*).

1038. Customers' statements reflect the barriers to entry. East Penn has never considered investing capital in an Asian supplier of PE. (Leister, Tr. 4036). East Penn does not have any current plans to sponsor the entry of a new battery separator manufacturer. (Leister, Tr. 4037-4038). Nor does East Penn have any plans to invest capital in a battery separator manufacturer or to vertically integrate and manufacture separators in-house. (Leister, Tr. 4038).

Response to Finding No. 1038:

Complaint Counsel's finding number 1038 is incorrect. Complaint Counsel mistakenly assumes that because East Penn does not desire to vertically integrate there are barriers preventing other battery manufacturers from doing so. East Penn is currently satisfied with the separators and service it receives from Daramic. For example, Daramic consistently ranks in the top 20 suppliers, with a score of 80%-90%. (Leister, Tr. 3987). Daramic rates "excellent" with East Penn in on-time delivery and technology, and is equal to all competitors with respect to quality. (Leister, Tr. 3988). {

}

(Leister, Tr. 3984-85). {

} (RFOF 787-789).

Accordingly, since East Penn is apparently satisfied with its separator supply options, it is not surprising that they have not considered vertical integration.

1039. Since the acquisition, Trojan has looked into vertically integrating into the manufacture of deep-cycle battery separators and determined that it was not feasible due to the cost and resources required to run a battery separator manufacturing facility. (Godber, Tr. 229-30). The equipment would cost approximately \$8 million and because the process is unique, Trojan would need the right personnel to set up and run the facility, which it does not have. (Godber, Tr. 230-31).

Response to Finding No. 1039:

Complaint Counsel's finding number 1039 is misleading. Trojan is actually no stranger to the concept of vertical integration. At one time, Trojan Battery had an ownership interest in Microporous. (McDonald, Tr. 3784; RFOF 320). Furthermore, Trojan is the largest manufacturer of golf cart batteries in the world. (Godber, Tr. 274). In 2007, {
} (Godber, Tr. 252-53, *in camera*). Clearly, a mere \$8 million dollars would not be cost prohibitive should Trojan seriously consider vertical integration. Additionally, there are several individuals in the battery separator industry know how to install a PE separator line. (Gaugl, Tr. 4547-48).

1040. EnerSys {
} (Craig, Tr. 2644, *in camera*; Burkert, TR. 2363, 2365, *in camera*). While Mr. Craig has spoken to other industry CEOs about the possibility of vertical integration, {
} (Craig Tr. 2643-45, *in camera*).
EnerSys would not put money in to {
} (Burkert, Tr. 2463, *in camera*).

Response to Finding No. 1040:

Complaint Counsel's finding number 1040 is misleading and colored by EnerSys' bias in the matter. Led by Mr. John Craig, EnerSys has been a vocal opponent to the Daramic-Microporous merger. Craig, having been described as being on the "warpath" about the announced merger (RX211; Gagge, Tr. 2544-46), {

} (Craig, Tr. 2619, *in camera*), {
} (RX233, *in camera*; Craig, Tr. 2619-21, *in camera*). Craig then instructed EnerSys employees to cooperate fully with the FTC lawyers (Gagge, Tr. 2547), which included voluntarily providing documents, dummy batteries and other information -- some of which was not even requested by the FTC (Burkert, Tr. 2372-74; Burkert, Tr. 2404-10, *in camera*; RX192; RX1017, *in camera*; RX221 *in camera*; RX1012; RX1208 *in*

camera). Craig also provided the contact information for its outside counsel, Stevens & Lee, to EnerSys' competitors to contact the FTC regarding the Daramic merger with Microporous. (Craig, Tr. 2623, *in camera*; Godber, Tr. 280-282).

Despite his adamant refusal before this Court that EnerSys would not consider vertical integration, {

} (Craig, Tr. 2625, *in camera*). {

} (Craig, Tr. 2626, *in*

camera). {

} (Berkert, Tr. 2453-56, *in camera*; RX199, *in camera*). So while

Craig claims before this Court that EnerSys would not vertically integrate, his actions show that EnerSys has at the very least explored and considered the possibility.

1041. JCI has not considered building its own PE separator manufacturing lines to manufacture separators for internal use. (Hall, Tr. 2703). Nor does JCI have the competency to build and run a separator manufacturing line on its own. (Hall, Tr. 2703).

Response to Finding No. 1041:

Complaint Counsel's finding number 1041 is misleading. {

} For instance, {

}. (Weerts, Tr. 4480, *in*

camera). {

}. (Hall, Tr. 2820, *in camera*). {

}. (Hall, Tr. 2749, 2825, *in camera*). {

} (Hall, Tr.

2749, 2825, *in camera*). Another example is {

}. (PX0907 (Kung, Dep. at 59), *in camera*). {

}. (PX0907 (Kung, Dep. at 59), *in camera*). {

}

(RX00050 at 04, *in camera*). {

}. (RX00053, *in camera*; RX00052, *in camera*; Hall, Tr. 2715-16).

The resulting three-party joint venture continued to be called BFR. (Hall, Tr. 2716). {

}. (RX00032, *in camera*).

1042. Exide is not interested in vertically integrating into the separator industry by making separators for internal use. (Gillespie, Tr. 2983-2984). In the past, Exide had manufactured separators, but got out of that business because it was not a “core competency” for Exide. (Gillespie, Tr. 2983-2984). Subsequently, Exide has “never had any intention of going back into that business.” (Gillespie, Tr. 2983).

Response to Finding No. 1042:

Complaint Counsel’s finding number 1042 is misleading and should be regarded with caution by this Court due to Gillespie’s bias in this matter. Prior to 1998 Exide owned and operated its own vertically integrated facility in Corydon, Indiana. (RX00899). In 1999, Exide sold Daramic its Corydon facility for \$25.6 million in cash and assumption of lease obligations of \$21 million. Exide was “delighted” to have reached the agreement at that time. (PX0727 at 002). The agreement reached by Exide and Daramic was of great benefit to Exide in that it provided significant cash with an agreement to buy separators at a reasonable and, at that time, competitive market price. (PX0726; PX0727). Exide sold this facility in order to alleviate its own mounting financial pressures, independent from its ownership of the Corydon plant. These financial pressures resulted in Exide entering into Chapter 11 bankruptcy in early 2002. (PX0990 at 010).

Exide's prior ownership of the Corydon facility proves that vertical integration is possible. Furthermore, Gillespie's statements as to whether Exide would or would not presently vertically integrate should be given little consideration by the Court since Exide and Gillespie have shown significant bias in this proceeding and these biases are manifest in the record. (Gillespie, Tr. 2980, 3151-53).

1043. Exide has never considered entering a joint venture with any separator manufacturer. (Gillespie, Tr. 2984). Nor is Exide interested in investing money into a battery separator manufacturer. (Gillespie, Tr. 2984-2985). Exide's work with MPLP included an obligation for MPLP to shoulder the capital costs related to supply of Exide. (Gillespie, Tr. 3088).

Response to Finding No. 1043:

For its response to Complaint Counsel's finding number 1044, Respondent incorporates its reply to finding number 1043. Furthermore, there is no evidence in the record that there was a binding obligation between Exide and MPLP, and Exide did not take any material steps to exhibit any commitment to MPLP. (RFOF 580). Therefore it is not surprising that Exide did not offer any financial assistance or commitment to MPLP.

VIII. Respondent has no failing firm defense.

1044. Microporous was not a failing firm. Microporous was a profitable company. (Trevathan, Tr. 3652). Prior to the acquisition, Microporous was profitable and growing its business as the result of the addition of a new plant. Mr. Gilchrist, Microporous's CEO described the firm's near term business prospects as "all upside potential for us." (Gilchrist, Tr. 403).

Response to Finding No. 1044:

Complaint Counsel's finding number 1044 is misleading and contrary to the weight of the evidence on the record. Even prior to the Acquisition, IGP was concerned about the future financial viability of the company. (Trevathan, Tr. 3628-29; PX2300 (Heglie, IHT at 72-73); RX00248). Contrary to Gilchrist's belief that Microporous was in "good financial shape," the evidence indicates otherwise. (Gilchrist, Tr. 403; RX00248 at 001-2). While Management seemed content with growth in revenues only, IGP was "predominantly focused on cash flow

growth” which takes into account those expenses associated with revenue. (PX2300 (Heglie IHT at 62)). Inconsistently with the Board, Gilchrist, particularly, seemed to want “to grow for the sake of growth, and was not as focused on profitability as we [IGP] were.” (PX2301 (Heglie, Dep. at 149)). Microporous’ revenues were below where IGP had projected upon acquiring the company in 2006 and also below Management’s internal forecasts. (Trevathan, Tr. 3628-29, PX2300, (Heglie, IHT at 72-73)). For example, during 2007, sales were below budget and not generating a return on capital for many of its products as expected by IG (RX00248 at 002; Trevathan, Tr. 3628-29). As sales declined in 2007, raw material costs continued to escalate contributing to the deterioration of margins. (Trevathan, Tr. 3629). Additionally, the Board questioned the financial viability of the Austrian expansion as the costs of the expansion soared substantially over budget without any long-term supply commitments in place. (RX00248 at 002). Due to the capital expended to further the expansions thus far, Microporous was capital constrained compared to most businesses under IGP’s ownership (PX2300 (Heglie, IHT at 72)). As of December 31, 2007, Microporous had outstanding debt of approximately \$46 million, which included debt for the prior Piney Flats expansion and the 2007 Feistritz expansion. (PX0078 at 21; Gilchrist, Tr. 549).

There is additionally substantial evidence on the record that if Microporous remained a stand alone company today, there are questions as to whether it would be financially viable. (RFOF 421). {

} (Riney, Tr. 4963, 4968-69, *in camera*). Forecasts for 2009 reveal that if Piney Flats were a stand-alone facility its net income would be {

} (Riney, Tr. 4969, *in camera*). Forecasts for 2009 also reveal that if Feistritz were a

stand-alone facility its net income would be { } (Riney, Tr. 4969, *in camera*).

1045. At the time of the acquisition, Microporous had multiple offers for backfilling its CellForce production line at Piney Flats, including offers from C&D Dynasty for a UPS application, EnerSys, Trojan, Crown Battery and East Penn. (Gilchrist Tr. 397-98, 402-403, 467, *in camera*; RX00207). The contract with EnerSys/Hawker filled one line at Feistritz, while Microporous was making “a very concentrated effort” to sell PE separators from the second Feistritz line to several SLI battery manufacturers. In addition to Exide and Johnson Controls, there were 35-40 smaller SLI battery manufacturers in Europe many of whom were good customer prospects because they liked Microporous’s PE technology which was based on Jungfer’s technology. Some of these manufacturers had formerly purchased separators from Jungfer when it was still in business. (Gilchrist Tr. 344-347).

Response to Finding No. 1045:

Complaint Counsel’s finding number 1045 is misleading. Despite the approaching opening of the facility in Austria, Microporous had no commitments besides its supply agreement with EnerSys to secure additional volume to fill its idle capacity at Piney Flats. Microporous had no commitment from Crown with respect to backfilling the PE line at Piney Flats, and CellForce was not even been qualified by Crown for general commercial use in any application. (Gilchrist, Tr. 239, *in camera*; Balcerzak, Tr. 4119-20). {

} (Gilchrist, Tr. 239, *in camera*).

Furthermore, Trojan’s history of purchasing from Microporous did not indicate that they would switch any significant volume of their production from FLEX-SIL to CellForce. In 2006 and 2007, 95% of Trojan’s purchases from Microporous were of FLEX-SIL. (Godber, Tr. 275). Trojan also has invested substantial time and effort in marketing FLEX-SIL® to its customers. (Godber, Tr. 277.) Microporous did have brief discussions with East Penn regarding SLI separators in the U.S., which Microporous had not produced commercially. (Trevathan, Tr. 3623; PX2300 (Heglie, IHT at 186-87)). Discussions never went beyond preliminary stages and

no MOUs, letters of interest, or contract drafts were exchanged. (Trevathan, Tr. 3623; Gilchrist, Tr. 503, *in camera*).

Complaint Counsel also ignores the harsh reality that despite its efforts Microporous' only supply commitment to fill its capacity in Europe was also with EnerSys. (RX00207 at 010, *in camera*). In fact, Microporous was unable to secure a single MOU, commitment or supply agreement with any of these smaller battery manufactures in Europe. (McDonald, Tr. 3831; Gilchrist, Tr. 539). {

} (Trevathan, Tr. 3624).

Furthermore, Complaint Counsel ignores the financial difficulties EnerSys is experiencing today. It is therefore unlikely that even if Microporous remained a viable entity today that production for EnerSys alone could fill idle PE lines in both Piney Flats, Tennessee and Fiestritz Austria. {

} (Craig, Tr. 2639 *in camera*). {

} (Craig, Tr. 2642 *in camera*). {

} (Axt, Tr. 2254, *in camera*).

1046. {

} (RX00207, *in camera*). EnerSys is a significant customer, with approximately a 40 percent market share in motive battery sales worldwide. (Axt, 2227). {

} (Axt, Tr. 2151, *in camera*).

Response to Finding No. 1046:

Complaint Counsel's finding number 1046 is incomplete. Complaint Counsel fails to recognize that the 2007 amendment was entered into by Management without approval from the

Board of Directors despite the fact that capital would be required to execute the expansion required to fulfill this contract. (PX2300 (Heglie, IHT at 138-39, 164)).

1047. {

} (Axt, Tr. 2210-11, *in camera*).

Response to Finding No. 1047:

Complaint Counsel's finding number 1047 is misleading. Complaint Counsel ignores the financial difficulties EnerSys is experiencing today. {

} (Craig, Tr. 2639 *in camera*). {

} (Craig, Tr. 2642 *in camera*).

{

} (Axt, Tr. 2254, *in camera*). It is therefore unlikely

that even if Microporous remained a viable entity today that production for EnerSys alone could fill idle PE lines in both Piney Flats, Tennessee and Fiestritz Austria.

1048. There was a restructuring plan within MPLP to address the deteriorating margins (Trevathan, Tr. 3773-3774; RX00283).

Response to Finding No. 1048:

Complaint Counsel's finding number 1048 is misleading as Microporous' margins were in a serious state of decline, and despite the efforts of Mr. Trevathan, there had been little headway in increasing Microporous' margins. {

} (Riney, Tr. 4961-62, *in*

camera). For example, the average contribution margin for the ACE-SIL® product in 2008 was

{ } (Riney, Tr. 4961-62, *in camera*). The average contribution margin for the

FLEX-SIL® product was { } (Riney, Tr. 4962, *in camera*). This compares to an

average contribution margin of {

} (Riney, Tr. 4963, *in camera*).

However, Complaint Counsel ignores that the primary factor contributing to Microporous' eroding margins was Managements inability to pass along the escalating prices of raw materials in the form of price increases. (RFOF 344). Prior to 2004, Microporous had not increased prices for approximately 10-years despite escalating energy and raw material costs. (Trevathan, Tr. 3576-77). Starting in 2004, Microporous attempted to recover costs through price increases and surcharges but was often unsuccessful and received significant pushback from its customers, including Trojan, EnerSys, and Exide. (RFOF 346-47).

1049. IGP never "seriously entertained" a sell to other potential buyers. (PX2300 (Heglie, IHT at 217-18)). According to Mr. Heglie, "with the magnitude of what we had going on with the company and the demands on management time, we thought it was unrealistic to bring any kind of buyers that weren't already familiar with the company or its markets into a process." (PX2300 (Heglie, IHT at 217-18)).

Response to Finding No. 1049:

Complaint Counsel's finding number 1049 is misleading. IGP did realize the difficulty it would have in selling Microporous because of "magnitude of what we had going on" as well as the declining profitability of the company. Daramic only fully grasped the dire financial straits Microporous was in upon acquiring the company. {

} (Toth, Tr. 1587-89, *in camera*; RX00546,

in camera; RX00724). {

} (Toth, Tr. 1587, *in*

camera). For example, {

} (Riney, Tr. 4961, *in camera*). Actual sales in 2008 were {

} (Riney, Tr. 4961, *in camera*). The actual EBITDA for Microporous products was {

} (Riney, Tr. 4961, *in camera*).

If IGP had tried to sell Microporous on the open market the value of the sale may have been far less than the amount paid by Daramic, which desired to obtain the benefits of the rubber technology and access to the deep cycle segment. (Toth, Tr. 1554-55, 1564; Toth, Tr. 1587, *in camera*).

1050. {

} (PX0433 at 001, **in camera**). {

camera). {
} (PX0904 (Seibert, Dep. 40), *in*

camera). {
} (PX0911 (Roe, Dep, 226-227), *in*

camera);
Roe, Tr. 1211-1212).

Response to Finding No. 1050:

Complaint Counsel's finding number 1050 is false and contrary to the weight of the evidence on the record. Daramic's HD separators are not competitive with Microporous' FLEX-SIL separators in terms of performance for all of the following reasons: First, FLEX-SIL® is the industry gold-standard separator in motive, deep-cycle battery applications. (Whear, Tr. 4683; PX0433 at 001 ("FLEX-SIL® is no doubt the separator of choice in today's market for golf cart battery application."); Gilchrist, Tr. 535; Godber, Tr. 271). Second, FLEX-SIL® is unique in that no other battery separator product can offer the same degree of antimony suppression as

FLEX-SIL®. (Whear, Tr. 4684-85). Trojan, Microporous' largest customer, considers FLEX-SIL® to be unique. (Godber, Tr. 277; RX00772, *in camera*; RX01338). U.S. Battery uses FLEX-SIL® in its premium battery line, offering a one year warranty. (Wallace, Tr. 1966-67). Over 90% of U.S. Battery separator purchases have been FLEX-SIL®. (Qureshi Tr. 2064-65). Both Trojan and U.S. Battery advertise the FLEX-SIL® separator on their websites, not Daramic HD. (Godber, Tr. 245-46, *in camera*; Godber, Tr. 277; Wallace, Tr. 1963-65) (For illustrative purposes, see RX01643). Third, Trojan's testing of Daramic's HD product revealed that CellForce performed better than HD by 10-15% and that FLEX-SIL® performed better than CellForce by 15-20%. (Godber, Tr. 271). Accordingly, FLEX-SIL®, based on Trojan's testing, has a significantly better performance than Daramic's HD.

IX. Efficiencies

1051. {

Kahwaty {
5249-5250, *in camera*).

} (Simpson, Tr. 3240, *in camera*). Dr.
}. (Kahwaty, Tr.

Response to Finding No. 1051:

Complaint Counsel's finding number 1051 is false and unsupported by the weight of evidence on the record. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. {

} (Kahwaty, Tr. 5215-5218, *in camera*). For example, {

} (Kahwaty Tr.

5215-5218, *in camera*).

1052. {
(PX0033 at 11, *in camera*; PX0950 at 59-60, *in camera*; PX0912 (Riney, Dep. 53, 54, 71, 77), *in camera*).

Response to Finding No. 1052:

Complaint Counsel's finding number 1052 is incorrect. Daramic provided documentation to Complaint Counsel through the discovery process documenting efficiencies. (*See* RX00771, *in camera*; RX01603, *in camera*). Additionally, Mr. Riney and Mr. Hauswald testified before the Court about the many efficiencies which Daramic is just now beginning to capitalize on as a result of the Acquisition. For example, prior to the Acquisition, the CellForce line had a yield of approximately 76%. (Hauswald, Tr. 1062). This yield was improved to approximately 90% through the efforts of the Daramic task force. (Hauswald, Tr. 1062). Also, {

(Hauswald, Tr. 904, *in camera*; RX1603, *in camera*). {

} (Hauswald, Tr.

904, *in camera*; Riney, Tr. 5020, *in camera*; RX01427, *in camera*; RX01428, *in camera*).

{

} (Hauswald, Tr. 904, *in camera*; RX01431, *in camera*; RX01432, *in camera*;
RX01433, *in camera*; RX01473, *in camera*).

Furthermore, Dr. Kahwaty's {
} (RFOF 1384-85;
Kahwaty, Tr. 5215-5218, *in camera*). {

} (Kahwaty Tr. 5215-5218, *in camera*).

1053. {

} (PX0950 at 060, *in camera*). Daramic last updated its
interrogatories on March 17, 2009. (PX0952, *in camera*).

Response to Finding No. 1053:

Complaint Counsel's finding number 1053 is misleading. Due to the gradual nature of
the integration process, Daramic is just now starting to quantify the efficiencies gained as a result
of the merger {

} (PX0950 at 060,
in camera). Mr. Riney, in fact, testified to many of the efficiencies achieved as a result of the
merger before the Court during his live testimony. (*See Riney, Tr. 4971-73, in camera*).

Additionally, there are specific documents in evidence which attempt to quantify the efficiencies achieved as a result of the merger. (*See e.g.* RX01603, *in camera*; RX00771, *in camera*).

1054. {

} (PX0950 at 059-060, *in camera*; PX0912 (Riney, Dep. at 53, 54, 71, 77, 82, 87-90, 95, 104, 106, 108, 112), *in camera*). {

} (Riney, Tr. 5025, *in camera*).

Response to Finding No. 1054:

Complaint Counsel's finding number 1054 is false. Complaint Counsel's broad generalizations completely ignore all testimony presented at trial which {

} (Kahwaty, Tr. 5215-5218, *in camera*). Furthermore, {

} (Riney, Tr. 4973, *in camera*). Mr. Riney testified that {

} (Riney, Tr.

4973, *in camera*).

1055. {

} (Riney, Tr. 5027, *in camera*).

Response to Finding No. 1055:

Complaint Counsel's finding number 1055 is false. {

} (Riney, Tr. 5027, *in camera*).

1056. {

} (Riney, Tr. 5025, *in camera*). {

} (Riney, Tr. 5031, *in camera*).

Response to Finding No. 1056:

Complaint Counsel's finding number 1056 is entirely false. Again, the value of the headcount reductions is in evidence and was testified to by Mr. Riney. (Riney, Tr. 4973, *in camera*). Mr. Riney testified that {

} (Riney, Tr.

4973, *in camera*). {

} (Riney, Tr.

5031, *in camera*).

1057. Daramic never discussed with Trojan potential cost savings from its acquisition of Microporous. (Godber, Tr. 220). Daramic has not offered to pass on any cost savings from its acquisition of Microporous to Trojan. (Godber, Tr. 221).

Response to Finding No. 1057:

Respondent has no specific response.

X. Monopolization

A. Existing Market Power

1058. {

}. (Simpson, Tr. 3226, *in camera*).

Response to Finding No. 1058:

Complaint Counsel's finding number 1058 is misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Also, Complaint Counsel mistakenly equates "market power" with "monopoly power." The Complaint alleges that Daramic maintained "monopoly power", not "market power." (RX01572 at 008). {

} (Simpson, Tr. 3404, *in camera*). {

} (Simpson, Tr. 3406, *in camera*; *see also* Respondent's Post
Trial Reply Br. at pp. 29-30).

{

}

(Simpson, Tr. 3355-57, *in camera*; PX0033 at 041, *in camera*). Although the FTC alleges in the Complaint that Daramic maintained monopoly power in each of the FTC's four product markets (deep cycle, motive, SLI, UPS) (RX1572 at 7), no evidence has been presented to this Court for which this Court to conclude that Daramic ever had a monopoly in any of those alleged markets, let along "maintaining" a monopoly in those markets. {

} (PX0033 at 040, *in camera*). {

} (PX0033 at 041, *in camera*).

1. {

};

1059. Exide currently pays Daramic { } for automotive separators in North America. (Gillespie, Tr. 3018-3020, 3059, *in camera*).

Response to Finding No. 1059:

Complaint Counsel's finding number 1059 is misleading, and Complaint Counsel gives no consideration to the circumstances surrounding the pricing negotiations between Exide and

Daramic which arose from the sale of the Corydon facility in the early-2000s. Pursuant to
{

} (RX00976, *in camera*, PX0728, *in camera*). {

} (RX00976, *in camera*). {

} (PX0728, *in camera*). In or about April 2001,

{

} (RX01517, *in*

camera). At the time of the Amendment, {

} (RX01517, *in camera*). Daramic agreed in the Amendment to {

} (RX01517, *in camera*). The Amendment contained significant terms which brought substantial financial benefit to Exide at a time when it was financially troubled. (RX01517, *in camera*; RX01285).

1060. As early as January 2007, Exide approached Daramic and indicated that it would
{

} (Bregman, Tr. 2900-2901, *in camera*). At that time, Exide was willing to contemplate {

} (PX1063 at 001, *in camera*).

Response to Finding No. 1060:

Complaint Counsel's finding number 1060 is false and misleading. Complaint Counsel implies that Exide individually and selectively approached Daramic about extending the current supply contract. In fact, despite Exide's longstanding relationship with Daramic, Exide issued a Request for Proposal ("RFP") in 2007 to battery separator manufacturers around the world including { } (Gillespie, Tr. 2962; PX1036, *in camera*).

1061. { } (PX1026 at 001-002, *in camera*). In the proposal, Daramic boasted that it was { } (PX1026 at 001, *in camera*).

Response to Finding No. 1061:

Complaint Counsel's finding number 1061 is misleading. The RFP called for each separator manufacturer to bid on all PE supplies globally at volumes of 25%, 50%, 75% and 100%; however, Exide did not define in the RFP how the supplier was to bid a lower percentage, whether by plant, product mix or otherwise. (Gillespie, Tr. 2967; Gillespie, Tr. 3015, *in camera*). Exide gave the suppliers to whom it issued the RFP the "choice to quote on part or all or whatever they felt comfortable with..." Exide "left it up to [the separator manufacturers] to decide what or any portion they wanted to quote on." (Gillespie, Tr. 2965). {

} (PX1036, *in camera*).

1062. Daramic's proposal included a { } Price reductions would { } (Gillespie, Tr. 3018-3020, *in camera*; PX1026 at 001-002, *in camera*).

Response to Finding No. 1062:

Complaint Counsel's finding number 1062 is misleading. {

} (RX01036, *in camera*). Further,

{

} (Gillespie, Tr. 3106-3109, *in camera*; RX01036, *in*

camera).

1063. To Exide, it appeared that {

Tr. 2901, *in camera*). Mr. Gillespie viewed this proposal as {
3020, *in camera*).

} (Bregman,
} (Gillespie, Tr.

Response to Finding No. 1063:

For its response to Complaint Counsel's finding number 1064, Respondent incorporates its reply to finding number 1063. Respondent additionally notes that {

} (PX2296 at 002, *in camera*).

1064. Mr. Bregman subsequently informed Mr. Hauswald that Exide would {

} (Bregman, Tr. 2901, *in camera*). Mr. Hauswald's
response to Mr. Bregman was {

} (PX1050, *in camera*; Bregman Tr. 2901-2902, *in camera*).

Response to Finding No. 1064:

Complaint Counsel's finding number 1064 is false. Exide was considering alternative options of supply long before Daramic submitted its proposal to Exide. In fact, beginning in 2007, Exide also began to seek out battery separator manufacturers in Asia to supply product to Exide. (Gillespie Tr. 2962). Additionally, {

} (PX0910

(Trevathan Dep. at 37-39), *in camera*).

Furthermore, Bregman's statements are false, self-serving, and clearly unsupported by the long history of partnership and cooperation between Exide and Daramic. Exide itself admits that Daramic has done things along the way to help Exide. (Gillespie, Tr. 3100). For instance,

{

} (PX0835, *in camera*; Gillespie, Tr. 3102, *in camera*).

For example, at the time this proposal was being discussed Exide was approximately \$14 million dollars in over its significant \$19 million credit line with Daramic. (Bregman, Tr. 2908-09, *in camera*; RX01285). Exide repeatedly exceeded this credit limit with Daramic in violation of its contract and in violation of the order of the court after Exide emerged from bankruptcy. (Bregman, Tr. 2909-11, *in camera*). Mr. Bregman actually penned the email relaying the fabricated threats of Mr. Hauswald only an hour and 48 minutes after receiving an email from Tucker Roe attempting to reaffirm Daramic's commitment towards Exide and propose a solution allowing Exide "to pay down the deficit amounts over 6 months to reach the \$19 million credit limit." (PX1026, *in camera*).

1065. {

camera). {

} (Bregman, Tr. 2903-2905, *in*

}

(Bregman, Tr. 2902, *in camera*).

Response to Finding No. 1065:

Complaint Counsel's finding number 1065 is false. Rather than in solely response to contract negotiations, as suggested by Complaint Counsel, {

} (PX1007 at 002, *in camera*; Bregman, Tr. 2915-17, *in camera*). Daramic clearly did not take any steps to reduce Exide's status as a preferred customer and partner. {

} (PX1026, *in camera*). {

} (Bregman, Tr. 2919-20, *in camera*;
RX01253 at 001, *in camera*).

1066. {
} (PX1040 at 002, *in camera*). Because Exide is such a large purchaser, {

} (PX1040 at 002, *in camera*; see also PX1085 at 002 (discussing engineering conclusion that fully replacing Daramic material with alternative separator material is not possible; "there is significant volume that can not be replaced within the two year time frame available" before the contract expired)).

Response to Finding No. 1066:

Complaint Counsel's finding number 1066 is inaccurate and should be disregarded. First, there are suppliers, other than Daramic, capable of supplying most if not all of Exide's separator requirements. For example, {

} (Gillespie, Tr. 3123-24, *in camera*; Weerts, Tr. 4486, 4521-23, *in camera*). Second, Daramic has consistently treated Exide as a preferred customer, and Exide has no basis for alleging that Daramic would limit the supply available to Exide. For instance, Mr. Gillespie testified that Exide was "treated very well"

during the October 2006 force majeure event (which was clearly real to Exide), and that “it wasn’t easy” during that time for Daramic, but that it worked with Exide to ensure it received supplies. (PX1048; Gillespie, Tr. 2985, 3095). Third, the evidence indicates Daramic has only sought price increases { } and {

} (RX00019, in camera; Gillespie, Tr. 3101-3104, in camera; RX00927 at 005-16, in camera).

1067. Exide believes that negotiations with Daramic are { } (Gillespie, Tr. 3002, in camera). From 2005 to the present, Exide { } (Gillespie, Tr. 3000, in camera). Cumulatively, this means { } (Gillespie, Tr. 3000, in camera). Exide does not feel that it has many negotiating levers when dealing with Daramic. (Gillespie, Tr. 3066-3067). Exide lacks pressure points in negotiations with Daramic and therefore is unable to exert its will on Daramic to get price decreases as it is able to do with many other suppliers. (Gillespie, Tr. 3097-3098).

Response to Finding No. 1067:

Complaint Counsel’s finding number 1067 is misleading and should be disregarded. First, Exide ignores that from 1999-2004, Daramic did not pass on any raw material costs to Exide, despite the contractual provisions that would have allowed such increases. (Gillespie, Tr. 3070). Second, {

} (RX00019, in camera; Gillespie, Tr. 3101-3104, in camera; RX00927 at 005-16, in camera). Third, Gillespie’s testimony that Exide does not have many negotiating levers when dealing with Daramic is completely without merit. {

} (Gillespie, Tr. 3073, 3101-3103, in camera; RX00537, in camera). {

} (RX00019, *in camera*; Gillespie, Tr. 3101-3104, *in camera*). Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

1068. {

} (Gillespie, Tr. 2999, *in camera*; see also PX2050 at 038-039, *in camera*; PX2052 at 005-006, *in camera*). Daramic has {
Tr. 2999, *in camera*). } (Gillespie,

Response to Finding No. 1068:

Complaint Counsel's finding number 1068 is false and contrary to the evidence on the record. {

} (Gillespie, Tr. 2999, *in camera*). {

} (PX2052 at 005, *in camera*). Further, {

} (RX00342 at 033, *in camera*). Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

2. {
}

1069. Daramic responded to Exide's 2007 RFP by quoting prices for {
PX1028, *in camera*). Exide found it very unusual that {
} (Gillespie, Tr. 3017-3018, *in camera*).

Response to Finding No. 1069:

Complaint Counsel's finding number 1069 is misleading. The RFP called for each separator manufacturer to bid on all PE supplies globally at volumes of 25%, 50%, 75% and 100%; however, Exide did not define in the RFP how the supplier was to bid a lower percentage, whether by plant, product mix or otherwise. (Gillespie, Tr. 2967; Gillespie, Tr. 3015, *in camera*). Furthermore, Exide gave the suppliers to whom it issued the RFP the "choice to quote on part or all or whatever they felt comfortable with..." Exide "left it up to [the separator manufacturers] to decide what or any portion they wanted to quote on." (Gillespie, Tr. 2965).

{

} (Gillespie, Tr. 3017, *in camera*). {

} (Gillespie, Tr. 3122, *in camera*). {

} (Gillespie, Tr. 3015, *in camera*). Exide has a very complex array of products and 17 manufacturing locations, and Daramic had no way to know which regions and which types of products would make up the 50% of supply to Exide in order provide accurate pricing. (Roe, Tr. 1718; Hauswald, Tr. 1170-71).

Moreover, at the time Daramic submitted the RFP to Exide it was exploring other business opportunities which prohibited it from making a quote at 50%. For instance, at the time, Daramic still believed that it was in the midst of negotiations with Johnson Controls and had the opportunity to pick up incremental volume. (Roe, Tr. 1716-17). Also, Daramic was considering a modification to the line at Corydon (which supplies Exide) in order to manufacture a synthetic paper material known as Artysin. (Roe, Tr. 1717). Finally, Daramic was considering

modification of several of its PE lines for a project involving the production of filtration applications. (Roe, Tr. 1717).

Also, while Exide claims it was not satisfied with the proposal it received from Daramic, they never made a counterproposal to Daramic's offer, it never asked Daramic to submit a new proposal, or specify the parts of the proposal which they considered insufficient. (Roe, Tr. 1718-19). Because Daramic has never received a counter-proposal from Exide, it feels as if they are merely quoting against themselves and making no headway with regards to this negotiation. (Roe, Tr. 1719-20).

Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

1070. The exclusive supply offer from Daramic provided {
Tr. 3011-3012, *in camera*; PX1028 at 041-046, 058-060, *in camera*). Under Daramic's proposal, Exide's pricing, payment terms, credit limit and other terms {
} (Gillespie, Tr. 3016, *in camera*; PX1028 at 058-059, *in camera*).

Response to Finding No. 1070:

Complaint Counsel's finding number 1070 is inaccurate and misleading. For its response to this finding, Respondent incorporates its reply to Finding No. 1069. {

} (Gillespie, Tr. 3122, *in camera*). Exide is currently Daramic's highest volume customer, and any loss of volume from Exide would necessitate Daramic realigning its sourcing strategy. (Roe, Tr. 1306, 1717-20).

Furthermore, {

} (Roe, Tr. 1782-83, *in camera*). {

} (Roe, Tr. 1783, *in camera*).

1071. Under Daramic's proposal, Exide would {
} (Gillespie, Tr.
3142, *in camera*). For example, under Daramic's proposal, Exide's total spend at
Daramic for golf cart separators would {
} (Gillespie, Tr. 3139-3140, *in camera*).

Response to Finding No. 1071:

Complaint Counsel's finding number 1071 is misleading and should be disregarded due
to Exide bias. For its response to this finding, Respondent incorporates its reply to Finding Nos.
1069 and 1070.

1072. By {
} Daramic structured its pricing proposal to
Exide to prevent them from taking advantage of the benefits of multi-sourcing. If Exide
chose to purchase {
} Exide would pay a penalty of approximately {
} (PX1036 at 002, *in camera*). Whereas, Exide analysis indicated that if
it was able to multi-source {
} of its separator needs, Exide could actually save
upwards of {
} (PX1036 at 003, *in camera*).

Response to Finding No. 1072:

Complaint Counsel's finding number 1072 is inaccurate and misleading. For its response
to this finding, Respondent incorporates its reply to Finding Nos. 1069 and 1070. Furthermore,
Complaint Counsel calculates Exide's savings on mere projections and estimates which are
misleading and should be disregarded as evidence of Exide's potential savings from multi-
sourcing its separator needs. {

} (PX1036 at 003, *in camera*). {

}

(PX1036 at 003, *in camera*). This would presumably leave Daramic's facility at Corydon running well below its available capacity potentially necessitating that Daramic shut down production lines or even the entire plant.

Furthermore, the supposed savings of over \$1.5 million are in comparison to what Exide is currently paying Daramic today, which as previously discussed in Finding No. 1059 is because of the pricing structure Daramic and Exide negotiated years ago, allowing Exide to pay-off outstanding debt over time. (RFOF 528-541).

These projections are additionally evidence of Exide's lack of good faith in working with Daramic to negotiate a proposal. {

} (Gillespie, Tr. 3015, *in camera*; PX1036 at 003, *in camera*).

1073. {

} (PX1028 at 58-60, *in camera*; Roe, Tr. 1785-1786, *in camera*). { } (PX1028 at 58, *in camera*; Roe, Tr. 1360, *in camera*). Exide understood {

} (PX0228 at 02, *in camera*).

Response to Finding No. 1073:

Complaint Counsel's finding number 1073 is misleading and inaccurate. For its response to this finding, Respondent incorporates its reply to Finding Nos. 1069, 1070, and 1072.

1074. {

(PX0228 at 02, *in camera*; PX0922 (Roe IHT, 237), *in camera*; Roe, Tr. 1361-1363, *in camera*). }

Response to Finding No. 1074:

Complaint Counsel's finding number 1074 is false. Mr. Roe, in fact, testified that

{

} (Roe, Tr. 1361-63, *in*

camera). {

} (Roe, Tr. 1782-83, *in camera*). In fact, {

} (Roe, Tr. 1783,

in camera).

1075. {

} (Roe, Tr. 1363-1364, *in camera*; PX0922 (Roe IHT, 239), *in camera*).

{

} (PX1028 at 59).

Response to Finding No. 1075:

Complaint Counsel's finding number 1075 is misleading and false. For its response to this finding, Respondent incorporates its reply to Finding Nos. 1069, 1070, 1072, and 1074.

1076. Daramic's response to Exide's RFP {
} (Gillespie, Tr. 3012, *in camera*).

Response to Finding No. 1076:

Complaint Counsel's finding number 1076 is false and based entirely on the self-serving statements of Gillespie. First, the evidence show that Exide is considering several alternative sources of supply. Specifically, {

} (Gillespie, Tr. 3023-24, *in camera*). Also, {

} (Gillespie, Tr. 3122-27, *in camera*).

Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony on this issue should be disregarded.

1077. { } (PX0261, *in camera*). {

} (PX0261, {
}) *in camera*). {

} (Roe, Tr.

1775-1776, *in camera*).

Response to Finding No. 1077:

Complaint Counsel's finding number 1077 is misleading and false. Daramic continues to provide Exide with a proposal for 100% of its business, because Exide has never made a counterproposal to Daramic's initial offer, never asked Daramic to submit a new proposal, or specified the parts of the proposal which they considered insufficient. (Roe, Tr. 1718-19). Furthermore, Daramic did, in fact, provide estimates of significant costs savings of {

} (PX0261 at 002, *in camera*). {

} (PX0261 at 002-03, *in camera*). {

} (PX0261 at 002, *in camera*).

1078. {

this belief that { } (Roe, Tr. 1786-1787, *in camera*). Despite
prices to { } Daramic indicated to Exide that it expected
} and offered to limit Exide's {
} in return for a contract extension covering 100% of Exide's business. (PX0261 at
003, *in camera*; Roe, Tr. 1786, *in camera*). Most of the remaining cost savings offered to
Exide were simply proposals to {
} (PX0261 at
002-007, *in camera*; Roe, Tr. 1788, *in camera*).

Response to Finding No. 1078:

Complaint Counsel's finding number 1078 is false and based on unreliable assumptions. For its response to this finding, Respondent incorporates its reply to Finding No. 1077. Daramic's cap on pricing increase is, in fact, advantageous for Exide, especially in light of the fact that Daramic proposed decreasing Exide's current prices for 2008 by .5% and limits increases through 2010 to 2%. (PX0262 at 003). In fact, according to the proposal submitted by Daramic, the prices charged in 2010 could only be 1% greater than what Exide was then paying in 2007. These prices result in significant savings, especially considering the fact of {

} (Gillespie, Tr. 3000, *in camera*).

{

} (PX0261 at 002, *in camera*; Seibert, Tr. 4223). {

} (PX0261 at 002, *in camera*; Seibert, Tr. 4223). However, {

} (PX0261 at 002,

in camera).

3. Daramic believes it had pricing power

1079. Every quarter, Mr. Toth does an internal call for people inside the company, which is designed to be a motivational message to the organization. (Toth, Tr. 1439, *in camera*). A document from the March 2006 conference call with Mr. Toth's handwritten notes entitled "Bob Toth Talking Points – 4Q/Year-end 05 Internal Call," states: "Specifically, we will continue demonstrating pricing power in the market, not only to stay ahead of rising costs, but to capture the value we bring to our customers." (PX0938 at 002; Toth, Tr. 1439-1440). With corrections and additions in Mr. Toth's handwriting, this bullet point goes on to say, "I have a fundamental belief that we are woefully undervalued in everything we do, so there should be some upside given our scale and the certainty of supply that we bring to the market." (PX0938 at 002; Toth, Tr. 1440-1441; *see also* PX0831 at 003 "Pricing power to capture the value we bring to customers;" Toth, Tr. 1447).

Response to Finding No. 1079:

Complaint Counsel's finding number 1079 is misleading and inaccurate. As Mr. Toth explained, during the 2004 to 2006 timeframe, Daramic had been falling behind in recapturing cost increases and as a result was Daramic's "margins were eroding rapidly." (Toth, Tr. 1449-50). The evidence clearly demonstrates that Daramic does not have pricing power.

{

} (Riney, Tr. 4945, *in camera*). As a result, Daramic is being "squeezed from both ends" as it faces escalating raw material and energy costs and eroding margins. (Toth, Tr. 1502, 1573, 1559; Riney, Tr. 4931, *in camera*).

1080. Similarly, a document entitled "Internal Call Agenda: March 16, 2006" contains opening remarks and a script for a call. (PX0832 at 002-011; Toth, Tr. 1448). Again, the script states that Daramic will "expand its solid market leadership" because it "will continue demonstrating pricing power in the market regardless of movements in material and energy costs." (PX0832 at 004).

Response to Finding No. 1080:

Complaint Counsel's finding number 1080 is misleading and unreliable and therefore should be disregarded. Mr. Toth specifically testified that he does like speaking from a script

and often just drafts a rough script in order to prepare for the call or meeting. (Toth, Tr. 1447). Mr. Toth additionally testified that he would not have made this specific statement during the internal call and instead would have incorporated these thoughts as part of a broader discussion about cost escalation. (Toth, Tr. 1449). The evidence clearly demonstrates that Daramic does not have pricing power. {

} (Riney, Tr. 4945, *in camera*). As a result, Daramic is being “squeezed from both ends” as it faces escalating raw material and energy costs and eroding margins. (Toth, Tr. 1502, 1573, 1559; Riney, Tr. 4931, *in camera*).

1081. Mr. Hauswald noted feedback from Mr. Toth {
} (Hauswald, Tr. 1182-83, *in camera*; PX0093 at 101, *in camera*). Mr. Hauswald’s {

} (PX0093 at 101, *in camera*;
Hauswald, Tr. 1182-1183, *in camera*).

Response to Finding No. 1081:

Complaint Counsel’s finding number 1081 is misleading. First, {

} (Hauswald, Tr. 1181-83, *in camera*). Mr. Toth does remember Mr. Hauswald’s presentation on February 27, 2007 to himself and a few board members in anticipation of an investors conference. (Toth, Tr. 1419-20). Mr. Toth provided context for his comment about “price was up in front of cost” explaining that at that time Daramic was behind with respect to their margins, Mr. Hauswald needed to emphasize that they were now attempting to “get ahead of the curve” and recover some of these losses. (Toth, Tr. 1421). {

} (Toth, Tr. 1595-97, *in camera*). {

(Toth, Tr. 1595, *in camera*). {

}

(Toth, Tr. 1597, *in camera*).

}

1082. {

} (Hauswald, Tr. 797, 800, *in camera*).

The executive summary of the report, concluded that {

} (PX0194 at 018, *in*

camera). The body of the report also states: {

} (PX0194 at 022,

in camera).

Response to Finding No. 1082:

Complaint Counsel's finding number 1082 is false. {

} (Hauswald, Tr. 797, *in*

camera). The evidence reveals that the battery manufacturers not only have purchasing power but the specific ability to dictate to a supplier the pricing and profit margins. For instance, {

} (Weerts, Tr. 4477-78, *in*

camera). {

} (Weerts, Tr. 4477-78, *in*

camera). JCI also attempted to negotiate a contract with Microporous with the a similar unattractive pricing structure. (PX2300 (Heglie, IHT at 151); PX2301 (Heglie, Dep. at 132); RX00730). As Mr. Heglie stated "JCI demanded lower prices than [Microporous] could produce and generate an acceptable profit." (PX2300 (Heglie, IHT at 151)). These example shows the significant power of battery manufacturers as well as the lack of any bargaining power by

separator suppliers. Moreover, Daramic's experience with JCI, Exide, EnerSys and Troga show the market power that battery manufacturer have (*See e.g.* RFOF 509, 603, 606-07 and 762-64).

1083. Daramic's Strategy Audit notes that {
} (PX0265 at 4, *in camera*).

Response to Finding No. 1083:

For its response to Complaint Counsel's finding number 1083, Respondent incorporates its response to finding number 1082.

1084. Exide lacks buyer power despite its large size. Exide is the first or second largest battery manufacturer in the world in each market that it participates in. (Gillespie, Tr. 2930). Exide purchases a little over 70 million dollars of battery separators annually. (Gillespie, Tr. 2929).

Response to Finding No. 1084:

Complaint Counsel's finding number 1084 is false. As shown by the weight of evidence on the record, Exide does have significant "buyer power." Exide, as evidenced by its ability to resist price increases and defeat energy surcharges (RFOF 556-57, 559, 561, 570), has the wherewithal and ability to constrain prices (RFOF 556-57, and 559) and that Exide has and will continue to use such power against battery separator suppliers, including Daramic.

For example, Exide has used the fact that it is one of the largest battery manufacturers in the world as negotiating leverage with suppliers, including Daramic. (Gillespie, Tr. 3070-71). Even with written supply agreement with fixed pricing, Exide still uses anything "not clearly stated in the contract interpretation as leverage points" against Daramic. This includes technology, volumes and future business. (Gillespie, Tr. 3071). These actions show the power and leverage Exide has vis a vis even its contractual suppliers. (Gillespie, Tr. 3070-71).

Also, Exide further demonstrates its "buying power" by not paying or short paying its invoices to its suppliers. (RFOF 561, 570). For instance, in 2005, when the Microporous and Exide were negotiating a new agreement and Microporous implemented a price increase, Exide cancelled a meeting to discuss the issues at the last minute after Microporous personnel had

traveled to Georgia. Thereafter, Exide began unilaterally deducting the announced price increase and energy surcharges from their invoices and failed to pay certain invoices. (RX00748 at 002).

1085. EnerSys does not consider itself to be a power buyer in the markets for separators. (Craig, Tr. 2565). As Mr. Craig points out, EnerSys's purchases from Daramic in 2008 were approximately \$13 million. (Craig, Tr. 2565). EnerSys estimates that Daramic's revenues were approximately \$348 million in 2008. (Craig, Tr. 2565). Thus EnerSys purchases make up approximately 3.6 or 3.7 percent of Daramic's sales. (Craig, Tr. 2565). In contrast, 50% of EnerSys's revenues, or \$1 billion dollars, depends on EnerSys's receipt of a steady supply of separators from Daramic. (Craig, Tr. 2557).

Response to Finding No. 1085:

Complaint Counsel's finding number 1085 is false. Complaint Counsel has merely distorted the numbers in order to hide EnerSys' true power buyer status from the Court. In fact, EnerSys' total battery sales for the past year were approximately \$2 billion. (Axt, Tr. 2227; RX01185 at 063). This represents approximately 38-40% of the industrial battery sales in the world. (Axt, Tr. 2227). EnerSys' sales stand in sharp contrast to Daramic's actual sales of approximately { } in 2007. (RX01119, *in camera*). EnerSys' revenues are therefore more than { } than those of Daramic, allowing it to wield considerable purchasing power. (Axt, Tr. 2227; RX01185 at 063; RX01119, *in camera*). Furthermore, EnerSys' annual spend for battery separators in 2007 was a staggering {

} (Burkert, Tr. 2411, *in camera*). The numbers above speak for themselves and show EnerSys' significant purchasing power. Additionally, the distortion of these numbers evidences a lack of credibility and bias by Mr. Craig who has been described as being on the "warpath" about the announced merger between Microporous and Daramic. (RX00211; Gagge, Tr. 2544-46).

1086. In response to questions about who has the "upper hand" in negotiations between Daramic and EnerSys, Mr. Craig testified that Daramic has the strength in the negotiations,

{

}

They clearly have the upper hand because this is not a competitive market.
There's only one source available to us.
(Craig, Tr. 2567, *in camera*).

Response to Finding No. 1086:

Complaint Counsel's finding number 1086 is false and should be disregarded due to Mr. Craig's lack of credibility and bias. The evidence reveals that it is EnerSys not Daramic wielding the upper hand during all pricing and contract negotiations. For example, {

} (Axt, Tr. 2230-31, 2244, *in camera*). In 2005, Daramic sought to pass on an energy surcharge to EnerSys for both Europe and the U.S. (RX00608). {

} (RX00582 *in camera*; Axt, Tr. 2242-43, *in camera*). The negotiations between Daramic and EnerSys as to this surcharge are telling as to EnerSys' strength in negotiating the price of separators. Even though EnerSys had objected only to an increase over 3% for Europe, and obtained a concession on this point from Daramic (RX00582, *in camera*; RX00209), EnerSys later sought to use this concession to argue for a price concession for the US as well. (RX00584 at 001). ("Why do you continue to try for an additional 3% in the US, it is not validated and will never be confirmed."). (RX00584 at 001). {

} (RX00596, *in camera*;
Axt Tr. 2249, *in camera*). It is apparent that EnerSys, even in 2005, was a tough negotiator. (RX00595).

{

} (RX00210; Axt, Tr. 2245-46,

in camera). {

} (Axt, Tr. 2246, *in camera*; RX00210). Again, in 2007, {

} (RX00228, *in camera*). {

} (RX00228 at 002-

03, *in camera*). {

} (Burkert, Tr. 2434-37, *in camera*; RX00228 at 001 *in camera*). This further evidences EnerSys' strength to use its buying power.

Furthermore, EnerSys has available to it potential suppliers of battery separators for its industrial batteries and, in fact, has been in discussion with several potential suppliers since the merger of Daramic and Microporous was announced. These available suppliers include: {

} and Amer-Sil. (RFOF 681-85, 699-702). However, {

} (Gagge, Tr.

2510, *in camera*).

1087. “In October of 2006, Daramic was able to force EnerSys to sign a contract because as Mr. Craig explained, “they knew that we had no other options, they knew that we had no other choices at that time but Daramic. They knew that if they turned us off, shut us off, that it would have a catastrophic impact on our business. They had all the cards in their hand.” (Craig, Tr. 2596-97). EnerSys has no options but to purchase from Daramic today. (Craig, Tr. 2611).

Response to Finding No. 1087:

Complaint Counsel’s finding number 1087 is false and should be disregarded due to Mr. Craig’s lack of credibility and bias in this matter. First, {

} (RX00707 at 005, *in camera*;

RX00698 at 005, *in camera*; RX00806 at 035, *in camera*). Second, {

} (Axt, Tr. 2207, *in camera* {

}). This is evidenced by the fact that even during the negotiation over the last the contract extension with Daramic in 2006, when EnerSys claims to have had a “gun to its head” or “feet to the fire,” EnerSys negotiated better contractual terms with Daramic than were found in its then existing contract. (PX1211, *in camera*; PX1212; PX1224, *in camera*; Axt, Tr. 2265-67, *in camera*; Axt, Tr. 2291, 2293).

Furthermore, EnerSys does have available to it potential suppliers of battery separators for its industrial batteries and, in fact, has been in discussion with several potential suppliers since the merger of Daramic and Microporous was announced. These available suppliers include: {

} and Amer-Sil. (RFOF 681-85, 699-702). However,

{

} (Gagge, Tr. 2510, *in camera*).

Finally, Mr. Craig has demonstrated considerable bias and questionable credibility before the Court and his statements should accordingly be disregarded. (*See* FOF 725-32).

1088. { (PX0922 (Roe,
IHT at 25-26, *in camera*)). {
} (PX0784; Riney, Tr. 5011, *in camera*). {
} (PX0784; Riney, Tr.
5011, *in camera*). {
} (PX0784; Riney, Tr. 5012, *in camera*).

Response to Finding No. 1088:

Complaint Counsel's finding number 1088 is false. Complaint Counsel incorrectly suggests that Daramic's estimated increase which it includes in its budget for the upcoming year is the increase it needs to achieve to cover its escalating production costs. As the evidence shows {

} (Riney, Tr. 4943-44, *in camera*). {

} (Riney, Tr. 4945, *in camera*;
RX00927 at 14-16; *in camera*). {

} (Riney, Tr. 4945, *in camera*; RX00927 at 14-16, *in camera*).

{
} (Riney, Tr.
4932-33, *in camera*; Riney, Tr. 4945, *in camera*).

B. In 2007, Daramic solicited Microporous's agreement to not enter the SLI separator market in exchange for Daramic's deep-cycle technology

1. Market conditions were favorable for using exclusive contracts to impede entry.

1089. { } (Simpson, Tr. 3209, *in camera*).

Response to Finding No. 1089:

Complaint Counsel's finding number 1089 is false. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Second, {

} (Douglas, Tr. 4067, *in camera*;

Balcerzak, Tr. 4106-07, *in camera*). In fact, Jim Douglas testified that Douglas Battery had not seen anyone from Microporous for years prior to the merger. (Douglas, Tr. 4062-63). {

} (Hall, Tr. 2802-03). This fact undermines Simpson's premise that exclusive contracts impeded entry or buying from Daramic's rivals. Fourth, to the extent that Simpson bases his opinion here on Daramic's dealings with EnerSys in 2006 during the force majeure, the evidence concretely proves that the force majeure experienced by Daramic in 2006 was real and not fake as the FTC and Simpson assert. (FOF 636-58).

1090. Daramic documents show that {
} (PX0694; PX0097; PX0245 at 015,017; PX0246, *in camera*; PX0238;
PX0922 (Roe, IHT 173-174), *in camera*, 362-633, *in camera*; PX0433; PX0168 at 002).
{ } (PX0211, *in camera*; PX0212, *in camera*; PX0255, *in camera*; PX0257, *in camera*; PX0258;
PX0744). {
} (PX0265 at 011, *in camera*; PX0218). {
} (PX0241, *in camera*; Simpson, Tr. 3232-
3233, *in camera*). {

} (PX0241 at 001, *in camera*).

Response to Finding No. 1090:

Complaint Counsel's finding number 1090 is inaccurate and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Second, {

}

(Hauswald, Tr. 925-26, *in camera*). Third, Daramic never used exclusive contracts to deprive Microporous of sales. (See RFOF 1271-82). Fourth, Complaint Counsel's assertion that "Daramic believed delays in gaining sales volumes could impede entry" is never stated or implied in PX0241 ("Daramic Strategy Summary"). This statement is simply a conclusion drawn by Dr. Simpson and is not in evidence. In fact, the evidence shows that {

}

(Hauswald, Tr. 934-35). Fifth, while Daramic acknowledges that its scale is one of its competitive advantages, it is not necessary for a company to have such scale to compete successfully in the market. Competitors can add additional capacity at a reasonable costs. For example, Separindo {

} (PX0907 (Kung, Dep. at 27, 34-35), *in camera*). Additionally,

Kung {

} (PX0907 (Kung, Dep. at 54, 61), *in camera*). Also, competitors can tweak existing lines for very little costs in order to produce industrial-type separators. For example, calendar rolls, which allow a producer to switch between automotive and industrial separators, cost between \$20,000 and \$50,000. (Gaugl, Tr. 4553; Weerts, Tr. 4488-89, *in camera*).

1091. Daramic strategy for maintaining its duopoly with Entek in North America and Western Europe is to execute long-term supply agreements with customers in those markets. (PX0171 at 004).

Response to Finding No. 1091:

Complaint Counsel's finding number 1091 is false. {

} The principle reason Daramic prefers long-term supply agreements is for planning purposes. Daramic cannot keep its lines operating without assurances from its customers that there will be enough demand to justify the plant's continued operation. It is for this reason that obtaining an assurance of demand of 10% or 50% may not be sufficient to make it economic to continue operating the plant if Daramic cannot fill the remaining capacity. This fact was evidenced by the impact on Daramic's business that resulted from its loss of the JCI business at the end of 2008. {

} (Hauswald, Tr. 918, *in camera*; Riney, Tr. 4930-31, *in camera*; Hall, Tr. at 2791-92).

1092. {

} (Simpson, Tr. 3227, *in camera*). {

} (Simpson, Tr. 3227, *in camera*). {

} (Simpson, Tr. 3227, *in camera*). {

} (Simpson, Tr. 3227-328, *in camera*).

Response to Finding No. 1092:

Complaint Counsel's finding number 1092 is misleading and inaccurate. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, Dr. Simpson completely ignores that

battery manufacturers are sophisticated consumers who have the ability to make strategic supply decisions considering both near term and long term pricing structures.

{
(RX00995, *in camera* (Crown contract); RX00993, *in camera* (Douglas contract)). {

} (Douglas, Tr. 4067, *in camera*; Balcerzak, Tr. 4106-07, *in camera*). In fact, Jim Douglas testified that Douglas Battery had not seen anyone from Microporous for years prior to the merger. (Douglas, Tr. 4062-63). Simpson also ignores that the Douglas and Crown contracts have not impeded entry. For example, since Daramic's contracts with Crown and Douglas were executed, {

} and East Penn has considered purchasing separators from Anpei. (Hall, Tr. 2849-52, *in camera*; RX00023 at 002, *in camera*; RX00072, *in camera*; Hall, Tr. 2747, *in camera*; Leister, Tr. 3992-93; RX00079).

{
} (RX00983 (EnerSys contract), *in camera*; RX01519 (East Penn Contract), *in camera*).

{
} (Hall, Tr. 2802-03). This fact undermines Simpson's premise that exclusive contracts impeded entry or buying from Daramic's rivals.

1093. {
} (Simpson, Tr. 3227-3228, *in camera*). {
} (Simpson, Tr. 3227, *in camera*; PX0265 at 004, *in camera*; PX0595, PX0835 at 003, *in camera*). {

} (Simpson, Tr. 3227, *in camera*).
If it does, a lower-cost, more-aggressive rival will gain market share at its expense.
(Simpson, Tr. 3227-3228, *in camera*). {

} (Simpson, Tr.
3228, *in camera*).

Response to Finding No. 1093:

Complaint Counsel's finding number 1093 is pure speculation and is misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, in considering Dr. Simpson's view of the battery industry Respondent is quite perplexed. The evidence on the record actually shows that this battery manufacturing market is very consolidated instead of "highly competitive" as Dr. Simpson suggests. For example, over the past decade there has been considerable consolidation in the battery industry. (Douglas, Tr. 4049-4051). {

} (Seibert, Tr. 4172, *in camera*; RX01084, *in camera*). {

} This fact was evidenced
by the impact on Daramic's business that resulted from its loss of the JCI business at the end of
2008. {

} (Hauswald, Tr. 918, *in camera*; Riney, Tr.

4930-31, *in camera*; Hall, Tr. at 2791-92). Simpson ignored the loss of the JCI business here, as he did in his HHI calculations.

1094. {

} (Simpson, Tr. 3229, *in camera*).

{

} (Simpson, Tr. 3229, *in camera*). {

} (Simpson,

Tr. 3229, *in camera*).

Response to Finding No. 1094:

Complaint Counsel's finding number 1094 is pure speculation and is unsupported by the evidence on the record. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, Dr. Simpson completely ignores that even smaller battery manufacturers are sophisticated consumers who have the business acumen to make strategic supply decisions and encourage entry of new suppliers into the market if they so choose.

Several relatively small battery manufacturers appeared before the Court including: Bulldog Battery, U.S. Battery, East Penn, Crown Battery, and Douglas Battery. Each testified and showed business acumen. Each made strategic business decisions on contracts and many fiercely negotiated such contracts. (*See* RFOF 765-89, 790-925). These battery manufacturers have continued to purchase separators from Daramic because Daramic provides high quality separators and service as well as many other value added components not available from its competitors. (RFOF 827, 800; Douglas, Tr. 4066, *in camera*, PX2058 at 015-17, *in camera*

{

}).

Furthermore, {

}

(RX01519, *in camera*). It also has sought out alternative suppliers, such as Microporous and

Anpei, and encouraged the entry of these suppliers into the battery separator market. (Leister, Tr. 3980, 3992-93; RX00079). However, East Penn continues to purchase separators from Daramic because of its excellent quality, delivery performance, technology, information feedback, and cost. (RFOF 776).

2. Market share discounts can have similar effects as exclusive contracts.

1095. Dr. Simpson used a hypothetical example to show how offering a market share discount to customers can have an exclusive effect. (Simpson, Tr. 3256-3261). In the hypothetical example, Daramic offers to sell a customer 100 percent of its needs at some per-unit price (1P) and offers to sell this customer 75 percent of its needs at a per-unit price that is 14 percent higher (1.14P). (Simpson, Tr. 3256). If the customer buys the last 25 percent of its requirements from Daramic, the effective per unit price for these units is 1P. (Simpson, Tr. 3258). However, if the customer buys the last 25 percent of its requirements from another firm at a price of P, its effective per unit price for this last 25 percent is 1.42P since this customer must pay a 14 percent penalty on the 75 percent of its requirements that it still obtains from Daramic. (Simpson, Tr. 3259). If the entrant were to try to absorb the cost of this penalty, so that the customer pays an effective price of P for the last 25 percent of its requirements, it would need to set a price equal to 0.58P. (Simpson, Tr. 3259 - 3260).

Response to Finding No. 1095:

Complaint Counsel's finding number 1095 is pure speculative theory that has no basis in fact and should be disregarded by the Court. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Furthermore, Dr. Simpson does not consider any factual basis in creation of this hypothetical situation. {

} (RFOF 463-72, 475, 488). {

} (RFOF 771, 784).

1096. Daramic sued Microporous when it began building its Feistritz, Austria plant over a non-compete agreement originally between Microporous and Jungfer related to Microporous's purchase in 1999 of Jungfer's PE technology and production equipment. Subsequent to the purchase, Daramic acquired the remaining assets of Jungfer and became a party to the non-compete. (Gilchrist, Tr. 391-92).

Response to Finding No. 1096:

Complaint Counsel's finding number 1096 is misleading. The arbitration demand was not an attempt to prevent Microporous from entering the market as Complaint Counsel suggests. The lawsuit between Microporous and Daramic, was brought for breach of contract, related to the sale of SLI separators in Europe only, and survived both a 12(b)(6) and summary judgment motion by Microporous. (RFOF 267; PX2237; PX2235 at 11, *in camera*). Daramic initiated this arbitration merely to protect its customer information and its interest in the unique features of the Jungfer technology in Europe, which Daramic purchased from Jungfer and implements at its facilities around the world today. (Hauswald, Tr. 1153; PX2235, *in camera*).

1097. On August 2, 2007, under the guise of a "mediation" meeting about the then pending arbitration proceeding, Daramic and Microporous business people met to discuss "possible cooperative scenarios between our two companies where both sides would benefit." (PX1103 at 001). It was Mr. Gilchrist's impression that Daramic was very concerned that it would lose in the arbitration process and that Microporous would soon enter the SLI market in Europe. (Gilchrist, Tr. 431-32).

Response to Finding No. 1097:

Complaint Counsel's finding number 1097 is false and should be disregarded due to Mr. Gilchrist lack of credibility. First, there is no evidentiary basis except for Mr. Gilchrist's own self-serving statements to support Complaint Counsel's finding that Daramic was concerned about losing in the arbitration process. In fact, the evidence shows that the lawsuit between Microporous and Daramic survived both a 12(b)(6) and summary judgment motion by

Microporous. (RFOF 267; PX2237; PX2235 at 11, *in camera*). Second, the evidence raises significant credibility questions about Gilchrist's testimony in this proceeding (RFOF 396, 402-03, 409, 581), and Gilchrist's testimony on this issue should be disregarded. Moreover, IGP, MP's owner, was concerned that Daramic was giving to win the arbitration (Trevathan, Tr. 3624).

1098. During this meeting at Daramic's Charlotte headquarters on August 2, 2007, Pierre Hauswald and Tucker Roe offered to settle a lawsuit over a non-compete agreement affecting the SLI separator market in Europe by giving Daramic's deep-cycle technology to Microporous in exchange for its agreement to stay out of the SLI separator market. The offer was made to Mr. Gilchrist, Larry Trevathan of Microporous and an attorney representing Microporous. (Gilchrist, Tr., 426-27, 431-32, 575-76; Trevathan, Tr. 3707-3708; PX0077, *in camera*; PX1103 at 001).

Response to Finding No. 1098:

Complaint Counsel's finding number 1098 is false and contrary to the weight of the evidence on the record. The evidence reveals that a variety of settlement options were discussed at the meeting, including: (1) Daramic selling its industrial business to Microporous; (2) Daramic acquiring Microporous; and, (3) Microporous acquiring Daramic. (Trevathan, Tr. 3615). During the course of settlement discussions, Daramic never conditioned the sale of its industrial business, or any other settlement options, on the promise by Microporous to stay out of the SLI business. (Roe, Tr. 1759). Furthermore, the evidence raises significant credibility questions about Gilchrist's testimony in this proceeding (RFOF 396, 402-03, 409, 581), and Gilchrist's testimony and statements on this issue should be disregarded.

1099. Microporous's Michael Gilchrist reported back that at the meeting Daramic "offered us basically all of their industrial business!!! . . . All of that was prefaced by them for us staying out of automotive. Amazing conversation." (PX1103 at 001). In reporting the meeting to Mr. Heglie, Mr. Gilchrist stated that "Daramic is definitely looking for a solution that keeps us out of automotive and/or takes us completely out of the game." (PX1103 at 002).

Response to Finding No. 1099:

Complaint Counsel's finding number 1099 is inaccurate. In response to this finding, Respondent incorporates its response to finding number 1099. Mr. Gilchrist's statements are completely unsupported by the evidence and should be disregarded due to his questionable credibility.

1100. At its Board of Director's meeting two weeks later, Microporous management reported the August 2 meeting to the full board. (PX1106 at 035). The handout for the board meeting discusses Daramic's offer to give Microporous its deep-cycle and industrial business "all in exchange for MPLP not participating in SLI markets." (PX1106 at 035 (emphasis in original)). Mr. Heglie testified that he was reasonably certain that the Board discussed Daramic's proposal, but that he did not recall anything specific outside of what was written in the Board presentation. (PX2301 (Heglie, Dep. at 81), *in camera*). He further testified that Daramic's offer "'all in exchange for MPLP not participating in SLI markets,'" does not appear to be limited to a geographic area. (PX2301 (Heglie, Dep. at 81), *in camera*).

Response to Finding No. 1100:

Complaint Counsel's finding number 1100 is inaccurate and Complaint Counsel misstates the evidence on the record. In response to this finding, Respondent incorporates its response to finding number 1099. Moreover, when asked by Complaint Counsel whether management informed the Board about a "geographical limitation" on Daramic's alleged offer, Mr. Heglie replied "I don't recall it no." (PX2301 (Heglie, Dep. at 81)). This is consistent with his testimony that he did not recall anything specific outside what was written by Mr. Gilchrist in the Board Presentation. (PX2301 (Heglie, Dep. at 81)).

This is merely another example of Mr. Gilchrist's tendency to exaggerate and blow comments out of proportion. For instance, IGP Board members had multiple discussions with Gilchrist "disagreeing with his general assessment of the competitive landscape of the market." (RFOF 402; PX2301 (Heglie, Dep. p. 91)). IGP's Board members also questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (RFOF 402; PX2301 (Heglie, Dep. 164)). Mr. Heglie also noted that "Mike [Gilchrist] frequently blew comments out of proportion" (RFOF 402; PX2300 (Heglie, IHT 84)).

C. Daramic's Latest Effort to Block the MPLP Expansion – the MP Plan

(See CCFOF 725-747)

D. Exclusionary effects on MPLP.

1101. { } (Simpson, Tr. 3209, *in camera*; PX0033 at 030, *in camera*). { } (PX0033 at 025, *in camera*, 030, *in camera*). This delay imposed costs on Microporous. (PX1215).

Response to Finding No. 1101:

Complaint Counsel's finding number 1101 is false. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Second, Complaint Counsel cites to Dr. Simpson's Expert Report which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing Tr. at 20). Dr. Simpson's report is not a "fact" and Complaint Counsel's use of his testimony and report as a finding of "fact" is improper and should be disregarded.

Moreover, {

} (Douglas, Tr. 4067, *in camera*; Balcerzak, Tr. 4106-07, *in camera*). In fact, Jim Douglas testified that Douglas Battery had not seen anyone from Microporous for years prior to the merger. (Douglas, Tr. 4062-63). Additionally, Daramic's contracts with East Penn and EnerSys were not exclusive contracts. {

} (Burkert, Tr. 2426-27, *in camera*). Likewise, {

} (RX01519, *in camera*). {

} (Leister, Tr. 3999-4000, *in camera*). {

} (RX01519, *in camera*). {

} (Leister, Tr. 3984-85).

{

} (PX0265, *in camera*; PX0295, *in camera*; PX0536, *in camera*). Finally, to the extent that Simpson bases his opinion here on Daramic's dealings with EnerSys in 2006 during the force majeure, the evidence concretely proves that the force majeure experienced by Daramic in 2006 was real and not fake as the FTC and Simpson assert. (RFOF 636-58).

1102. Michael Gilchrist, Microporous's President at the time, later wrote Mr. Axt: AWe [Microporous] are taking a significant hit with the altered dates as our initial profitability and return on our capital is thrown off by almost a year later due to Daramic. @ (PX1215). {

PX0089, *in camera*).

} (PX0092 at 002;

Response to Finding No. 1102:

Complaint Counsel's finding number 1102 is misleading and inaccurate. First, the "finding" is misleading because it connects two completely unrelated events and documents. The Mandate issued to Mr. Gilchrist in November of 2007 was not driven by Microporous' lack of commitment from EnerSys as Complaint Counsel implies. {

} (RX00207, *in camera*).

Furthermore, it was not Daramic which caused the delay in execution of Microporous' supply agreement with EnerSys. EnerSys did not enter into the contract with Microporous until January 2007 due to the fact that the Microporous board of directors, and the owners of Microporous, IGP Partners, did not provide its support to the project until that time. (Axt, Tr. 2256, 2153, *in camera*; PX2300; PX2301).

Finally, the documents cited by Complaint Counsel show that Microporous realized the importance of securing long-term supply agreements. (PX1215; PX0092 at 002; PX0089, *in camera*). For instance, Mr. Gilchrist stated in his letter to Mr. Axt that Microporous "was taking a huge risk" without a contract from you. (PX1215). Also, Microporous' Board of Directors instructed Management to "prove out the financial viability" of the lines in Feistritz and ordered Mr. Gilchrist to devote his "maximum attention" to securing volume for these lines through supply contracts. (PX0092 at 002).

1103. {

} (Simpson, Tr. 3236, *in camera*; PX0033 at 046, *in camera*). {

(Simpson, Tr. 3230, *in camera*; PX0033 at 046, *in camera*). }

Response to Finding No. 1103:

Complaint Counsel's finding number 1103 is incomplete and misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as

such is improper and should be disregarded. Second, Complaint Counsel cites to Dr. Simpson's Expert Report which is not evidence. As Mr. Robertson himself noted at the pre-trial conference "they're [the expert reports] admissible, but they can't be used to support facts." (JX2; Pretrial Hearing Tr. at 20). Dr. Simpson's report is not a "fact" and Complaint Counsel's use of his testimony and report as a finding of "fact" is improper and should be disregarded.

Furthermore, it is inaccurate to separate a PE separator used for one end-use application from a PE separator used in other end-use applications. (RFOF 78; Whear, Tr. 4694). Therefore, a "motive battery separator market" is not a valid product market in this case. Instead, the "alternative" all PE separator market is the correct relevant market here. (RX01572; RFOF 76-77, 116, 126; RPT Brief at 9).

In addition, the contracts relied on by Complaint Counsel to support their claim in this finding are not exclusionary. (See PX0033 at 047, *in camera*). The long term contracts entered into by Daramic with { } are not "exclusionary." For instance, { } was entered into as part and parcel of the { }, and was entered into prior to the time that Microporous even had a PE line. Furthermore, at the time { } (RFOF 526, 551-56).

Likewise, the { } Daramic entered into in January 2008, is not exclusive and allows purchase of up { } separators from another supplier, and was entered into during a time that Microporous had no excess capacity so could not have supplied product to { } (PX0637 at 002, *in camera*). Further, { } testified at trial that it did not consider Microporous and entered the contract with Daramic because it contained good terms and pricing. This is not an exclusionary contract. (RFOF 773, 775, 779, 782). Neither the { } contract, nor the { } contract were exclusionary either since both {

} (Balcerzak, Tr. at 4106-08, *in camera*; Douglas, Tr. at 4063, 4067, *in camera*; RFOF 814, 832).

Additionally, {
} (RX00953, *in camera*). {
} (RX00953, *in camera*).

Moreover, the supplier to Exide, East Penn, Crown and Douglas did not change between 2007 and the first quarter of 2008. (RFOF 526, 530, 531, 772, 796 and 825). Because of its size, EnerSys' sales represent approximately 38-40% of the industrial battery sales in the world. (RFOF 606; Axt, Tr. 2227). Accordingly, Daramic's assumption of Microporous' contract with EnerSys, and not the use of exclusive contracts, caused an increase in Daramic's sales of separators for motive power applications.

E. Daramic did not need to use exclusive contracts to attain efficiencies.

1104. {
} (Simpson, Tr. 3230, *in camera*). {
}
(Simpson, Tr. 3231, *in camera*). {
}
} (Simpson, Tr. 3232, *in camera*).

Response to Finding No. 1104:

Complaint Counsel's finding number 1104 is misleading. First, Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded. {

} (RX00983 (EnerSys contract), *in camera*; RX01519 (East Penn Contract), *in camera*).

{

} (Simpson, Tr. 3230-31, *in camera*); it is evident that Simpson did not consider all of the relevant facts and testimony. Daramic witnesses testified about the benefits to customers and Daramic in having contracts that set certain percentages to be supplied. (Hauswald, Tr. 1037-41, 1094-96; Roe, Tr. 1728-29). Daramic's contracts help provide certainty of supply to a customer and help Daramic plan to maintain its factories and production lines. Without adequate assurances of demand, Daramic cannot maintain its production lines throughout the world. These contracts amount to a sharing of risk between customer and Daramic. (Hauswald, Tr. at 1096).

Moreover, Daramic cannot keep its lines operating without assurances from its customers that there will be enough demand to justify the plant's continued operation. It is for this reason that obtaining an assurance of demand of 10% or 50% may not be sufficient to make it economic to continue operating the plant if Daramic cannot fill the remaining capacity. This fact was evidenced by the impact on Daramic's business that resulted from its loss of the JCI business at the end of 2008. {

} (Hauswald, Tr. 918, *in camera*;;

Riney, Tr. 4930-31, *in camera*; Hall, Tr. at 2791-92). Simpson ignored the loss of the JCI business here, as he did in his HHI calculations.

1105. {

} (Simpson, Tr. 3417, *in camera*). {

} (Simpson, Tr. 3417, *in camera*).

Response to Finding No. 1105:

Respondents have no response to Complaint Counsel's finding number 1105 other than to again state that Dr. Simpson's testimony is not factual evidence, and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

1106. Some customers purchase separators pursuant to a written contract, while others purchase separators without a written contract. (Gilchrist, Tr. 614). Most MPLP customers did not have actual supply contracts with MPLP. (Trevathan, Tr. 3773). Some customers in fact "contributed over one million dollars in sales without contracts." (Trevathan, Tr. 3775).

Response to Finding No. 1106:

Complaint Counsel's finding number 1106 is misleading. First, while some customers purchased separators from Microporous without a supply agreement in place, a significant portion of the volume sold by Microporous was covered by long-term supply agreements. For example, {

} (RX01120, *in camera*; McDonald, Tr. 3854-57, *in camera*). These sales were governed by an {

} (RX00985, *in camera*). EnerSys, one of Microporous' largest customers, also entered into a long-term supply agreement with Microporous {

} (RX00207 at 010, *in camera*).

Furthermore, at the time of the Acquisition, Microporous only had a single manufacturing facility in Piney Flats, Tennessee. It was therefore not as necessary for planning purposes for Microporous to have supply agreements in place because Microporous did not have to consider the logistics of running multiple plants and filling idle capacity. As the Board considered expansion in Europe, securing long-term supply agreements became a priority. For example, in the Board Mandate, Management was ordered to "prove out the financial viability" of the lines in Feistritz and devote "maximum attention" to securing volume for these lines through supply contracts. (PX0092 at 002).

1107. Executing long term supply agreements with its battery manufacturer customers is one of Daramic's primary strategies for achieving its income goals. (PX0171 at 002-003 ("Daramic 3-Year Strategy")).

Response to Finding No. 1107:

Complaint Counsel's finding number 1107 is misleading. Daramic cannot keep its lines operating without assurances from its customers that there will be enough demand to justify the plant's continued operation. It is for this reason that obtaining an assurance of demand of 10% or 50% may not be sufficient to make it economic to continue operating the plant if Daramic cannot fill the remaining capacity. This fact was evidenced by the impact on Daramic's business that resulted from its loss of the JCI business at the end of 2008. {

} (Hauswald, Tr. 918, *in camera*; Riney, Tr. 4930-31, *in camera*; Hall, Tr. at 2791-92). Simpson ignored the loss of the JCI business here, as he did in his HHI calculations.

i) **Hard Ball:**

1108. The approach of playing hard ball with a customer and threatening to supply all or nothing was a favored tactic at Daramic. Daramic took this approach with JCI during the 2004 contractual negotiations, threatening to terminate supply to JCI in Europe if a contract was not signed. (Hall, Tr. 2677-2678; PX0820 at 014).

Response to Finding No. 1108:

Complaint Counsel's finding number 1108 is false. Contrary to Complaint Counsel's assertion, Tucker Roe testified that neither he nor any of his sales team ever told a customer to "take it or leave it," that Daramic was going to "play hardball," or that Daramic was going to show "no mercy" with respect to pricing and contract negotiations. (Roe, Tr. 1725-26). Roe further explained that neither he nor any of his sales team have ever taken such a position with a customer. (Roe, Tr. 1725-26). This type of posturing would be inconsistent with the manner in

which Roe has operated for more than 20 years – a philosophy that builds intimate, long-term customer relationships. (Roe, Tr. 1725-26).

1109. Mr. Roe discussed the very same concept of an all or nothing relationship with regards to supply to C&D Battery when C&D's business was at risk of loss to MPLP in 2006. (PX0806 at 003; *see also* PX2060 at 001 (Daramic discussion of playing hard ball and stopping" consignment to C&D when faced with competition from MPLP in 2003)). When C&D continued to take a wait and see approach towards long term contracting with Daramic, Mr. Hauswald instructed to Mr. Roe to { } (PX1793 at 001, *in camera*). Mr. Hauswald further told Mr. Roe to have { } (PX1793 at 001, *in camera*).

Response to Finding No. 1109:

For its response to Complaint Counsel's finding number 1109, Respondent incorporates its response to finding number 1108.

1110. Mr. Toth also suggested playing hard ball with EnerSys when it refused to contract with Daramic just prior to the 2006 force majeure. (PX0456 at 001). In each instance where Daramic threatened or discussed the possibility of cutting off supply to a customer, the reason for Daramic to threaten all or nothing supply was to lock up business from MPLP. (PX1793 at 002, *in camera*; PX0456 at 001).

Response to Finding No. 1110:

For its response to Complaint Counsel's finding number 1110, Respondent incorporates its response to finding number 1108.

F. EnerSys Story

1111. EnerSys is one of the largest industrial battery manufacturers in the world, with plants in North America, Europe, and Asia. (Axt, Tr. 2108; PX1204 at 002-003, *in camera*).

Response to Finding No. 1111:

Respondent has no specific response.

1112. EnerSys produces batteries for both motive and UPS applications. (Axt, Tr. 2097, 2099-2100, 2114; Gagge, Tr. 2482, 2490-2491; PX 1204 at 002, *in camera*) EnerSys produces about 38 percent of the motive batteries in the North American market. (Axt, Tr. 2129).

Response to Finding No. 1112:

Respondent has no specific response.

1113. EnerSys manufactures motive power batteries in North America at facilities in Richmond, Kentucky; Ooltewah, Tennessee; and Monterrey, Mexico. (Axt, Tr. 2099-2100). It makes UPS batteries in North America at the Monterrey, Mexico plant and a facility in Hays, Kansas. (Axt, Tr. 2100).

Response to Finding No. 1113:

Respondent has no specific response.

1114. { }
(RX00964, *in camera*; PX1204 at 001, *in camera*; Axt, Tr. 2122). Daramic { }
America. (RX00964 at 002, *in camera* (“{ } in North
}.”)). See
also (RX00208; RX00209, *in camera*; Axt, Tr. 2122, 2134, *in camera*).

Response to Finding No. 1114:

Respondent has no specific response.

1115. The expiration date for the EnerSys/Daramic agreement was { }. (RX00964
at 001, *in camera*; Axt, Tr. 2122-2123, 2134, *in camera*). During this period, EnerSys
{ }
{ }. (PX1200 at 002, *in camera*; Axt, Tr. 2118, 2125-2127, 2141-2142, *in
camera*).

Response to Finding No. 1115:

Respondent has no specific response.

1116. In late 2005 and early 2006, EnerSys { }
{ }. (Axt, Tr. 2123-2124, 2129, 2166,
in camera; Gilchrist, Tr. 309-310, 416, *in camera*).

Response to Finding No. 1116:

Respondent has no specific response.

1117. Daramic decided that it should fight this threat because “[w]e have a leverage saying that
it is all or nothing, at least in the US, when our contract will be over (April 07).” PX0694
at 001.

Response to Finding No. 1117:

Complaint Counsel’s finding number 1117 is misleading. Mr. Hauswald wrote this email
when he first assumed the role as General Manager of Daramic and before he fully understood

the competitive landscape. (Hauswald, Tr. 733). Furthermore, the evidence shows that

{

}

(RFOF 619). {

} (RFOF 610-622; Axt, Tr. 2252-53, *in camera*).

1118. On February 10, 2006, {
}. (PX1200 at 001-005, *in camera*; Axt, Tr. 2140, 2145, *in camera*).

Response to Finding No. 1118:

Respondent has no specific response.

a. {

} . (Axt, Tr. 2141-2144, *in camera*). {

}
(PX1200, *in camera*; RX00206, *in camera*; Axt Tr. 2148-2149, *in camera*).

Response to Finding No. 1118 (a):

Respondent has no specific response.

b. The MOU specified {

}.” (PX1200 at 004, *in camera*).

Response to Finding No. 1118 (b):

Respondent has no specific response.

1119. The overall goal of Microporous {
get a facility in Europe {
camera}. } was “to figure out a plan to
}.” (Gilchrist, Tr. 310, *in*

Response to Finding No. 1119:

Complaint Counsel's finding number 1119 is inaccurate and should be disregarded due to the questionable credibility of Gilchrist. While Gilchrist may have had his own agenda in order to open a second facility in Europe, this agenda was not ever approved or adopted by Microporous' Board of Directors. In fact, despite the fact that capital would be required to execute the expansion required to fulfill this contract with EnerSys, Microporous did not even obtain approval from its Board before entering into the Amendment. (PX2300 (Heglie, IHT at 138-39, 164)). Board members were unhappy with Management, but they supported the contract because EnerSys was a very important customer. (PX2300 (Heglie, IHT at 138-39, 164)).

Furthermore, Mr. Gilchrist's testimony is unreliable and should be disregarded. For example, among many things, IGP's Board members questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (RFOF 402; PX2301 (Heglie, Dep. at 164)).

1120. The proposed timeline for expansion was to build two CellForce lines in Austria and to have them operating by February 2008. (PX0038 at 015.) EnerSys {
2148-2149, *in camera*}. (Axt, Tr.

Response to Finding No. 1120:

Respondent has no specific response.

1121. During early 2006, EnerSys was also in negotiations with Daramic concerning the future relationship between the companies. Daramic {
}. (Axt, Tr. 2118, 2164, *in camera*). Pierre Hauswald and Tucker Roe visited EnerSys in January 2006 {

}. (PX1289 at 001, *in camera*; Axt, Tr. 2160-2161, *in camera*).

Response to Finding No. 1121:

Respondent has no specific response.

1122. Mr. Roe followed up on the January discussions by submitting a written proposal to EnerSys on February 26, 2006. (PX1289 at 001-003, *in camera*). The proposal

{

} (PX1289 at 001, *in camera*).

Response to Finding No. 1122:

Respondent has no specific response.

1123. Mr. Axt compared the competing proposals from Daramic and Microporous, and {
}. (Axt, Tr. 2166, *in camera*). He then informed Daramic that {
}. (Axt, Tr. 2166, *in camera*).

Response to Finding No. 1123:

Complaint Counsel's finding number 1123 is misleading. In fact, despite repeated attempts to obtain a response to Daramic's proposal submitted in February, no response was initially received from EnerSys. Daramic was in essence talking to itself as EnerSys was unwilling to engage in meaningful negotiations. (Toth, Tr. 1405-06). Not until the spring 2006 BCI meeting, did Axt respond to Daramic's proposal. In that conversation, Axt told Toth that the contract between Daramic and EnerSys was not worth the paper it was written on, indicating that it would not be honored by EnerSys, and that Daramic's business was going to zero. (Toth, Tr. 1512; Axt, Tr. at 2167-68, *in camera*). Toth responded that Daramic remained interested in earning EnerSys' business. (Toth, Tr. 1512).

1124. EnerSys did not { }, because {
}. (Axt, Tr. 2166-2167, *in camera*). In the following months, Mr. Axt continued {
}. (Axt, Tr. 2166-2167, *in camera*).

Response to Finding No. 1124:

For its response to Complaint Counsel's Finding No. 1124, Respondent incorporates its reply to Finding No. 1123.

1125. In May 2006, { } (Axt, Tr. 2256,
in camera; PX1200 at 004, *in camera*).

Response to Finding No. 1125:

Complaint Counsel's finding number 1125 is incomplete. {

} (Axt, Tr. 2251, *in camera*).

1126. On May 17, 2006, Tucker Roe of Daramic { }
(PX1201 at 002, *in camera*; Axt, Tr. 2251-2252).

Response to Finding No. 1126:

Complaint Counsel's finding number 1126 is incomplete. {

} (Axt, Tr.

2253, *in camera*). {

} (Axt, Tr. 2253, *in camera*). {

} (Axt, Tr. 2252, *in camera*).

1127. EnerSys decided in June 2006 that it would move forward with Microporous. {

} (Axt, Tr. 2252-2253, *in camera*).

Response to Finding No. 1127:

Complaint Counsel's finding number 1127 is incomplete. At this meeting, Axt also advised Roe that EnerSys would move to Microporous its separator purchases for its Motecchio Italy plant serving the FIAMM business. (Roe, Tr. 1701; PX1240). {

} (Roe, Tr. 1170-71, *in camera*;

PX1240, *in camera*; PX1203, *in camera*). {

} (Roe, Tr. 1170-71, *in camera*;

PX1240; PX1203, *in camera*). {

} (Axt, Tr. 2172, *in camera*).

Axt testified that with spot pricing, there would be no stability of price, no stock of inventory and no guaranteed availability of supply. (Axt, Tr. 2116).

{

} (Axt, Tr. 2172, *in camera*). Yet, Axt also testified that EnerSys prefers not to have written contracts and would rather purchase product from its suppliers on a purchase order basis only. (Axt, Tr. 2110-11). (“We are a handshake type of company, we make agreements and we issue purchase orders for our material requirements for all of our factories around the world.”).

Q Now, do you have any preference – at EnerSys would you prefer – how would you prefer to purchase your separators?

A. We have a couple of hundred suppliers. We do not have contracts as a norm. The only commodity we have contracts on is lead that we utilize in our plants.

Q. When do you – I mean, with respect to the contract you have with Daramic, would it be your preference to purchase from Daramic by contract or on a purchase order basis?

* * *

A. I would like to place purchase orders like I do with 90 percent of our other suppliers.

(Axt, Tr. 2115-16).

Such purchasing would of course be subject to availability of supply and pricing would vary. EnerSys' testimony is at best contradictory and not credible.

1128. At that meeting, which took place on July 6, 2006, EnerSys informed Daramic that certain battery plants then supplied by Daramic would, beginning in 2007, be transferred to Microporous. Specifically, {
} . (PX0986 at 001; Axt, Tr. 2128-2129, 2148, 2159, *in camera*).

Response to Finding No. 1128:

For its response to Complaint Counsel's Finding No. 1128, Respondent incorporates its reply to Finding No. 1127.

1129. Mr. Roe related this news to Daramic management by email dated July 7, 2006. He concludes his internal communication this way: "Needless to say, this is not acceptable and we will respond accordingly." (PX0986 at 001).

Response to Finding No. 1129:

Complaint Counsel's finding number 1129 is misleading and incomplete. Mr. Roe's statement in this email is in direct response to {

} (Roe, Tr. 1770-71, *in camera*; PX1240, *in camera*; PX1203, *in camera*). {

} (Roe, Tr. 1770-71, *in camera*; PX1240; PX1203, *in camera*).

1130. Daramic management then evaluated various strategies for blocking Microporous from proceeding with its expansion plans for Austria. One scheme was to {

} at the new plant. (PX0246, *in camera*; Hauswald, Tr. 831-832, *in camera*).

Response to Finding No. 1130:

Complaint Counsel's finding number 1130 is misleading. Daramic never attempted to keep Microporous from fulfilling any commitment it may have had to EnerSys as Complaint

Response to Finding No. 1133:

Complaint Counsel's finding number 1133 is misleading. In fact, even at the August meeting, Mr. Axt continued to invite Daramic to issue a revised proposal, and conveniently did not mention that a signed MOU with Microporous was already in place and that EnerSys was not going to even consider a proposal from Daramic. (Axt, Tr. 2256, *in camera*). In fact, Mr. Axt says that he continued to engage Daramic because "there was no commitment from the ownership of Amerace to move forward." (Axt, Tr. 2256, *in camera*). Once again, Axt and EnerSys continued the perfidious activity.

1134. Following the meeting, Daramic { } on August 11, 2006. (PX1204, *in camera*). The { } (PX1204 at 001, *in camera*; Axt, Tr. 2258, *in camera*). Daramic again { } (PX1204 at 001-003, *in camera*; Axt, Tr. 2255-2256, 2257, 2260, *in camera*).

Response to Finding No. 1134:

For its response to Complaint Counsel's Finding No. 1134, Respondent incorporates its reply to Finding No. 1133.

1135. Daramic gave EnerSys a deadline to respond of August 31, 2006. (PX1205; Axt, Tr. 2259, *in camera*). The deadline was later extended to September 15, 2006. (PX1205).

Response to Finding No. 1135:

Respondent has no specific response.

1136. Mr. Axt informed Daramic that { } (Axt, Tr. 2146, 2260, *in camera*).

Response to Finding No. 1136:

Complaint Counsel's finding number 1136 is not accurate. {

} (Axt, Tr. 2263-64, *in camera*; PX1205; Roe, Tr. 1701). Axt's past conduct further undermines his credibility in this hearing.

When EnerSys did get around to responding to Daramic's proposal, {

} (Roe, Tr. 1772, *in camera*).

1137. EnerSys sought assurances from Microporous that the Austrian plant was still "on target" to begin production in the first quarter of 2008. (Axt, Tr. 2180, *in camera*; PX1206). Microporous provided the desired assurances. (PX1206; Axt, Tr. 2180-2181, *in camera*).

Response to Finding No. 1137:

Complaint Counsel's finding number 1137 is contrary to the weight of evidence on the record. In fact, Axt testified that {

}

(Axt, Tr. 2256, *in camera*).

1138. The September 15 deadline passed without a formal response from EnerSys. When informed of this development, Polypore CEO Robert Toth decided that Daramic "should pull our offer and force a decision. Unless I don't know or understand something, we should play hardball here." (PX0456 at 001).

Response to Finding No. 1138:

Complaint Counsel's finding number 1138 is misleading. Mr. Toth wrote these words out of pure frustration. Daramic first issued a proposal to EnerSys to provide it separators in February of 2006. (Roe Tr. 1699; PX1289, *in camera*). Six months later, when Mr. Toth responded to this email, EnerSys still had not provided Daramic with a firm decision as to its future plans of supply and continued to invite Daramic to bid on the EnerSys business. (Axt, Tr. 2263-64, *in camera*; PX1205; Roe, Tr. 1701).

Furthermore, Mr. Toth had his first experience with Mr. Axt at the BCI Convention in 2006 causing him to question EnerSys' sincerity with respect to the continuing supply negotiations. In that conversation, Axt told Toth that the contract between Daramic and EnerSys was not worth the paper it was written on, indicating that it would not be honored by EnerSys, and that Daramic's business was going to zero. (Toth, Tr. 1512; Axt, Tr. at 2167-68, *in camera*). Toth responded that Daramic remained interested in earning EnerSys' business. (Toth, Tr. 1512).

1139. {

} (PX0694 at 001; PX1211 at 001, *in camera*; PX0456 at 001).

Response to Finding No. 1139:

Complaint Counsel's finding number 1139 is false and contrary to the weight of evidence on the record. Complaint Counsel and EnerSys have both claimed in this hearing that Daramic's force majeure, declared in October 2006, was fake. The evidence presented at trial adequately demonstrates that the force majeure event was not only real, but posed substantial difficulty to Daramic in the operation of its business. (Hauswald, Tr. 1101).

{

} (Hauswald, Tr. 884-85, *in*

camera). In 2006, {

} (Hauswald, Tr. 885-86, *in*

camera). UHMWPE is the primary raw material used by Daramic. Daramic's purchases of UHMWPE are approximately 10 times greater than those of Microporous. (Trevathan, Tr. 3646).

In September 2006, Ticona notified Daramic that it was experiencing a force majeure and Ticona anticipated that it would not be able to supply more than 50% of Daramic's demand for several months. (RX01077, *in camera*; Hauswald Tr. 885, *in camera*; RX01598; Toth, Tr. 1404-

05). {

} (Hauswald, Tr. 884, 890-91, *in*

camera). {

}

(Hauswald, Tr. 886, *in camera*).

Following Ticona's announcement of the Force Majeure, Daramic attempted to find alternative supply of UHMWPE. (Hauswald, Tr. 887, *in camera*; Roe, Tr. 1707). Representatives of Daramic worked long hours, traveling around the world trying to locate alternate supply of UHMWPE and to move some of its existing supply of UHMWPE from Daramic's facilities in North America to Asia and Europe. (Hauswald, Tr. 891-92, *in camera*; RX01054). {

} (Hauswald, Tr. 887-88, *in camera*; RX00698 at 005, *in camera*).

Daramic declared a force majeure event as a result of the reduction of supply by Ticona and advised EnerSys, among other customers. (Hauswald, Tr. 889, *in camera*; RX00698 at 005, *in camera*; RX01052; PX1048; Roe, Tr. 1708-09). {

} (Hauswald, Tr. 889, *in camera*; RX00698 at

005, *in camera*).

{

}

(Hauswald, Tr. 890, *in camera*; Hauswald Tr. at 1143-46, *in camera*). Daramic advised its customers that it would need to allocate its separator production among its customers during this

period of time. (Hauswald, Tr. 889-90, *in camera*; RX00698 at 005; PX1048, (“[O]ur current estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.”)).

{

(RX00964 at 002-03 (emphasis added), *in camera*).

While Complaint Counsel has repeatedly attempted to portray Daramic as telling EnerSys that it would receive only 10% of its PE supply, a full review of the evidence demonstrates amply that this simply was not the case at all. (Roe, Tr. 1707-09). Daramic actually advised in its letter to EnerSys that EnerSys would “receive most likely 10 to 20%, if possible up to 50%, of your normal material requirements for the next six to eight weeks. Based on the timing communicated to us by our vendor, our current best estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.” (PX1207). The Court finds Complaint Counsel’s assertion to this Court that it would receive only 10% to be, at best, overstated.

Daramic’s internal documents (RX00707 at 005, *in camera*; RX00698 at 005, *in camera*; RX00806 at 035, *in camera*) reflect {

} (RX01054).

EnerSys admits that it confirmed with Microporous that Ticona had suffered a production disruption. (Axt, Tr. 2284-85; PX1209). {

} (RX00235, *in camera*;

Craig, Tr. 2617-18, *in camera*). Kubis was one of several EnerSys employees (including Craig) that Axt alerted about Daramic's force majeure on October 7, 2006. (PX2104). Craig also admits that Toth explained that Daramic was declaring the force majeure due to a problem that it was having with a supplier. (Craig, Tr. 2577).

Daramic did not tell EnerSys' employees that if EnerSys signed a contract the force majeure would go away. (Toth, Tr. 1579; Roe, Tr. 1713, 1724). Not one single contemporaneous document has been provided by the FTC to support EnerSys' bald assertion that Toth told Craig that if EnerSys signed a contract the force majeure would go away. (Craig, Tr. 2571; Axt, Tr. 2294, 2296).

Daramic was proactive in its dealing with EnerSys on this force majeure event. Tucker Roe attempted to reach EnerSys over the telephone before sending the letter notifying EnerSys of the force majeure situation. (Roe, Tr. 1707-11). Bob Toth on at least two occasions sent emails to John Craig assuring EnerSys that Daramic was doing what it could to handle the situation fairly with it and apprising of the status of deliveries. (PX1287; PX1288; Craig, Tr. 2577-82). Roe developed a plan with Axt whereby they would talk daily about the supply situation during this force majeure period. (Roe, Tr. 1711). Toth told every customer with whom he spoke, including Craig, that Daramic was doing everything that it could to get separators to them and that Daramic did not want to shut any of the customer's plants down. (Toth, Tr. 1406).

In fact, Daramic employees worked 12 hour days during this force majeure period trying to manage the situation, juggling schedules and verifying inventories all in an effort to meet the customer requirements. (Roe, Tr. 1704-05). {

} (Hauswald, Tr. 893-894, *in camera*).

{

} (Axt, Tr. 2207, *in camera*).

1140. At Daramic, {

}.
(PX0258 at 001; PX0257 at 001, *in camera*). (See also PX0694 at 001; PX0852 at 001, *in camera* (“{ }.”)).

Response to Finding No. 1140:

Complaint Counsel’s finding number 1140 is false. Daramic did not have a strategy or specific meaning associated with the term “hard ball.” Contrary to Complaint Counsel’s assertion, Tucker Roe testified that neither he nor any of his sales team ever told a customer to “take it or leave it” or that Daramic was going to “play hardball” with respect to pricing and contract negotiations. (Roe, Tr. 1725-26). Roe further explained that neither he nor any of his sales team have ever taken such a position with a customer. (Roe, Tr. 1725-26). This type of posturing would be inconsistent with the manner in which Roe has operated for more than 20 years – a philosophy that builds intimate, long-term customer relationships. (Roe, Tr. 1725-26).

1141. On October 6, 2006, Daramic unleashed its hardball strategy. Daramic notified EnerSys by letter that evening (a Friday) that Daramic would not { }.
(Axt, Tr. 2146-2147, *in camera*; PX1207; PX1208). “[E]ffective immediately EnerSys will receive most likely 10 to 20%, if possible up to 50% of your normal material requirements for the next six to eight weeks.” (PX1207). This cut back in supply would apply to EnerSys battery plants in both Europe and the United States. (PX1207; PX1208).

Response to Finding No. 1141:

Complaint Counsel's finding number 1141 is incorrect and contrary to the weight of evidence on the record. For its response to this finding, Respondent incorporates its response to Finding No. 1139 and 1140.

1142. Daramic represented to EnerSys that this disruption in supply was necessary because of a force majeure event outside of Daramic's control. Specifically, "an extensive fire in the production facility of [Daramic's] key raw material supplier" would, going forward, "severely limit the amount of raw material available to Daramic." (PX1207).

Response to Finding No. 1142:

Respondent has no specific response.

1143. EnerSys investigated Daramic's claim, and determined that the asserted force majeure was a sham. (i) {

} (Axt, Tr. 2206, *in camera*; see also Hauswald, Tr. 1136, *in camera*). (ii) EnerSys contacted its second PE supplier, Microporous. On October 9, 2006, Microporous reported that in the United States no allocation was planned and that "U.S. supply positions are whole." (PX1209). (iii) Mr. Craig contacted the CEOs of several other battery manufacturers, including East Penn, Trojan, and Exide. Each executive reported that his company had not been informed that there was a product shortage; further, these companies had not been informed that there would be a curtailment of supply. (Craig, Tr. 2558).

Response to Finding No. 1143:

Complaint Counsel's finding number 1143 is incorrect and contrary to the weight of evidence on the record. For its response to this finding, Respondent incorporates its response to Finding No. 1139.

Furthermore, EnerSys admits that it confirmed with Microporous that Ticona had suffered a production disruption. (Axt, Tr. 2284-85; PX1209). {

}
(RX00235, *in camera*; Craig, Tr. 2617-18, *in camera*). Kubis was one of several EnerSys employees (including Craig) that Axt alerted about Daramic's force majeure on October 7, 2006.

(PX2104). Craig also admits that Toth explained that Daramic was declaring the force majeure due to a problem that it was having with a supplier. (Craig, Tr. 2577).

Moreover, {
} (Craig, Tr. 2258,
in camera), and did not even bother to search the Internet for “force majeure and Ticona” to see what information he could learn. (Craig Tr. 2587). Had he contacted Exide’s purchasing manager, Gillespie, he would have learned that Exide also received notification of the force majeure from Daramic. (PX01048). {

} (RX00207 at 005 *in camera*).

1144. Although letters concerning the force majeure were later received by a number of Daramic’s customers, Tucker Roe from Daramic “told most of them we will do everything possible to supply 100% of their current demand.” (PX0487; see also PX1048). However, he stated: “For EnerSys, the allocation is 10%.” (PX0487).

Response to Finding No. 1144:

Complaint Counsel’s finding number 1144 is misleading. While Daramic hoped to meet 100% of all its customer demands, {
} (Hauswald, Tr. 890, *in camera*; Hauswald Tr. at 1143-46, *in camera*). Daramic advised its customers that it would need to allocate its separator production among its customers during this period of time. (Hauswald, Tr. 889-90, *in camera*; RX00698 at 005; PX1048, (“[O]ur current estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.”)).

While Complaint Counsel has repeatedly attempted to portray Daramic as telling EnerSys that it would receive only 10% of its PE supply, a full review of the evidence demonstrates

amply that this simply was not the case at all. (Roe, Tr. 1707-09). Daramic actually advised in its letter to EnerSys that EnerSys would “receive most likely 10 to 20%, if possible up to 50%, of your normal material requirements for the next six to eight weeks. Based on the timing communicated to us by our vendor, our current best estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.” (PX1207).

Furthermore, {

} (Axt,

Tr. 2172, *in camera*). And {

}

(RX00964 at 002-03 (emphasis added), *in camera*).

While Daramic had no contractual commitment to insure supply to EnerSys, Daramic was proactive in its dealing with EnerSys on this force majeure event. Tucker Roe attempted to reach EnerSys over the telephone before sending the letter notifying EnerSys of the force majeure situation. (Roe, Tr. 1707-1711). Bob Toth on at least two occasions sent emails to John Craig assuring EnerSys that Daramic was doing what it could to handle the situation fairly with it and apprising of the status of deliveries. (PX1287; PX1288; Craig, Tr. 2577-82). Roe developed a plan with Axt whereby they would talk daily about the supply situation during this force majeure period. (Roe, Tr. 1711). Toth told every customer with whom he spoke, including

Craig, that Daramic was doing everything that it could to get separators to them and that Daramic did not want to shut any of the customer's plants down. (Toth, Tr. 1406).

{

} (Hauswald, Tr. 893-894, *in camera*). {

} (Axt, Tr. 2207, *in*

camera).

1145. In November 2006, a senior level Entek executive had a conversation with Mr. Hauswald of Daramic at the European lead acid battery conference. (PX1808). In that conversation, Mr. Hauswald informed the Entek representative that Daramic was "taking steps against [MPLP]" with regards to MPLP's European expansion plans. (PX1808).

Response to Finding No. 1145:

Complaint Counsel's finding number 1145 is nothing more than hearsay and is completely unsupported by the evidence on the record proving that the force majeure was a real event which threatened supply to all of Daramic's customers. In response to this finding, Respondent incorporates its responses to Findings Nos. 1139, 1140, 1143, and 1144.

1146. After the acquisition of Microporous, Mr. Hauswald and Mr. Roe of Daramic told {

} (Gilchrist, Tr. 414, 621, *in camera*).

Response to Finding No. 1146:

Complaint Counsel's finding number 1146 is false and should be disregarded due to Mr. Gilchrist's questionable credibility. First, there is not one shred of evidence that Daramic threatened to cut off EnerSys' supply, or that they did so. (Axt, Tr. 2207, *in camera* {

} Second, both Mr. Hauswald and Mr. Roe, adamantly deny that they ever had a conversation with Mr. Gilchrist about the force majeure in 2006 or ever stated that the force majeure event in 2006 was fabricated. (Roe, Tr. 1709; Hauswald, Tr. 1101). Finally, the

evidence in the record raises significant questions about Mr. Gilchrist credibility. Specifically, IGP's Board members often questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (RFOF 402; PX2301 (Heglie, Dep. at 164)). Mr. Heglie, a member of IGP and the Micorporous Board of Directors, even stated that "Mike [Gilchrist] frequently blew comments out of proportion." (RFOF 402; PX2300 (Heglie, IHT at 84)).

1147. The CEO of EnerSys, John Craig, called the CEO of Daramic, Bob Toth, shortly after the force majeure announcement. (Craig, Tr. 2556). Their conversation confirmed that the prospective curtailment was a ploy aimed at forcing EnerSys to enter into a new long term contract for the majority of its requirements. Specifically, Mr. Toth threatened that Daramic was "going to stop shipping product to you [EnerSys] within two weeks if you don't sign a long-term contract. Correction. 10 to 20 percent in the next two weeks." (Craig, Tr. 2556-2559). Mr. Craig viewed the {
} (Craig, Tr. 2562-2563, 2570, *in camera*).

Response to Finding No. 1147:

Complaint Counsel's finding number 1147 is inaccurate and should be disregarded due to Craig's and Axt's inconsistent testimony and lack of credibility on this issue.

Axt and Craig both testified regarding a purported conversation that they claim occurred with Mr. Toth in October 2006. Yet, both Craig and Axt admitted that despite the supposed critical importance of Daramic separators to its business and supposed potential impact on its business of the force majeure, no one at EnerSys sent a single email or wrote a single memorandum documenting the purported conversation. (Craig, Tr. 2593, 2659-60; Axt, Tr. 2293-96). The only document that Craig could point to and only after prompting by Complaint Counsel on re-direct (after testifying first in his deposition and then again at the hearing that he was not aware of any documentation of his purported conversation with Toth) was the Complaint filed by EnerSys against Daramic in October 2006. (RX00243; Craig, Tr. 2658-59). Yet, as Craig admits, Toth is nowhere referenced in the Complaint. (Craig, Tr. 2658-59).

{ }

(Axt, Tr. 2191, *in camera*), yet Craig testified that he alone was on the call with Toth and that he briefed Axt after the call. (Craig, Tr. 2592, 2571).

{

} (PX1211, *in camera*; PX1212; PX1224, *in camera*; Axt, Tr. 2265-67, *in camera*; Axt, Tr. 2291, 2293).

1148. When it informed Exide, a competitor of EnerSys, of the force majeure event on October 6, 2006, Daramic pledged to continue supplying Exide with “80% to 90%, and if possible up to 100%” of its normal requirements in the following weeks. (PX1048).

Response to Finding No. 1148:

In response to Complaint Counsel’s finding number 1148, Respondent incorporates its response to Finding No. 1144.

1149. During the force majeure period, Daramic “treated Exide very well,” and “did a very good job” of supplying the separators Exide needed at that time. (Gillespie, Tr. 2985, 3095-3096.) Nobody from Daramic told Exide that their supply would be cut off or that Daramic would not sell to them during the force majeure. (Gillespie, Tr. 2985, 3155; PX1048).

Response to Finding No. 1149:

Complaint Counsel’s finding number 1149 is inaccurate and incomplete. The evidence clearly reveals that Daramic did notify Exide about the force majeure event in a letter to Mr. Gillespie on October 6, 2006. (PX1048 at 001). In this letter Daramic states that it “was recently notified by one of its key raw material that it had experienced a force majeure event, caused by an extensive fire in the production facility.” (PX1048 at 001). The letter went on to explain that “effectively immediately Exide will receive most likely 80% to 90%. (PX1048 at 001). While Mr. Gillespie did testify that Exide was “treated very well” during the October 2006 force majeure event (which was clearly real to Exide), he additionally stated that “it wasn’t easy”

during that time for Daramic, but that Daramic worked with Exide to ensure it received supplies. (PX1048; Gillespie, Tr. 2985, 3095).

1150. Microporous was “never affected by the same [limited PE supply] conditions” as Daramic claimed to be during October 2006, even though both companies obtained their PE stock for making separators from Ticona. (Gilchrist, Tr. 414-415; Trevathan, Tr. 3655).

Response to Finding No. 1150:

Complaint Counsel’s finding number 1150 is misleading. First, Daramic’s purchases of ultra high molecular weight PE from Ticona were approximately 10 times greater than those of Microporous. (Trevathan, Tr. 3646). Also, “Microporous had PE deliveries from the Ticona facility in Texas,” not Europe where the force majeure event occurred. (Trevathan, Tr. 3646). Moreover, when Microporous learned about the force majeure event it verified that it had available “inventory on hand” and “inventory in transit” to insure that there were no disruptions in orders. (Trevathan, Tr. 3647).

1151. {
}. (Axt, Tr. 2182, *in camera*). No alternative source of supply was available to EnerSys. (Craig, Tr. 2557, 2598). After exhausting its separator inventories, EnerSys would be forced to shut down production at its plants. One half of the company’s total revenues, or about \$1 billion in battery sales, were at risk. (Craig, Tr. 2561, 2598-2599). In addition, {
}.
(Axt, Tr. 2182, *in camera*; Craig, Tr. 2561).

Response to Finding No. 1151:

Complaint Counsel’s finding number 1151 is inaccurate and based solely on the testimony of Mr. Axt and Mr. Craig who have demonstrated questionable credibility and extreme bias. First, EnerSys’ concerns are clearly exaggerated and do not reflect the reality of force majeure situation. Daramic did not abandon EnerSys as Mr. Axt and Mr. Craig suggests. Instead, EnerSys had repeated assurances from Daramic that Daramic was doing everything it could to meet EnerSys’ requirements. For instance, Tucker Roe attempted to reach EnerSys over the telephone before sending the letter notifying EnerSys of the force majeure situation. (Roe,

Tr. 1707-11). Bob Toth on at least two occasions sent emails to John Craig assuring EnerSys that Daramic was doing what it could to handle the situation fairly with it and apprising of the status of deliveries. (PX1287; PX1288; Craig, Tr. 2577-82). Roe developed a plan with Axt whereby they would talk daily about the supply situation during this force majeure period. (Roe, Tr. 1711). Toth told every customer with whom he spoke, including Craig, that Daramic was doing everything that it could to get separators to them and that Daramic did not want to shut any of the customer's plants down. (Toth, Tr. 1406). {

} (Axt, Tr.

2207, *in camera*).

Second, Mr. Axt and Mr. Craig have demonstrated considerable bias and questionable credibility before the Court and their statements should accordingly be disregarded. For example, the EnerSys witnesses were heavily coached by FTC lawyers. (Axt, Tr. 2230; Burkert, Tr. 2369-76; Gagge, Tr. 2543-47; RX00192 at 001-2). EnerSys has also been a vocal opponent to the Daramic-Microporous merger. Craig, having been described as being on the "warpath" about the announced merger (RX00211; Gagge, Tr. 2544-46), {

}(Craig, Tr. 2619, *in camera*),

{ } (RX00233, *in camera*; Craig, Tr. 2619-21, *in camera*). Craig then instructed EnerSys employees to cooperate fully with the FTC lawyers (Gagge, Tr. 2547), which included voluntarily providing documents, dummy batteries and other information – some of which was not even requested by the FTC (Burkert, Tr. 2372-74; Burkert, Tr. 2404-10, *in camera*; RX00192; RX01017, *in camera*; RX00221 *in camera*; RX01012; RX01208 *in camera*). Craig also provided the contact information for its outside counsel, Stevens & Lee, to EnerSys' competitors to contact the FTC regarding the Daramic merger with Microporous. (Craig, Tr. 2623, *in camera*; Godber, Tr. 280-282).

In addition is the clear bias of EnerSys in this matter, for example, Mr. Craig repeatedly feigned a lack of recollection of his deposition testimony but yet was able to recall, unsolicited, a particular page of his deposition transcript. (Craig, Tr. 2574-81, Craig, Tr. 2619-20, *in camera*; RX00243; PX1288; PX1287).

Craig testified that he could not recall the content of the complaint filed by EnerSys against Daramic, even though he was questioned about it at his deposition and admitted at that time that the complaint did not allege that Daramic threatened to shut EnerSys down. (Craig, Tr. 2575-76). Yet Craig was able to recall the content when asked questions about it by the FTC on re-direct, contradicting his prior sworn and unchanged testimony. (Craig, Tr. 2652-53).

Craig also admitted that he read the testimony after the deposition, which included his prior testimony regarding the complaint, made no changes to it and signed the transcript under oath. (Craig, Tr. 2589-90, 2591-92; Craig, Tr. 2620-21, *in camera*).

Axt and Craig both testified regarding a purported conversation that they claim occurred with Mr. Toth regarding Daramic's declaration of a force majeure in October 2006. Yet, both Craig and Axt admitted that despite the supposed critical importance of Daramic separators to its business and supposed potential impact on its business of the force majeure, no one at EnerSys sent a single email or wrote a single memorandum documenting the purported conversation. (Craig, Tr. 2593, 2659-60; Axt, Tr. 2293-96). {

} (Axt, Tr. 2191, *in camera*), yet Craig testified that he alone was on the call with Toth and that he briefed Axt after the call. (Craig, Tr. 2592, 2571).

1152. Mr. Craig concluded that he had no choice but to accede to the Daramic demand. (Craig, Tr. 2562-2563). He instructed a senior manager at EnerSys "to get involved with this, get the contract worked out, do what we can, let's get so we don't shut ourselves down." (Craig, Tr. 2558).

Response to Finding No. 1152:

Complaint Counsel's finding number 1152 is false and should be disregarded due to the questionable credibility and bias of Mr. Craig. Daramic never told EnerSys' employees that if EnerSys signed a contract the force majeure would go away. (Toth, Tr. 1579; Roe, Tr. 1713, 1724). Not one single contemporaneous document has been provided by the FTC to support EnerSys' bald assertion that Toth told Craig that if EnerSys signed a contract the force majeure would go away. (Craig, Tr. 2571; Axt, Tr. 2294, 2296).

Mr. Craig's testimony should be disregarded because it is inconsistent and accordingly lacks credibility. For example, Mr. Craig repeatedly feigned a lack of recollection of his deposition testimony but yet was able to recall, unsolicited, a particular page of his deposition transcript. (Craig, Tr. 2574-81, Craig, Tr. 2619-20, *in camera*; RX00243; PX1288; PX1287). Additionally, Craig testified that he could not recall the content of the complaint filed by EnerSys against Daramic, even though he was questioned about it at his deposition and admitted at that time that the complaint did not allege that Daramic threatened to shut EnerSys down. (Craig, Tr. 2575-76). Yet Craig was able to recall the content when asked questions about it by the FTC on re-direct, contradicting his prior sworn and unchanged testimony. (Craig, Tr. 2652-53). Craig also admitted that he read the testimony after the deposition, which included his prior testimony regarding the complaint, made no changes to it and signed the transcript under oath. (Craig, Tr. 2589-90, 2591-92; Craig, Tr. 2620-21, *in camera*).

In addition to his lack of credibility, Mr. Craig's testimony is also colored by his extreme bias. For instance, Mr. Craig has been a vocal opponent to the Daramic-Microporous merger. Craig, having been described as being on the "warpath" about the announced merger (RX00211; Gagge, Tr. 2544-46), {

} (Craig, Tr. 2619, *in camera*), {

} (RX00233, *in camera*; Craig, Tr. 2619-21, *in camera*). Craig then

instructed EnerSys employees to cooperate fully with the FTC lawyers (Gagge, Tr. 2547), which included voluntarily providing documents, dummy batteries and other information – some of which was not even requested by the FTC (Burkert, Tr. 2372-74; Burkert, Tr. 2404-10, *in camera*; RX00192; RX01017, *in camera*; RX00221 *in camera*; RX01012; RX01208 *in camera*). Craig also provided the contact information for its outside counsel, Stevens & Lee, to EnerSys' competitors to contact the FTC regarding the Daramic merger with Microporous. (Craig, Tr. 2623, *in camera*; Godber, Tr. 280-282).

1153. After a short period of negotiations, EnerSys and Daramic {
}. (Axt, Tr. 2193, *in camera*; PX1211, *in camera*;
PX1224, *in camera*). EnerSys agreed to buy separators from Daramic exclusively for its North American and Chinese battery plants through May 2009, and for its Italian plant through December 2009. (Axt, Tr. 2114-2115).

Response to Finding No. 1153:

Complaint Counsel's finding number 1153 is misleading. {

} (PX1211, *in camera*; PX1212;
PX1224, *in camera*; Axt, Tr. 2265-67, *in camera*; Axt, Tr. 2291, 2293).

Moreover, the contract negotiated between the parties which was executed on October 31, 2006 was not an exclusive contract as suggested by EnerSys and Complaint Counsel.

{

} (Burkert, Tr. 2426-27, *in camera*).

1154. Daramic { }.” (Axt, Tr. 2206-2207, *in camera*). When { }, Daramic { }. (Axt, Tr. 2207, *in camera*; PX1211 at 002, *in camera* ({ })).

Response to Finding No. 1154:

Complaint Counsel’s finding number 1154 is false and contrary to the weight of evidence on the record. Complaint Counsel confidently ignores that Daramic employees worked diligently during this force majeure period trying to manage the situation, juggling schedules and verifying inventories all in an effort to meet customer requirements, including those of EnerSys. (Roe, Tr. 1704-05). It was through those efforts that Daramic was able to { } (Roe, Tr. 1704-05; Axt, Tr. 2206-07, *in camera*).

Additionally, Daramic never told EnerSys’ employees that if EnerSys signed a contract the force majeure would go away. (Toth, Tr. 1579; Roe, Tr. 1713, 1724). Not one single contemporaneous document has been provided by the FTC to support EnerSys’ bald assertion that Toth told Craig that if EnerSys signed a contract the force majeure would go away. (Craig, Tr. 2571; Axt, Tr. 2294, 2296). This is further evidenced by EnerSys’ Complaint filed against Daramic in October 2006. (RX00243; Craig, Tr. 2658-59). {

} (RX01601, *in camera*; PX1224 *in camera*). As is clear, EnerSys was represented by counsel throughout this timeframe. No evidence has been presented to this Court that EnerSys ever sought to have its contract with Daramic nullified for supposedly signing it under duress and no evidence has even been presented to this Court that EnerSys ever made that assertion prior to the institution of this matter.

Additionally, while Complaint Counsel suggests that Daramic only restored supply to EnerSys after it agreed to a new contract, this suggestion is not supported by the evidence on the record. In fact, supply resumed to EnerSys and Daramic all other customers in October of 2006 only after {

} (Hauswald. Tr. 887-88, *in camera*; RX00698 at 005, *in camera*).

Moreover, the mere fact that EnerSys subsequently bargained for a provision in its contract with Daramic eliminating its exposure should another force majeure event occur is not significant as Complaint Counsel suggests. These types of provisions are not unusual, and when {

} (RX00207 at 005 *in camera*).

1. The Impact of the Contract Extension with Daramic

1155. {

2128-2129, 2148, 2159, *in camera*; PX1259, *in camera*).

} (Axt, Tr.

Response to Finding No. 1155:

Complaint Counsel's finding number 1155 is misleading. {

}

(RX00207, *in camera*). {

} (RX00207, *in camera*). {

}

(PX1224 at 001-03, *in camera*; PX1211, *in camera*; PX1213, *in camera*; RX00964, *in camera*; Axt, Tr. 2265-2267, *in camera*, 2291, 2293). {

} (PX1224, *in camera*). EnerSys was able to contract with Microporous, or any other separator producer, for separators then and when its agreements with Daramic expired.

At the end of 2006, EnerSys was unsure if the Microporous product would work in the EnerSys North American plants and qualification was uncertain. (Axt, Tr. 2127-2128). While EnerSys may have been in “talks” with Microporous, there was no “planned conversion” as Complaint Counsel alleges. {

}

(Axt, Tr. 2251, *in camera*). EnerSys was interested in moving forward with Microporous, if Microporous had two plants. (Axt, Tr. 2129; Axt, Tr. 2143, *in camera*). {

} (Axt, Tr. 2260, *in camera*). In fact, Axt directly testified that

{

}. (Axt, Tr. 2303-04, *in camera*). {

} (Axt, Tr. 2150, *in camera*).

1156. {

} (Simpson, Tr. 3230-3231, *in camera*). {

}. (Gilchrist, Tr. 454).

Response to Finding No. 1156:

Complaint Counsel’s finding number 1156 is misleading. First, Dr. Simpson’s testimony is not a “fact” and Complaint Counsel’s use of his testimony as such is improper and should be disregarded. {

} (RX00401; Gilchrist, Tr. 500-

03, *in camera*; Axt, Tr. 2303-04, *in camera*). {

} (RX00207 at 010, *in*

camera). Microporous did so without obtaining board approval for any capital expansions that the agreement would require. (PX2300 (Heglie, IHT at 138-39, 164)). The Microporous Board refused to allow Microporous to enter into any additional supply contracts that would required capital commitments. (RX00401 at 002).

The Microporous Board also showed concern about further capital investment in the planned expansion. These concerns were based upon Microporous' poor financial performance, doubt about the management's ability to execute the expansion, and doubt about Microporous' ability to find customers to fill the new capacity created by the expansion. (Trevathan, Tr. 3630-31; RX00248 at 001-02; RX00401 at 001-02; Trevathan, Tr. 3628). {

}

(Axt, Tr. 2157-58, *in camera*; Axt, Tr. 2297-98; PX1215).

During late 2006 and 2007, Microporous was also struggling in negotiations with another large customer, JCI. Microporous had planned to supply portions of JCI's separator needs out of its planned European plant (Trevathan, Tr. 3599). Expansion plans slowed when negotiations became strained with JCI. (Trevathan, Tr. 3601-02). As a result, the Microporous Board attempted to discontinue or slow down the few equipment orders for the Austrian expansion that had occurred. (Trevathan, Tr. 3602-04, 3764; PX2300 (Heglie, IHT at 185); PX0905 (Gaugl, Dep. at 94)). JCI demanded prices lower than Microporous could provide and a clause forbidding the sale of Microporous. (Trevathan, Tr. 3608-09; Gilchrist, Tr. 503-04, *in camera*). Negotiations halted and JCI decided to pursue other supply options. (Trevathan, Tr. 3608-09;

Gilchrist, Tr. 503-04, *in camera*; RX00047; PX2300 (Heglie, IHT at 151); PX2301 (Heglie, Dep. at 132); RX00730).

1157. The force majeure event “delayed several pieces of business that Microporous was going to be granted, the timing of the Mexico business for our backfill, the timing of Italy. The Italian plant for EnerSys was also delayed and parts of the Tennessee business for EnerSys [were] delayed as well.” (Gilchrist, Tr. 413).

Response to Finding No. 1157:

Complaint Counsel’s finding number 1157 is misleading. At the time of the force majeure event in October of 2006, there was still no signed contact between EnerSys and Microporous. (Gilchrist, Tr. p. 413). Any loss on Microporous’ part is purely speculative as no agreement for North America was in place.

{

} (Axt, Tr. 2304, *in*

camera). {

} (Axt, Tr. 2304, *in camera*).

Gilchrist contends in his testimony that in early 2007, a few months after the force majeure, he saw no threat in Microporous’ ability to fill their backfill capacity on their United States line as Microporous actually had “more offers for business than [Microporous was] going to be able to handle under the scenario of backfilling.” (PX0078 at 023; Gilchrist, Tr. 344).

1158. With the potential for supplying significant PE volumes to EnerSys pushed out to June 2009 and beyond, Microporous needed to find additional customer orders to fill up its two new lines starting in March 2008, particularly the second PE line. (PX0089 at 002, *in camera*{

}; Gilchrist, Tr. 454, *in camera* {

}).

Response to Finding No. 1158:

Complaint Counsel's finding number 1158 is misleading and incomplete. In 2007, Gilchrist contends in his testimony that Microporous had "more offers for business than [Microporous was] were going to be able to handle under the scenario of backfilling." (PX0078 at 023; Gilchrist, Tr. 344). Microporous, however, did not progress past preliminary discussions and no Memorandums of Understanding, letters of interest, or contract drafts were ever exchanged with other customers. (Trevathan, Tr. 3623; Gilchrist, Tr. 539; Gilchrist, Tr. 503, *in camera*; McDonald, Tr. 3831).

1159. To be competitive against Daramic in motive, stationary and SLI applications, MPLP needed to operate its lines at an efficient scale. (Gilchrist, Tr. 422-424; RX00401 at 002 ("[T]he filling of these Austrian lines with solid, profitable business is an absolute requirement for the continued success and financial health of MPLP.")).

Response to Finding No. 1159:

Complaint Counsel's finding number 1159 is incomplete. As made clear in its November 14, 2007 Board Mandate, Microporous was, and was to remain, a *specialist* separator player. (RX00401 at 001 (emphasis in original)). The Board did not want Microporous to be like the other large separator producers;

We continue to believe more long-term value will be created by focusing on growing through products that are materially differentiated from competing products. Clearly Microporous' understanding and knowledge of rubber-based technologies, as well as the proven electrochemical benefits of rubber, are core strengths that create meaningful differentiation from competition, and should continue to be leveraged as much as possible.

(RX00401 at 001).

{

}

(RX00401 at 002).

1160. Operating at lower volume levels would {
} Daramic's pricing. (Simpson, Tr. 3232-3233, *in camera*). Daramic recognized these economic realities. (Simpson, Tr. 3233, *in camera*; PX0241 at 001-002, *in camera*). Microporous recognized them as well.

(Gilchrist, Tr. 508-509, *in camera* ({
})).

Response to Finding No. 1160:

Complaint Counsel's finding number 1160 is misleading and incomplete. First, Dr. Simpson's testimony is not a "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded. Additionally, {

} (PX0241 at 001, *in camera*).

{

} (Gilchrist, Tr. 508, *in camera*).

1161. At the same time that Daramic was threatening to withhold separators from EnerSys due to Ticona's European force majeure, Daramic also increased the pressure on C&D, whom it was also in contractual negotiations with, by informing C&D that they too might get less than 50% their separator needs. (Roe, Tr. 1804).

Response to Finding No. 1161:

Complaint Counsel's finding number 1161 is false. First, Daramic did not threaten to withhold separators from EnerSys. (RFOF 641-47). In accordance with its notification to all customers, Daramic informed C&D that they may receive less than 50% of their separator needs. (Roe, Tr. 1804). This, however, did not adversely effect C&D. {

} (Hauswald, Tr. 894, *in camera*). At the time of the force majeure, C&D was in contractual negotiations with Daramic. Those contract negotiations resulted on a zero price increase for stationary and a 2% price increase for C&D's motive separator needs. (Roe, Tr. 1761).

1162. Less than one month later, Mr. Roe informed Mr. Hauswald that if a contract with C&D was not wrapped up within two weeks time, "we will play hard-ball and force them to accept 100% or nothing." (PX0806 at 003).

Response to Finding No. 1162:

Complaint Counsel's finding number 1162 is inaccurate; {
}. (Hauswald, Tr. 1126, *in camera*). {
}
} (Hauswald, Tr. 1126-27, *in camera*).
{
} (PX1793, *in camera*;
Hauswald, Tr. 1127, *in camera*).

C&D received favorable terms in their contract negotiations with Daramic including a zero price increase for stationary and a 2% price increase for C&D's motive separator needs. (Roe, Tr. 1761).

1163. Daramic specifically intended to exclude Microporous from the relevant markets. In October 2005, Mr. Hauswald informed Mr. Nasisi, the former General Manager of Daramic, that he believed Microporous was going to build a PE line for EnerSys in Europe. (PX0694 at 002).

Response to Finding No. 1163:

Complaint Counsel's finding number 1163 is nonsensical and false. The belief that Microporous may build a PE line for EnerSys in Europe does not relate to Complaint Counsel's statement that "Daramic specifically intended to exclude Microporous from the relevant markets." For its response to this finding, Respondent also incorporates its replies to finding number 1164.

1164. After receiving this "bad news," Mr. Nasisi warned Mr. Hauswald that Microporous could grow to be "another Entek," and therefore Daramic "must do everything possible to stop this [expansion]." (PX0694 at 001). *See also* (PX0751 at 001, *in camera* ({
}).").

Response to Finding No. 1164:

Complaint Counsel's Finding 1164 is inaccurate and misleading. For its response to this finding, Respondent incorporates its replies to finding numbers 650-52.

Complaint Counsel also misleadingly portrays PX0751 in which a preference "is to stop [Amerace] from getting jci (sic) europe (sic) agreement which would stop them from building [a] plant." In other words, if the JCI Europe Agreement, is won by Daramic, a plant in Europe would not be necessary for Microporous.

1165. Mr. Hauswald understood that using "all or nothing" threats to prevent Microporous from gaining business at EnerSys might be effective in the short term, but in the long term, Daramic needed to "solve the [Microporous] case definitively." (PX0694 at 001). {

} (PX0171-008; PX0751 at 001, *in camera*).

Response to Finding No. 1165:

Complaint Counsel's finding number 1165 is misleading and inaccurate. For its response to this finding, Respondent incorporates its replies to finding numbers 648- 652.

When questioned about PX0694, Hauswald testified that at the time he wrote the email regarding "all or nothing" he did was incorrect. (Hauswald, Tr. 733). Hauswald testified that the statement in PX0694 that "it would be better to solve the Amerace case definitively" referred to the possible acquisition plan of Microporous at that time. (Hauswald, Tr. 733-34). The acquisition was not done so that Daramic would not lose anymore EnerSys business to Microporous. (Hauswald, Tr. 733-34).

Complaint Counsel surmises at the completion of their finding number 1165 that "Daramic needed to acquire Microporous, kill their expansion plans, or put them out of the PE business entirely." In so stating, Complaint Counsel takes incredible liberty with what is actually stated in PX0171 and PX0751. In referencing the Industrial market, PX0171 discusses Amerace's planned capacity expansions and if Daramic wanted to secure the Amerace's volume it would execute a long-term contract with EnerSys OR acquire Amerace. (PX0171 at 008). {

}

(PX1224, *in camera*). PX0171 does not state that Daramic must “acquire Microporous, kill their expansion plans, or put them out of the PE business entirely.”

Likewise, in PX0751 Hauswald merely states that {

}. (PX0751 at 001, *in camera*). See Response to finding numbers 658 and 1164. Nothing was stated in either document about putting Microporous out of the PE business.

1166. Daramic employed the MP Plan as the next step in its strategy to marginalize Microporous and exclude it from the relevant markets. *See* (CCFOF 725-747). Entek believed that, based on a conversation between Mr. Hauswald and the head of Entek’s European operations, Daramic’s successful extortion of a long-term contract from EnerSys after the force majeure was intentionally designed to remove the economic justification for Microporous’s investment in a new PE facility in Austria. (PX1808).

Response to Finding No. 1166:

Complaint Counsel’s finding number 1166 is inaccurate, misleading and based upon hearsay. See Response to finding numbers 725-747.

Complaint Counsel relies on a document that is without any factual basis and is solely based on hearsay and speculation. This document was not used in trial or deposition and does not prove the truth of the matter asserted. The email is based on a conversation that allegedly occurred in passing at the 10ELBC conference between Fraser-Bell and Hauswald. (PX1808). Fraser-Bell supposedly mentioned the Amerace investment in Europe to Hauswald. (PX1808). According to Fraser-Bell, Hauswald replied “we are taking steps against them” with no further explanation as to what that meant. If actually made, this statement could as easily reference the fact that Microporous was in violation of the Jungfer agreement and that steps may be taken by Daramic so as to have them comply with the agreement. {

}

XI. Hollingsworth & Vose

1167. Hollingsworth & Vose (“H&V”) manufactures absorptive glass mat (“AGM”) separators for sealed lead-acid batteries. (PX0094 at 001, *in camera*). It is the dominant AGM producer in North America, and is one of the largest AGM manufacturers worldwide. (PX0035 at 004; Roc, Tr. 1745; PX0011, *in camera*; RX01101 at 004).

Response to Finding No. 1167:

Respondent has no specific response

1168. H&V is {

(Porter, Dep. at 37)).

} (PX0925

Response to Finding No. 1168:

Complaint Counsel’s finding number 1168 is misleading and false. {

} (PX0925 (Porter, Dep. at 170), *in camera*; PX0200).

Complaint Counsel above references the fact that in 1999, {

} (PX0925 (Porter, Dep., at 37),

in camera). {

} (PX0925 (Porter, Dep., at 37), *in camera*).

In his deposition, Porter clarified the statement that Complaint Counsel relied upon in finding number 1168. {

} (PX0925 (Porter, Dep., at 38), *in camera*).

{

} (PX0925 (Porter, Dep., at 38),

in camera).

{

} (PX0925 (Porter, Dep., at 38), *in camera*). {

} (PX0925 (Porter, Dep., at

170), *in camera*). Accordingly, Daramic and H&V were not actual or potential competitors and

Complaint Counsel is incorrectly trying to manufacture a basis for saying H&V was trying to enter the PE separator business. (PX0011, *in camera*; PX0200; Hauswald, Tr. 645).

1169. In 1999, Exide Technologies (“Exide”) owned and operated a PE separator manufacturing facility in Corydon, Indiana. (PX0726; PX0925 (Porter, Dep. at 35); PX0917 (Cullen, Dep. at 11, *in camera*). Exide manufactured separators at Corydon for some of its North American battery plants. (Gillespie, Tr. 2983-84).

Response to Finding No. 1169:

Respondent has no specific response.

1170. In 1999, Exide engaged the services of Bowles Hollowell Conner (“BHC”), a financial advisory firm, to assist it with selling the Corydon plant. (PX0724 at 002).

Response to Finding No. 1170:

Respondent has no specific response.

1171. In June 1999, BHC contacted H&V about the possibility of acquiring the Corydon plant. H&V was invited to submit a proposal to purchase the assets. (PX1368 at 001).

Response to Finding No. 1171:

Complaint Counsel’s finding number 1171 is misphrased. H&V was invited to submit a “non-binding indicative offer.” (PX1368 at 001). {

} (PX0727).

1172. H&V was { } (PX0917 (Culllen, Dep. at 11)). Daramic was a competing bidder. (PX0726 at 006-008). Daramic was aware that H&V was interested in the Corydon facility. (Hauswald, Tr. 640-641; PX0169 at 001).

Response to Finding No. 1172:

Complaint Counsel's finding number 1172 is incomplete. {

} (PX0726). {

} (PX0726 at 002). Daramic was not aware of H&V's level of interest in the Corydon plant and only knew that H&V had made a single *visit* to the plant. (Hauswald, Tr. p. 640 (emphasis added)).

1173. On June 19, 1999, H&V received information by mail from BHC {
} (PX0925 (Porter, Dep. at 35)).

Response to Finding No. 1173:

Complaint Counsel's finding number 1173 is incomplete. {

}

(PX0726).

1174. {

} (PX0925 (Porter, Dep. at 37-38)).

Response to Finding No. 1174:

Complaint Counsel's finding number 1174 is incomplete. {

} (PX0925 (Porter, Dep. at 37), *in*

camera). {

} (PX0925 (Porter, Dep. at 37), *in camera*). {

} (PX0925 (Porter,

Dep. at 38), *in camera*).

1175. Second, at the time Exide was selling the Corydon plant, {
} (PX0925 (Porter, Dep. at 37)). Likewise, H&V believed that {
} (PX0925 (Porter, Dep. at 37)).

Response to Finding No. 1175:

For the reasons set forth in Respondent's reply to Complaint Counsel's finding number 1174, this finding should be rejected. Additionally, {
} (PX0925 (Porter, Dep. at 40-44), *in camera*). {
} (PX0925 (Porter, Dep. at 169), *in camera*).

1176. {
} (PX0925 (Porter, Dep. at 42-43)). {
} (PX0925 (Porter, Dep. at 35)).

Response to Finding No. 1176:

Complaint Counsel's finding number 1176 is incomplete. {
} (PX0925 (Porter, Dep. at 169), *in camera*). Following that instruction, {
} (PX0925 (Porter, Dep. at 35), *in camera*).

1177. On July 1, 1999, H&V submitted to BHC a proposal to acquire the Corydon plant for \$26,000,000 in cash, and to enter into a series of five-year agreements to supply PE and AGM battery separators to Exide. (PX1368 at 001-002).

Response to Finding No. 1177

Response to Finding No. 1179:

Complaint Counsel's finding number 1179 is false. Daramic and H&V were not actual or potential competitors, and Daramic did not need to try to prevent H&V from entering the PE separator market. (PX0011, *in camera*; PX0200; Hauswald, Tr. 645).

Complaint Counsel based their Finding 1179 on only two documents, PX0169 and PX0035, both written by Hauswald. Complaint Counsel repeatedly ignored testimony by Hauswald concerning his lack of familiarity with the H&V agreement. During trial, Hauswald testified that he was not familiar with the first agreement signed between H&V and Daramic and was only familiar with the technical part of the relationship between H&V and Daramic. (Hauswald, Tr. 631).

Thus, Hauswald statements in PX0169 and PX0035 should not be relied upon given his lack of familiarity with the H&V agreement. Complaint Counsel questioned Hauswald about his statement in PX0169 concerning an alleged threat by H&V to enter the PE separator business. (Hauswald, Tr. 636-37). Hauswald testified that what he wrote in PX0169 was "incorrect" and that he "didn't know anything about AGM during that period of time." (Hauswald, Tr. 636-37). Similarly, when questioned about PX0035, Hauswald again reiterated that when he wrote of the reasoning behind the Daramic agreement with H&V he was "not correct." (Hauswald, Tr. 639). Hauswald, the drafter of the two documents, specifically testified that the agreement between H&V and Daramic was not related to keeping H&V from going into the PE business. (Hauswald, Tr. 642).

Daramic was not concerned that H&V would enter the PE separator market and the documents to which Complaint Counsel bases finding number 1179 on were disputed by the drafter himself.

1180. {

} (PX0169 at 001; PX2143 at 001, *in camera*).

The core of this arrangement was a set of mutual promises to stay out of one another's markets. (PX0169 at 001; PX0094 at 002-003, *in camera*; PX0035 at 005-006; PX2150 at 001, *in camera*; PX1356 at 001).

Response to Finding No. 1180:

For the reasons set forth in Respondent's reply to Complaint Counsel's finding number 1179, this finding should be rejected. The purpose of the agreement was not to block H&V from entering the PE market. H&V had no plans to produce PE and did not find the PE market a desirable market to enter. (PX0925 (Porter, Dep., at 15-16, 170), *in camera*).

There were many purposes for the agreement between H&V and Daramic. {
} (PX0925 (Porter, Dep. at 110), *in camera*; Roe, Tr. 1745; RX00151). Under the agreement, H&V and Daramic were able to engage in joint promotional efforts and marketing. (PX0925, Dep. at 126-28), *in camera*; Roe, Tr. 1746-47; RX00373). The agreement allowed H&V and Daramic to put on joint customer appreciation events. These events widened the geographic reach for both companies. (Roe, Tr. 1746-47; PX0925 (Porter, Dep. at 126-27), *in camera*; RX01101; RX00363, *in camera*; RX01106). Because both companies produced different products, there was much to be gained in joint research and development projects as well. (Roe, Tr. 1747; PX0917 (Cullen, Dep. at 119-23), *in camera*).

These collaborations resulted in a non-compete clause in the agreement between H&V and Daramic. {

} (PX0925 (Porter, Dep. at 65-66), *in camera*). The non-compete clause had nothing to do with "blocking a competitive threat" as Complaint Counsel alleges, as H&V and Daramic were not competitors. (PX0011, *in camera*; PX0200; Hauswald, Tr. 645).

1181. Daramic's anticompetitive strategy is described in an internal Daramic email:

“[Every time we] meet investors they ALL ask: what about AGM? Aren’t you missing the boat? What do you do?”

Just a few words of history..

A few years ago, H&V announced that they want to go [in]to the PE business, and plan to make acquisition (it was Exide) or build their own plant.

In order to stop them, we made an (sic) written agreement with them, through a partnership, saying that:

- we will work together where ever possible
- they will not go in the PE business
- we will not go in the glass business (AGM)”

(PX0169 at 001).

Response to Finding No. 1181:

For the reasons set forth in Respondent’s reply to Complaint Counsel’s finding 1179, this finding should be rejected.

1182. After some negotiations, {
} (PX0094, *in camera*). Daramic
agreed therein {
} (PX0094 at 002-003, *in camera*).

Response to Finding No. 1182:

For the reasons set forth in Respondent’s reply to Complaint Counsel’s finding number 1180, this finding should be rejected.

1183. In addition, {
} (PX0094 at 002, *in camera*).

Response to Finding No. 1183:

Respondent has no specific response.

1184. The parties contemplated that {
} (PX0094 at 002, 003,
013-022, *in camera*; PX0925 (Porter, Dep. at 126-127) ({
}); Roe, Tr. at 1746, 1811 (Daramic contemplated sales opportunities in
“new markets, new territories” such as Eastern Europe or Asia, where H&V “may have
better representation.”)).

Response to Finding No. 1184:

Complaint Counsel's finding number 1184 is incomplete. The agreement between H&V and Daramic served many purposes. See RFOF 1180.

1185. Thus, virtually all collaboration in the United States was excluded. (PX0094 at 013, *in camera* ({
); PX1325 at
001 (virtually all potential customers in the Americas had 100% supply relationships with Daramic and/or H&V at the time the Agreement was entered); PX0925 (Porter, Dep. at 95-97, *in camera*) ({
})).

Response to Finding No. 1185:

Complaint Counsel's finding number 1185 is misleading and false. While one of the goals of the agreement between H&V and Daramic was to expose both companies to geographic regions where they may not have a strong presence, North America was not excluded from the proposed geographic areas. (PX0094 at 002, *in camera*; Roe, Tr. 1746-47; PX0925 (Porter, Dep. at 126-27), *in camera*; RX01101; RX00363, *in camera*; RX01106). {

} (PX0094 at 002, *in camera*).
{
} (PX0917 (Cullen, Dep. at 55), *in camera*).
{
} (PX0094 at 002, *in camera*). {
} (PX0094 at 002, *in camera*). Following that,
{
}. (PX0917 (Cullen, Dep. at 68-69), *in camera*).

1186. The sales agency was {
} (PX0923 (Hauswald, IHT at 280), *in camera* ({
})). Daramic representatives have made a small volume of sales on behalf of H&V in Brazil and India, {
} over five years. (PX0014, *in camera*; PX2145 at 001-002)

Response to Finding No. 1186:

Complaint Counsel's finding number 1186 is misleading and false. Again Complaint Counsel ignores testimony and statements from Hauswald that he was not familiar with the first agreement signed between H&V and Daramic and was only familiar with the technical part of the relationship between H&V and Daramic and had never been involved in the marketing aspect of the agreement. (Hauswald, Tr. 631). Contrary to what Complaint Counsel alleges in finding number 1186, there were many benefits of the agreement between H&V and Daramic. H&V and Daramic engaged in many joint marketing activities, joint promotions, joint exhibits at trade shows, and joint customer appreciation events—all deemed “very successful” by both H&V and Daramic. (PX0925 (Porter, Dep. at 126-28), *in camera*; Roe, Tr. 1746-47; RX00373; RX01102; RX01103; RX01104; RX01105). These joint events opened up new sales markets to both H&V and Daramic. (Roe, Tr. 1746-47; PX0925 (Porter, Dep. at 126-27), *in camera*; RX01101; RX00363, *in camera*; RX01106).

Contrary to Complaint Counsel's contention, Daramic has earned a great deal of commissions for sales of H&V product. (Roe, Tr. 1747-48; RX00363, *in camera*; RX00364, *in camera*; RX00365, *in camera*; RX00381, *in camera*; RX01100, *in camera*; RX01108, *in camera*; RX01109, *in camera*; RX01110, *in camera*; RX01111, *in camera*; RX01112, *in camera*; RX01113, *in camera*; RX01114, *in camera*; RX01115, *in camera*; RX01116, *in camera*; RX01117, *in camera*; RX01118). {

} (RX00381, *in camera*; (PX0917 (Cullen, Dep. at 314-15), *in camera*). Daramic has widely represented H&V a great deal in India. (Roe, Tr. 1747-48).

1187. In contrast, {
camera{ } (PX2150 at 001, *in camera*; PX1318). See also (RX00095 at 001, *in camera* {
}).

Response to Finding No. 1187:

Complaint Counsel's finding number 1187 is misleading. Both H&V and Daramic have honored all aspects of their agreement, both joint marketing and sales efforts (*See* Response to Finding No. 1186) and the non-compete clause of their agreement. Additionally the parties shared their product research and worked together on a product that would use both AGM and PE technologies. (Roe, Tr. 1747; PX0917 (Cullen, Dep. at 119-23, *in camera*). {

} (PX0925 (Porter, Dep. at 65-66), *in camera*). {

} (PX0925 (Porter, Dep. at 65-66),
in camera).

Complaint Counsel refutes their own previous Findings 1168, 1174, 1175, 1179, and 1180 when they acknowledge above that no PE separators were planned by H&V. {

} (PX0925 (Porter, Dep. at 170), *in camera*;
PX0200).

1188. In February 2003, Daramic and H&V considered expanding the Agreement to include Nippon Sheet Glass (NSG), a Japanese manufacturer of AGM separators and PE separators (through its subsidiary, Nippon-Muki). (PX1318). The three-way alliance idea did not come to fruition, but {

} (PX2150, *in camera*; PX2146).

Response to Finding No. 1188:

Complaint Counsel's finding number 1188 is misleading. While a relationship between H&V, Daramic and NSG was explored in February 2003, it was not pursued by Daramic. {

} (PX0161, *in camera*).

1189. The original {
} (PX0094 at 002, 006, *in camera*). {

PX2147). The parties agreed and understood that { } (PX0158, *in camera*;
} (PX0094 at 002, *in camera*; RX01014; PX2150 at
001, *in camera*; PX0158, *in camera*).

Response to Finding No. 1189:

Complaint Counsel's finding number 1189 is incomplete. {

} (PX0925 (Porter, Dep. at 65-66), *in camera*). {

} (PX0925 (Porter, Dep., at
65-66, 131), *in camera*). H&V had a great desire to renew the agreement between Daramic and
H&V and H&V initiated discussions with Daramic concerning the renewal in January of 2006.
(RX00374; RX00370).

1190. At the time that the parties {

} (PX0923 (Hauswald, IHT at 286), *in camera*).

Response to Finding No. 1190:

Complaint Counsel's finding number 1190 is false and misleading. Once more,
Complaint Counsel ignores the testimony and statements of Hauswald that he was not familiar
with the first agreement signed between H&V and Daramic and was only familiar with the
technical part of the relationship between H&V and Daramic and had never been involved in the
marketing aspect of the agreement. (Hauswald, Tr. 631). While Hauswald was uneducated
about the H&V and Daramic agreement, at the time of the renewal he asked Nasisi if the
agreement should be renewed—Nasisi thought it should be. (Hauswald, Tr. 644; (PX0923
(Hauswald, IHT at 285), *in camera*). {

} (PX0923 (Hauswald, IHT at 285), *in camera*).

{

} (PX0923 (Hauswald, IHT at 285), *in camera*).

1191. In considering {

(Hauswald, IHT at 290), *in camera*). That {

} (PX0923

} (PX0923 (Hauswald, IHT at 292, *in camera*)).

Response to Finding No. 1191:

Complaint Counsel's finding number 1191 is false and misleading. Complaint Counsel again relies on someone who testified, during trial, that he did not have a complete involvement in the agreement between H&V and Daramic. Under the line of questioning that Complaint Counsel references in their finding number 1191, Complaint Counsel asked the following;

{

}

(PX0923 (Hauswald, IHT at 291, *in camera*)).

On multiple occasions Hauswald conveyed his lack of knowledge concerning the nature of the agreement between H&V and Daramic. Complaint Counsel ignores this testimony and treats Hauswald's statements as accurate so as to facilitate their argument. The agreement between H&V and Daramic had nothing to do with keeping H&V out of the PE separator market.

1192. The Agreement is not needed to put on customer appreciation events jointly. (Roe, Tr. 1811-1812; RX00370 at 002).

Response to Finding No. 1192:

Complaint Counsel's finding number 1192 is incomplete. Roe testified that one of the reasons that Daramic went into the agreement with H&V was to do marketing, intelligence, and conferences with H&V. (Roe, Tr. 1811). Customer Appreciation nights, being one of the many joint marketing efforts that H&V and Daramic do together, was an activity that began as a result of the alliance and consisted of the companies acting as co-hosts for their customers. (Roe, Tr. 1811; RX00370 at 002). Roe merely guessed that customer appreciation events could be accomplished without a cross-agency agreement. (Roe, Tr. 1811).

1193. Daramic and H&V did not {
} (PX0925 (Porter, Dep. at 107-108), *in camera*)).

Response to Finding No. 1193:

Complaint Counsel's finding number 1193 is false. {
}
(PX0917 (Cullen, Dep. at 119-23), *in camera*). {
} (PX0917
(Cullen, Dep. at 119-20), *in camera*). {

} (PX0917 (Cullen, Dep. at 121), *in camera*). {

} (PX0917 (Cullen, Dep. at 123), *in camera*).

1194. Joint technical collaboration { } (PX1356 at 001) (Daramic and H&V each “will maintain [their] own intellectual property” under the Agreement).

Response to Finding No. 1194:

For the reasons set forth in Respondent’s reply to Complaint Counsel’s finding number 1193, this finding should be rejected. The full quotation from PX1356 is; “We will maintain our own intellectual property. However, wherever it makes sense to achieve our growth, [H&V and Daramic] will join together on a case-by-case basis on technical issues, either driven by the customers or us.” (PX1356 at 001). Clearly it was contemplated that when needed, H&V and Daramic would come together to work on technical issues.

The agreement also discussed and planned for the exchange of confidential information.

{

}

(PX0094 at 007, *in camera*).

1195. To the extent that the parties to the Cross Agency Agreement exchanged any confidential information, it was protected by non-disclosure provisions and other restrictions against improper use, { } (PX0094 at 007-008, *in camera*; PX1356 at 001 (noting “[a] Confidentiality Agreement exists between [H&V/Daramic] and each of its employees” that covers exchanges between the companies and communications with customers in connection with activities contemplated by the Agreement)).

Response to Finding No. 1195:

Respondent has no specific response. Additionally, *see* Response to Finding No. 1187.

1196. During the life of the cross-agency agreement between Daramic and H&V, Daramic never paid any commissions to H&V because H&V never made any sales of PE during the course of the agreement. (Roe, Tr. 1810).

Response to Finding No. 1196:

Complaint Counsel's Finding 1196 is incomplete. Roe testified that he was not aware of any commissions paid to H&V during the course of the cross-agency agreement, not that they were never paid. (Roe, Tr. 1810). Furthermore, Complaint Counsel completely disregards the uncontroverted evidence of the non-monetary benefits that H&V received through their cross-agency agreement with Daramic. See Response to Complaint Counsel's Finding Nos. 1186 and 1187. {

} (PX0917 (Cullen, Dep. 114-15), *in camera*). This opened up H&V's marketing presence in new regions. Additionally H&V was able to gain through their technological and development collaborations with Daramic. (Roe, Tr. 1747; PX0917 (Cullen, Dep. at 119-23), *in camera*).

XII. Remedy

A complete divestiture is required to restore the competition that the merger eliminated

1197. Dr. Simpson testified that to restore the competition lost through Daramic's acquisition of Microporous, a remedy would need to recreate a firm similar to the Microporous that would have existed but for the acquisition. (Simpson, Tr. 3262-3263). Dr. Simpson stated that, at a minimum, this would require recreating a firm with production facilities in both the United States and Europe, with intellectual property comparable to that of Microporous, a technical staff comparable to that of Microporous, a product mix comparable to that of Microporous, and intangible assets (knowledgeable and skilled workforce, industry reputation) comparable to that of Microporous. (Simpson, Tr. 3263).

Response to Finding No. 1197:

Complaint Counsel's Finding 1197 is completely false. First, Dr. Simpson's testimony is not a "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

At the time of the acquisition, Microporous did not have an operating plant in Europe. (Trevathan, Tr. 3571-72; RX01227 at 002, 039, 063-66, *in camera*; RX01228, *in camera*; RX01229 at 047, *in camera*; RX01572; RX01042, *in camera*; RX00546, *in camera*). It is

uncontroverted that there was no operational European plant as of the acquisition on February 29, 2008. The Feistriz plant, which was not owned by Microporous, did not become operational till March 2008 and was not fully operational until June 2008. (Gaugl, Tr. 4603; Gilchrist, Tr. 374-75).

Microporous was designed to be, and remained up to the point of the acquisition, a *specialist* separator producer. (RX00401 at 001 (emphasis in original)). {

} In fact, its Board mandated that the difference be maintained. (RX00401 at 001 (emphasis in original); RFOF 388-394). In trying to add a European presence that Microporous had not been able to acquire or maintain, Complaint Counsel does not seek to “recreate” Microporous to “restore” competition, but rather create their own brand new unique competitor, separate and apart from the role that Microporous played in the market prior to the acquisition.

{
} Gilchrist himself testified that {

(Gilchrist, Tr. 511, *in camera*). He further testified that {
}. (Gilchrist, Tr. 511, *in camera*; Gilchrist, Tr. 540-41). Complaint Counsel has produced no evidence showing that the Austrian plant would impact the products sold by Microporous in North America.

Additionally, Complaint Counsel’s “remedy” under finding number 1197 goes beyond the scope of “relevant geographic market” as defined by Complaint Counsel. Following the acquisition, when the Austrian plant became operational, the Austrian plant has yet to sell products to customers in the United States, the “relevant geographic market.” (Gaugl, Tr. at

4643). Furthermore, Complaint Counsel alleges that production facilities that are located outside of North America are unable to compete in North America. (RX01572 at 004-05). A divestiture needs to include the former MPLP facilities and the business associated with those facilities to provide the scale needed to compete

1198. {

} (Simpson, Tr. 3418, *in camera*). {

} (Simpson, Tr. 3418, *in camera*). Mr. Gilchrist testified that Microporous {

601, *in camera*). {

(Simpson Tr. 3225-3226; 3229, 3233, *in camera*; Gillespie, Tr. 3053, *in camera*).

}. (Gilchrist, Tr. 525, 593-
}.

Response to Finding No. 1198:

Complaint Counsel's Finding 1198 is false and inconceivable. See Response to Finding No. 1197. First, Dr. Simpson's testimony is not a "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

Microporous did not have an operational plant in Europe at the time of the acquisition. (Trevathan, Tr. 3571-72; Gaugl, Tr. 4603; Gilchrist, Tr. 374-75; RX01227 at 002, 039, 063-66, *in camera*; RX01228, *in camera*; RX01229 at 047, *in camera*; RX01572; RX01042, *in camera*; RX00546, *in camera*). While having a plant in Austria or anywhere in Europe or anywhere in the world would increase Microporous' scale, that doesn't change the reality that such plant did not exist in a functional capacity.

Furthermore, {

}.

(Gilchrist, Tr. 528-31, *in camera*; PX2301 (Heglie Dep. at 91-93, 149-153)). Microporous had a tremendous debt of approximately \$46,139,000. (PX0078 at 021; Gilchrst, Tr. 549). Had it been operational for Microporous, Feistriz would have actually been a significant financial drain on

Microporous. {

} (Gilchrist, Tr. 502, *in camera*).

Currently, and solely because of Daramic, Feistriz is operating at 70% capacity and, if it were operating as a stand-alone entity, Feistriz would have a negative income of \$3.9 million. (Gaugl, Tr. 4569, 4571-73). {

} (Riney, Tr. 4962, *in camera*). As a result of Daramic's loss of the JCI business and closure of the Potenza plant resulting in the transfer of that volume to Feistriz, the Feistriz plant would have been operating at only 35-40%. (Gaugl, Tr. 4572-73). The 35-40% figure does not take into account that {

} (Craig, Tr. 2639 *in camera*). {

} (Axt, Tr. 2254, *in camera*). {

} (RX01603, *in camera*; Riney, Tr. 5020-22, *in camera*).

Finally, in demanding the divestiture of the Feistriz plant, Complaint Counsel ignores their own "relevant geographic market" argument. There is no evidence that the Feistriz plant would effect output or competitive conditions in North America.

1199. {

} (Kahwaty, Tr. 5431-32, *in camera*).

Response to Finding No. 1199:

Complaint Counsel's Finding 1199 is misleading and incorrect. First, the Feistriz facility was not operational at the time of the acquisition and Microporous did not have any contracts or MOUs in place to absorb the additional capacity that the Feistriz plant would have added had it been operational. *See* Response to Finding Nos. 1198 and 1197. If operational for Microporous, the Feistriz plant would have added to Microporous' already skyrocketing debt. (PX0078 at 021; Gilchrst, Tr. 549; Gaugl, Tr. 4569, 4571-73). Thus, a high level of capacity does not equate a high level of financial success.

More importantly, {

}. (RFOF 1090). Currently, BFR operates four PE production lines and has over 22.4 million square meters of capacity. (Hauswald, Tr. 1034; RX00032, *in camera*; Hall, Tr. 2769, 2837-38, 2860, *in camera*; PX0922 (Roe, IHT at 328), *in camera*).

1200. MPLP's PE separator lines were unique. All the PE lines installed or planned were designed specifically to be capable of producing PE or CellForce separators. All other PE separator lines elsewhere in the world are only capable of producing PE. (Trevathan, Tr. 3714).

Response to Finding No. 1200:

Complaint Counsel's finding number 1200 is misleading and irrelevant. Prior to and following the acquisition, CellForce was only being produced by one company in the market. Prior to the acquisition, CellForce was produced by Microporous. Following the acquisition, CellForce was still only produced by one company, Daramic. There is no need for a remedy to this fact as there was no competitive change in the market following the acquisition.

Additionally, the CellForce lines are simply a PE line with the additional capability of adding a rubber additive for the production of CellForce. (RFOF 140-148). Further, in the above testimony referenced by Complaint Counsel, Trevathan continued to testify that Daramic

was able to switch a CellForce line to a PE line in as little as about four months. (Trevathan, Tr. 3715-16).

1201. At the time of the acquisition, Daramic's profit margins on HD were { } than the profit margins on CellForce and Flex-Sil. (Gilchrist, Tr. 467, *in camera*).

Response to Finding No. 1201:

Complaint Counsel's finding number 1201 is incorrect and misleading. Mr. Gilchrist's testimony is unreliable and should be disregarded. For example, among many things, IGP's Board members questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (RFOF 402; PX2301 (Heglie, Dep. 164)). Mr. Heglie, a member of IGP and of the Board of Directors, also noted that "Mike [Gilchrist] frequently blew comments out of proportion" (RFOF 402; PX2300 (Heglie, IHT 84)). There is significant evidence that {

} (RFOF 422; Riney, Tr. 4962, *in camera*).

{

} (Riney, Tr. 4925, *in camera*; Response to Finding No. 500). {

}

(Riney, Tr. 4925-27, *in camera*). {

} (Riney, Tr. 4926-27, *in camera*; RFOF

280).

1202. Daramic views global scale as critical to success. On January 23, 2007, Mr. Toth made a presentation at the J.P. Morgan Annual High Yield Conference. (Toth, Tr. 1430-32; PX0484 at 001-002) The presentation to the J.P. Morgan meeting states that global scale is a "critical success factor." The narrative that accompanied the slide states: "To be the market leader in the lead acid separator market, you need several things: global scale and service ..." (PX0484 at 019; Toth, Tr. 1434; PX0483 at 013). Polypore's separator business was "positioned for growth" because it had "multiple sites that allow us to have the scale and critical mass to service customers on a global basis." (PX0483 at 013).

Response to Finding No. 1202:

Complaint Counsel's finding number 1202 is false and incomplete. Again Complaint Counsel ignores testimony in order to facilitate their argument. When asked about the J.P. Morgan Annual High Yield Conference document, Toth specifically refuted the statement relied upon in Finding 1202. Complaint Counsel asked if it was accurate that "To be the market leader of the lead-acid separator market, you need several things: Global scale and service...high quality, reliable supply...strong technical support...and leading application development." (Toth, Tr. 1433). Toth replied that the statement was "dead...wrong today." (Toth, Tr. 1433). Toth stated that at the time Daramic thought that scale was an advantage but the basic need of customers is to simply be supplied. (Toth, Tr. 1433-34). Toth testified that the Daramic model of large global scale is clearly wrong because Daramic has continuously lost market share because of it and as a result has begun to shut down various plants. (Toth, Tr. 1434). Complaint counsel ignored the direct testimony that refutes Finding 1202 and chose to rely upon an out of date document instead.

1203. Exide believes that an effective remedy in this matter would require {

} (Gillespie, Tr. 3051-3052, *in camera*).

{

} (Gillespie, Tr. 3051-3052, *in camera*). {

} (Gillespie, Tr. 3051-3054, *in camera*). {

}

(Gillespie, Tr. 3051-3054, *in camera*).

Response to Finding No. 1203:

Complaint Counsel's Finding 1203 is not supported by factual evidence. See Response to Finding Nos. 1197 and 1198. Furthermore, the evidence raises questions of credibility about Exide's intent and Gillespie's testimony in this proceeding (RFOF 550, 601), and Gillespie's testimony should be disregarded. {

}

(Gillespie, Tr. 3054, *in camera*). The opinion of a customer as to what he desires of a new supplier is not evidence to which a factual finding should be based.

1204. Microporous believed that it was “imperative” to have an R&D and testing laboratory in order to be competitive. (Gilchrist, Tr. 327-328; see also Axt, Tr. 2109-2110 (“technical expertise” is important); Gillespie, Tr. 3051-3052, *in camera* ({})).

Response to Finding No. 1204:

Complaint Counsel’s Finding 1204 is incomplete. Daramic also believes that technological research and development of new products is important to their success. (Toth, Tr. 1433; Whear, Tr. 4661-62).

Furthermore, Mr. Gilchrist’s testimony is unreliable and should be disregarded. For example, among many things, IGP’s Board members questioned the credibility of Gilchrist because they “would hear one thing one day, and a different thing the next day.” (RFOF 402; PX2301 (Heglie, Dep. 164)). Mr. Heglie, a member of IGP and of the Board of Directors, also noted that “Mike [Gilchrist] frequently blew comments out of proportion” (RFOF 402; PX2300 (Heglie, IHT 84)). While R&D is important, it is likely not impreative for Microporous to be competitive. This is evidenced by the fact that Microporous often did not follow through on their so called developmental projects and many of their projects were put through testing only after Daramic became involved. (McDonald, Tr. 3862, *in camera*; Brilmyer, Tr.1901; Whear, Tr. 4735, *in camera*).

1205. Support of a large battery manufacturer is important because when a battery separator manufacturer’s customers are small companies, each time its customers order separators, the order is small, which affects production and efficiency costs. (PX0907 (Kung, Dep. at 70, *in camera*)). {

} (PX0907 (Kung, Dep. at 70), *in camera*).

{

} (PX0907 (Kung, Dep. at 70, *in camera*)). {

} (PX0907 (Kung, Dep. at 71, *in camera*)). {

} (PX0907 (Kung, Dep. at 70, *in camera*)).

Response to Finding No. 1205:

Complaint Counsel's Finding 1205 is clearly false. James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung {
} (PX0184 at 002; PX0273 at 009, *in camera*;
PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155),
in camera).
- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/
Microporous] acquisition." (sic) (RX00022).
- Kung {
} (PX1521 at
002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- {
} (PX1510 at 002, *in camera*). {
} (PX1510 at
002, *in camera*).
- Kung {
(PX1521 at 002, *in camera*). }

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* ("We have no chance to make this material. So we don't need to discuss that.")). In direct contradiction of Kung's testimony, Rodger Hall of JCI

testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

The evidence is uncontroverted that Microporous did not have an operational facility in Europe at the time of the acquisition. The evidence is further uncontroverted that Microporous, with it's singular facility, was able to operate and service large customers around the globe from its single plant in Piney Flats Tennessee. {

} (Weerts, Tr. 4459, 4479-80, *in camera*; Hall

Tr. 2828, *in camera*; RX00065 at 007, *in camera*).

A divestiture needs to include the former MPLP facilities in the US and Europe to attract global customers that seek multi-plant suppliers for global sourcing and surety of supply

1206. {

}

(Gilchrist, Tr. 309-10, 456-57, *in camera*; PX207, *in camera*).

Response to Finding No. 1206:

Complaint Counsel's Finding 1206 is incomplete and irrelevant. Each battery manufacturer has different needs and desires regarding the location of their separator suppliers.

For example, {

} (Weerts, Tr. 4459, 4479-80, *in camera*; Hall Tr. 2828, *in camera*; RX00065 at 007, *in*

camera). {

} Additionally, while EnerSys expressed interest in Microporous opening additional plants in other locations, EnerSys did not believe it is necessary for its business for its separator suppliers to be physically located in both North America and Europe. (Burkert, Tr. 2385; RX00224).

Further, Complaint Counsel finding seeks to create a “newco” that has a global presence that the former Microporous simply did not have. See Response to Finding Nos. 1197 and 1198. 1207. {

} (Gillespie, Tr. 2969-2970; Gillespie, Tr. 3131-3132, *in camera*). MPLP responded positively to Exide’s desire to have supply from one plant in the US and one in Europe. (Gillespie, Tr. 2970).

Response to Finding No. 1207:

Complaint Counsel’s Finding 1207 is incomplete and irrelevant. {

} (Gillespie, Tr. 3053-54, *in camera*). While Microporous provided schedules, quotations, a MOU, and a draft contract to Exide. (RX00009; RX00399; RX00403). Exide let the MOU expire and renewed the MOU for only 45 days. (RX00009; RX00399; RX00403). Following Exide’s continual showing of a lack of interest, Microporous did not truly believe that the Exide contract was a viable possibility. (Gilchrist, Tr. 445, *in camera*; McDonald, Tr. 3843, 3846-57). In finding number 1207, Complaint Counsel is trying to stretch one customer’s fleeting desire for a European presence in its supplier into a necessary condition for a successful separator supplier.

1208. Exide’s experience in Daramic’s handling of the strike at their Owensboro plant strike reinforced to Exide the need to have backup sources of separator supply in order to avoid supply disruptions. (Gillespie, Tr. 2992-2993).

Response to Finding No. 1208:

Complaint Counsel's Finding 1208 is incomplete and irrelevant to remedy. Exide was able to receive all the separator material they required from Daramic during the Owensboro strike and were in daily contact with Daramic management. (Gillespie, Tr. 2986). {

} (Hauswald, Tr. 893-94, *in camera*). Thus, Exide would have been able to receive supply during the strike from other separator suppliers had they chosen to do so, and could follow that strategy in the future as well.

Further, {
}. (Gillespie, Tr. 3122-27, *in camera*). Exide's experience in Daramic's handling of the strike has caused Exide to make no changes to its single source separator supply strategy despite other available options.

1209. Sufficient entry would require an entrant to have two manufacturing facilities to replicate the redundancy and surety of supply provided by MPLP and Daramic. As Mr. Axt noted, {

} (Axt, Tr. 2143, *in camera*). It was critical for EnerSys that its suppliers have more than one plant. (Axt, Tr. 2129).

Response to Finding No. 1209:

Complaint Counsel's Finding 1209 is inaccurate. Microporous did not have two facilities at the time that they were acquired and thus two facilities is not required for entry into the separator supply market. *See* Response to Findings Nos. 1197 and 1198.

Further there was direct testimony during trial that a European and North American plant was not necessary to be a viable supplier for EnerSys. (Burkert, Tr. 2385; RX00224). {

} (Burkert, Tr. 2424, *in camera*; RX00241). Further, EnerSys' desire for increased capacity by Microporous could have occurred at its Piney Flats

location. An expansion plan was in place in 2005 but the plan was terminated in 2007 and never revived by Microporous. (Trevathan, Tr. 3647).

1210. Daramic emphasizes the importance of maintaining multiple separator manufacturing plants when dealing with customers. (Roe, Tr. 1318-1319). Daramic believes that having manufacturing facilities in various parts of the world provides security of supply to customers. (Roe, Tr. 1318-1319). Daramic views this as a “competitive advantage.” (Hauswald, Tr. 722, 726-727, 807, *in camera*). Daramic advertises to customers that it can give them local supply from a global company. (Hauswald, Tr. 711, 722; PX0582 at 018).

Response to Finding No. 1210:

Complaint Counsel’s Finding 1210 is false and irrelevant. Complaint Counsel again ignores direct testimony that Daramic’s global scale is no longer viewed as a competitive advantage by management. (Toth, Tr. 1434). *See* Response to Finding No. 1202.

Additionally, to the extent that Daramic does have many global locations, that does not mean that a “newco” would need the same number of locations in order to be competitive, particularly in North America. {

} (Weerts, Tr. 4483, *in camera*; Gillespie, Tr. 3021, *in camera*).

1211. {

} (PX0904 (Seibert, Dep. 187), *in camera*). {

} (PX0904 (Seibert, Dep. 187), *in camera*).

Response to Finding No. 1211:

Complaint Counsel’s Finding 1211 is irrelevant. Currently, Daramic is only producing a small amount of HD at Piney Flats and Piney Flats is still operating at only 38% of its available capacity. (Trevathan, Tr. 3647; Riney, Tr. 4963, *in camera*). Thus Piney Flats has significant available capacity.

Further, the fact that Daramic has attempted to diversify the production of their HD product has no bearing on restoring competition to the pre-acquisition era. Microporous only had one plant at the time of the acquisition and giving a “newco” more plants than that goes beyond any remedy necessary to restore competition to the pre-acquisition level. *See* Response to Finding Nos. 1197 and 1198.

1212. The reason Microporous decided to open a second facility in Europe was twofold. A European facility would be close to EnerSys’s European operations, and having a second facility in Austria provides backup for the United States if something were to happen at Piney Flats. (Gaugl, Tr. 4602).

Response to Finding No. 1212:

Complaint Counsel’s Finding 1212 is inaccurate and incomplete. Gaugl testified the expansion was first considered “in December 2005 when EnerSys showed their interest in getting the product from Austria and giving us additional business in the U.S.” (Gaugl, Tr. 4602). Further, when asked if a second facility would give surety of supply, Gagul answered that “it helps.” (Gagul, Tr. 4602).

Though Microporous may have desired to open a European facility they had not done so at the time of the acquisition. Further, because of Microporous’ financial state, Microporous needed a capital investment from one of their customers and/or the guarantee of long term supply agreements so as provide for the additional capacity that Microporous would gain from the opening of a second facility. Microporous did not have any contracts or MOUs in place at the time of the acquisition with respect to the second line. *See* Response to Finding Nos. 1197 and 1198)

1213. MPLP opening a European facility actually helped it expand its business in the United States. (Trevathan, Tr. 3773). The Feistritz expansion freed up CellForce capacity in the US. (Trevathan, Tr. 3774). Trojan Battery was interested in this excess capacity which would enable it to switch a million square meters of its Flex-Sil purchases to CellForce for deep-cycle batteries. (Trevathan, Tr. 3740) But the primary reason for the Austrian expansion was to service European customers from a European facility. (Trevathan, Tr. 3709).

Response to Finding No. 1213:

Complaint Counsel's Finding 1213 is false and irrelevant. Microporous had not opened the Feistriz facility at the time of the acquisition. Additionally Microporous was threatened with financial difficulty at the time of the acquisition and Feistriz would not have made a contribution to Microporous' overall financial stability. {

} (Gilchrist, Tr. 502, *in camera*; (PX2301 (Heglie Dep. at 91-93, 149-153)). Today, Feistriz is only operating at 70% capacity and, {

}. (Gaugl, Tr. 4569, 4571-73; Riney, Tr. 4962, 4969, *in camera*; Hauswald, Tr. 922, *in camera*). If the merger had not occurred, Feistriz would have been operating at 35-40% capacity. (Gaugl, Tr. 4572-73).

There is no evidence that the Feistriz plant directly or indirectly added output or improved competitive conditions in North America. Microporous' CellForce line at Piney Flats was operating at or near full capacity in 2005. (Trevathan, Tr. 3582). While there was a temporary plan to increase the CellForce capacity at the Piney Flats location that was abandoned and CellForce at Piney Flats is currently at only 35-40% capacity. (Trevathan, Tr. 3647). There was no addition to the CellForce line after a transfer of EnerSys' PE supply went from Piney Flats to Feistriz, which was the plan of Microporous but was executed by Daramic. There has been no increase in production at Piney Flats following that transfer of EnerSys product to Feistriz.

Additionally, while Microporous held discussions with JCI and Exide about increasing their capacity at Piney Flats after the Feistriz plant became operational, those conversations were terminated in May of 2007. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615). As Piney Flats is

operating at such a low capacity and there are no plans to increase the Piney Flats capacity, the Feistriz plant would not have added to output or improved competitive conditions in North America.

Microporous was already supplying European customers from its Piney Flats facility. It is totally irrelevant that the Feistriz plant would allow Microporous to supply European customers from a European facility because North America is the “relevant geographic market.”

1214. Trojan was very concerned about the fact that Microporous only had one manufacturing facility. (Godber, Tr. 225). Trojan believed it was important for Microporous to have more than one manufacturing facility for its separators so that if one facility was damaged by fire or some other cause product would still be available from another facility. (Godber, Tr. 225-26). “This scenario (single source/single site) really scares me – if something happened to your facility TBC would be out of business. We are looking to Amerace to come up with a plan here to minimize this risk.” (PX1660 at 002-003).

Response to Finding No. 1214:

Complaint Counsel’s Finding 1214 is misleading and irrelevant. It is unlikely that Trojan was very concerned that Microporous only had one plant as Trojan has had a relationship with Microporous since the mid 1980s. (Godber, Tr. 155). {

}

(RX01120, *in camera*; McDonald, Tr. 3854-57, *in camera*). {

} (RX00949 at 224, *in camera*; RX01120, *in*

camera; McDonald, Tr. 3853-55, *in camera*). Further there was no evidence offered at trial that Trojan would have sponsored Microporous’ European expansion or offered them a long term contract for the Feistriz location.

Further, the exact Trojan testimony paints a somewhat different picture than that which Complaint Counsel finding number 1214 would have the Court believe. When asked about if “the development of a second manufacturing site in Austria by Microporous [was] something that interested Trojan,” Godber responded that it interested Trojan “to a certain degree” and that

the clear intent was sell product from the Austrian plant in Europe. (Godber, Tr. 226). Trojan's only plan with respect to Microporous and the expansion, was to move business from Flex-Sil to CellForce as more capacity for CellForce production could occur following an expansion. (Godber, Tr. 226-27). To date, even though the plant in Austria was built, only 16% of Trojan's line uses CellForce, far short of Trojan's alleged 25% goal. (Godber, Tr. 275). As a result, CellForce production in Piney Flats has not increased since the addition of the Austrian plant. (Trevathan, Tr. 3647).

1215. Microporous helped alleviate Trojan's concern because "now they had at least dual plants and there would be some protection." (Godber, Tr. 226).

Response to Finding No. 1215:

For the reasons set forth in Respondent's reply to Complaint Counsel's finding number 1214, this finding should be rejected.

1216. Having access to a separator supplier that has multiple plants is important for Crown in terms of surety of supply in the event of a work stoppage or other disruption to supply. (Balcerzak, Tr. 4127).

Response to Finding No. 1216:

Complaint Counsel's finding number 1216 is incomplete. On other occasions, Crown has had access to a supplier with only one production location. {

} (Balcerzak, Tr.

4097). {

} (Balcerzak, Tr. 4097). {

} (Balcerzak, Tr. 4129). {

}

(Balcerzak, Tr. 4128-29). Clearly it is not imperative that Crown's suppliers have multiple plants.

1217. The existing contract between Daramic and Crown contains a {
} (Balcerzak, Tr. 4111, *in camera*; RX00994 at 009, *in camera*). {

} (Balcerzak, Tr. 4113, *in camera*). However, during the strike at Owensboro, {

} (Balcerzak, Tr. 4117, *in camera*).

Response to Finding No. 1217:

Complaint Counsel's Finding 1217 is irrelevant and incomplete. {

} (Balcerzak, Tr. 4109, *in camera*). Moreover, this finding ignores evidence demonstrating that the strike had no adverse impact on Crown Battery. (Balcerzak, Tr. 4132). Crown emerged "remarkably unscathed" from the labor stoppage and congratulated Daramic for doing "a heckuva good job" keeping Crown in production. (RX00330; Balcerzak, Tr. 4101-02).

{

} (Balcerzak, Tr. 4117, *in camera*).

Allowing customers to terminate exclusive to new exclusive contracts will enable new entry to gain market share and scale

1218. Dr. Simpson noted that the remedy should also address Daramic's use of exclusive contracts by reducing the share of the market covered by Daramic's exclusive contracts. (Simpson, Tr. 3264).

Response to Finding No. 1218:

Complaint Counsel's finding number 1218 is false. First, Dr. Simpson's testimony is not a "fact" and Complaint Counsel's use of his testimony as such is improper and should be disregarded.

Complaint Counsel has not demonstrated the extent, if any, of Daramic's exclusionary conduct. (RPT Brief at 52-56). Many of Daramic's long term contracts were not exclusive.

(RPT Brief at 52-56). {

} (Kahwaty, Tr. 5226). {

} (Kahwaty, Tr. 5226).

{

} (Kahwaty, Tr. 5226). {

} (Kahwaty, Tr. 5226-27)

Furthermore, {

}. (Kahwaty, Tr. 5234). Complaint Counsel's finding number 1218 ignores the time, money, and energy that both parties expend when negotiating a supply contract. Finding 1218 promotes market uncertainty and does not create a rational business environment whereby the supply of separators will be continuous and guaranteed.

XIII. Witness Backgrounds

1219. Richard R. Godber is CEO and president of Trojan Battery Company in Santa Fe Springs, California. (Godber, Tr. 133). Trojan Battery is the largest producer of deep-cycle batteries in the world. Trojan Battery has been in business for 84 years and has been producing deep-cycle batteries since 1952. (Godber, Tr. 133). As president and CEO, Mr. Godber is responsible for the overall operation of the company, including strategic planning. (Godber, Tr. 134). Mr. Godber is extensively involved in procurement of the three largest and most expensive parts of a deep-cycle battery, the lead, the plastic, and the separators. (Godber, Tr. 134). Mr. Godber personally negotiates the final pricing and contract terms with battery separator suppliers. (Godber, Tr. 135).

Response to Finding No. 1219:

Complaint Counsel's finding number 1219 is misleading. Godber testified that he is involved with procurement only from an operational standpoint. (Godber, Tr. 134). Godber also testified that he "usually" handles the final negotiations of contracts. (Godber, Tr. 135).

Further, Respondent notes that Complaint Counsel's "Witness Backgrounds" section in their Findings of Fact No. 1219-1248 is not inclusive of all witnesses who testified during trial or by deposition.

1220. Trojan has been Microporous's largest customer since it began doing business with Microporous a little over 20 years ago. (Godber, Tr. 156-57). At the time of the acquisition of Microporous by Daramic, Trojan was Microporous's largest customer. (Godber, Tr. 157). Microporous told Trojan that it was its largest customer. (Godber, Tr. 157).

Response to Finding No. 1220:

Complaint Counsel's finding number 1220 is misleading. Godber testified that Trojan was "[p]robably" Microporous' largest customer when their relationship began in 1987. (Godber, Tr. 156-57).

1221. Michael Gilchrist was President and CEO of Microporous for about ten years at the time of the acquisition. Prior to becoming CEO he was vice president of sales and marketing and general manager at Microporous. (Gilchrist Tr. 297-298, 301). Following the acquisition, Mr. Gilchrist worked at Daramic as Vice President of Product and Global Strategy. This position gave Mr. Gilchrist a perspective on Daramic's product strategy. (Gilchrist, Tr. 297; PX920 (Gilchrist, I.H. Tr. 44-45)). Mr. Gilchrist had professional interactions with Daramic for over twenty years. (Gilchrist, Tr. 298).

Response to Finding No. 1221:

Complaint Counsel's finding number 1221 is misleading. Gilchrist's knowledge of Daramic was limited as he only worked for Daramic for a few months following the acquisition. (Gilchrist, Tr. 297). Gilchrist never testified during trial that he had "perspective on Daramic's product strategy." Gilchrist's initial interactions from 1988 to 1994 were not with Microporous or any other competitor, but rather were when Gilchrist sold silica to Daramic. (Gilchrist, Tr. 298).

Furthermore, Mr. Gilchrist's testimony is unreliable and should be disregarded. For example, among many things, IGP's Board members questioned the credibility of Gilchrist because they "would hear one thing one day, and a different thing the next day." (RFOF 402; PX2301 (Heglie, Dep. 164)). Mr. Heglie, a member of IGP and of the Board of Directors, also

noted that “Mike [Gilchrist] frequently blew comments out of proportion” (RFOF 402; PX2300 (Heglie, IHT 84)).

1222. Nawaz Qureshi is vice president of engineering and technology at U.S. Battery Manufacturing Company. (Qureshi, Tr. 1990). He has been involved in the battery industry for 42 years and has 23 years of experience in deep-cycle batteries. (Qureshi, Tr. 1990-91). Mr. Qureshi is primarily responsible for product design and development, but he also is responsible for quality control, manufacturing improvement, and customer service. (Qureshi, Tr. 1991). In designing and developing batteries for U.S. Battery, Mr. Qureshi is responsible for selecting and procuring battery separators. (Qureshi, Tr. 1992). In making a decision on what battery separator to use in a particular battery, Mr. Qureshi looks at the price of the battery separator in order to select the most cost-effective separator for that battery. (Qureshi, Tr. 1992).

Response to Finding No. 1222:

Respondent has no specific response.

1223. Pierre Hauswald has been at Daramic since 1981. In 2004, he was promoted to the position of Vice President and General Manager of Daramic. (Hauswald, Tr. at 629-630). Mr. Hauswald is the Chief Operating Officer of Daramic. (PX0923 (Hauswald IHT at 5)). Pierre Hauswald is the Vice President and General Manager of Daramic, LLC, and reports to Mr. Robert Toth. (PX0582 at 011). Mr. Hauswald is the person at Daramic who is principally responsible for strategy and strategic planning. Market intelligence is also a part of his job. (Hauswald, Tr. 630-631; (PX0923 (Hauswald IHT at 17)). {

}. (PX0904 (Seibert, Dep.

148), *in camera*).

Response to Finding No. 1223:

Complaint Counsel’s finding number 1223 is incorrect. Daramic does not have a Chief Operating Officer. Hauswald’s title is Vice President and General Manager of Daramic. (PX0582 at 011). *See also*, RFOF 235.

{

} (PX0904(Seibert, Dep. at 148) *in camera*). {

} (PX0904(Seibert, Dep. at

148), *in camera*).

1224. Robert Toth is the Chief Executive Officer of Polypore, Inc. (PX0582 at 011). Mr. Bob Toth joined Polypore as CEO in 2005. (Hauswald, Tr. 13-15).

Response to Finding No. 1224:

Complaint Counsel's finding number 1224 is incomplete. See RFOF 228. Toth is responsible for the management of Polypore, Inc. and gives the managers of all four of Polypore's business units "a fair degree of autonomy." (Toth, Tr. 1385-1386).

1225. Dr. George Brilmyer is an electrochemist formerly employed by Microporous and subsequently by Daramic. He resigned from Daramic in August of 2008 whereupon he began working for Atraverda Limited, a lead-acid battery manufacturer in the U.K., as VP of Business Development for North America. (Brilmyer, Tr. 1825-1826). Dr. Brilmyer worked for Johnson Controls for 10 years prior to joining Microporous. (Brilmyer, Tr. 1848). Prior to working for Microporous full time, Dr. Brilmyer consulted with Microporous in 1997 through 1998 working on its CellForce project. (Brilmyer, Tr. 1900). While employed by Microporous, Dr. Brilmyer held the position of Director of Research and Development. (Brilmyer, Tr. 1826). {

}. (Brilmyer, Tr. 1879, *in camera*).

Response to Finding No. 1225:

Complaint Counsel's finding number 1225 is misleading. Brilmyer's knowledge of Daramic is limited as he only worked for Daramic for a few months before resigning. (Brilmyer, Tr. 1825-26).

1226. John "Kevin" Whear is the vice president of technology for Daramic. (Whear, Tr. 4659). Along with product development, Mr. Whear is responsible for knowing how the separators Daramic sells are used, including, "applying the right [separators] to the right applications, and then if the customers are having trouble utilizing our products in their application or problems with the batteries, . . . address[ing] those as well." (Whear, Tr. 4661 (PX0913 at 002)).

Response to Finding No. 1226:

Complaint Counsel's finding number 1226 is incomplete. Before Whear became the vice president of technology for Daramic he began as a process engineer and has since held many positions in manufacturing, quality, and R&D. (Whear, Tr. 4660).

1227. John Craig is the Chairman, President and CEO of EnerSys. He is responsible for all functions within EnerSys. Mr. Craig is knowledgeable about the import and export of batteries by EnerSys. (Craig, Tr. 2549).

Response to Finding No. 1227:

Complaint Counsel's finding number 1227 is incomplete. Craig is responsible for initiating the FTC complaint against Daramic and has shown incredible bias in this matter. *See* RFOF 726-32.

1228. John Pharo Gagge, Jr. is the Senior Director of Engineering and Quality Assurance at EnerSys and has been with the company for 14 years. (Gagge, Tr. 2481). Mr. Gagge oversees all new product design development, troubleshooting of customer problems, warranty issues, designing new applications, developing batteries for new markets, supplier selection and control (including separators), and quality assurance. (Gagge, Tr. 2482-83).

Response to Finding No. 1228:

Complaint Counsel's finding number 1228 is incomplete. Gagge has shown bias against Daramic in this case. *See* RFOF 726-32.

1229. Larry Michael Burkert is the Senior Procurement Manager for EnerSys and reports to Mr. Axt. Mr. *Burkert* has been working in a purchasing role at EnerSys for 13 years and entered his current position in 1996. Mr. *Burkert's* responsibilities include support at a corporate level some of the factories in North America, and then globally responsibility for battery separators. He is responsible for negotiating prices with separator suppliers, including Daramic. Prior coming to EnerSys, Mr. *Burkert* worked at East Penn for two years. Mr. *Burkert* has a bachelor's degree from the University of Pittsburgh in mechanical engineering and a master's degree in mechanical engineering from Penn State. (*Burkert*, Tr. 2308-2310)

Response to Finding No. 1229:

Complaint Counsel's finding number 1229 is incomplete. Burkert has shown bias against Daramic in this case. *See* RFOF 726-32.

1230. Arthur T. Balcerzak began working as a consultant for Crown Battery in 1984-85. (Balcerzak, Tr. 4090). Mr. Balcerzak joined the buyout team in 1998 and became a ~ nine percent owner of Crown Battery while maintaining his consultancy. (Balcerzak, Tr. 4091- 4092).

Response to Finding No. 1230:

Complaint Counsel's finding number 1230 is incomplete. Balcerzak began in the battery industry in 1971. (Balcerzak, Tr. 4089-90). In 1984 Balcerzak went into independent consulting with a number of lead-acid battery related companies, including Trojan Battery, Continental

Battery, Power Batter, Crown Battery, and New Castle Battery. (Balcerzak, Tr. 4090).

Balcerzak's title at Crown has been the Director of Purchasing since 1998. (Balcerzak, Tr. 4091). Though Balcerzak is in semi-retirement, he remains in charge of any and all purchasing issues at Crown. (Balcerzak, Tr. 4092).

1231. Crown Battery sells deep-cycle, motive power and SLI batteries. (Balcerzak, Tr. 4092). Fifty percent of its business is motive power battery sales. (Balcerzak, Tr. 4092).

Response to Finding No. 1231:

Complaint Counsel's finding number 1231 is incorrect and misstated. Fifty percent of Crown's product line is what Crown calls "motive power industrial" which includes forklift batteries and mine equipment batteries. (Balcerzak, Tr. 4092).

1232. Gary Jensen is currently the Director of Engineering for Daramic, with responsibilities for worldwide capital equipment installation. (PX0924 (Jensen, Dep. at 5-6)).

Response to Finding No. 1232:

Respondent has no specific objection but notes that Jensen did not testify at trial.

1233. Steven McDonald became the director of sales fro MPLP in 2002. In that position he was in charge of worldwide sales fro MPLP. (McDonald, Tr. 3781). After the purchase by Polypore, Mr. McDonald became the director of sales for specialty products for the merged firm. (McDonald, Tr. 3782). And eventually Mr. McDonald was promoted to head of sales for the Americas for Daramic. (McDonald, Tr. 3783).

Response to Finding No. 1233:

Complaint Counsel's finding number 1233 is incomplete. *See* RFOF 331.

1234. Larry Trevathan is currently the Vice president of Operations at Daramic. He has responsibilities for worldwide quality and continuous improvement as well. (Trevathan, Tr. 3566). Mr. Trevathan began work at Microporous in November 2004, as Vice President of Operations. (Trevathan, Tr. 3568-3569). As VP of operations, Mr. Trevathan had responsibilities for all manufacturing at Piney Flats facility and had ultimate responsibility for purchasing. (Trevathan, Tr. 3571). After Microporous began its efforts at expansion, Mr. Trevathan was put in charge of the European arm of the expansion as co-managing director of Microporous products GmbH. (Trevathan, Tr. 3572).

Response to Finding No. 1234:

Complaint Counsel's finding number 1234 is incomplete and false. See RFOF 329. There was no "European arm" of Microporous' expansion in Europe. When Microporous began its expansion efforts a separate European entity was established, European Products GmbH. (Trevathan, Tr. 3571-72). Trevathan served as the co-manager of Microporous products GmbH. (Trevathan, Tr. 3572).

1235. Eric Heglie is a principal at Industrial Growth Partners ("IGP"), a private equity firm that makes investments in industrial manufacturing companies. (PX2300 (Heglie, IHT at 7-8)). IGP purchased a controlling interest in Microporous in late 2006. (PX2301 (Heglie, Dep. at 8)). Mr. Heglie was the primary person at IGP involved in the purchase of Microporous. (PX2300 (Heglie, Dep. at 8)). Mr. Heglie served on the board of Microporous along with other IGP people and along with Mike Gilchrist, president of Microporous. (PX2300 (Heglie, IHT at 33-34)). Mr. Heglie was the primary point person at IGP for the Microporous investment. When Microporous management called in to IGP they were mostly speaking to Mr. Heglie. (PX2301 (Heglie, Dep. at 11-12))

Response to Finding No. 1235:

Complaint Counsel's finding number 1235 is inaccurate and incomplete. Heglie was on the board of Microporous along with Wiljhem, three other members of IGP, and one outside board member. (PX2300 (Heglie, IHT at 33)). Because of the investment that they made in Microporous, IGP controlled all capital investments. (PX2300 (Heglie, IHT at 33)).

1236. Mr. Don Wallace is VP of sales and marketing for U.S. Battery manufacturing in Corona, Ca. He has held that position for the last eight years, and has been with the company in different capacities since 1993. (Wallace, Tr. 1927-1928). Mr. Wallace serves on the board of directors for U.S. Battery. (Wallace, Tr. 1928). Mr. Wallace is in charge of domestic and international sales as well as serving on the new product development committee where he assists in the planning and development of new battery products US Battery intends to bring to market. In his capacity as a member of this committee he helps evaluate separators for new batteries. (Wallace, Tr. 1929).

Response to Finding No. 1236:

Respondent has no specific response.

1237. US Battery had revenues of \$160 million in 2008 and \$130 million in 2007. Roughly 80-percent of US Batteries revenues are attributable to the deep-cycle category, and it spent approximately \$8million dollars last year on separators for its deep-cycle products. (Wallace, Tr. 1930-1931).

Response to Finding No. 1237:

Respondent has no specific response.

1238. Exide is the first or second largest battery manufacturer in the world in each market that it participates in. (Gillespie, Tr. 2930). Exide segments its business into two broad categories – transportation and industrial batteries. (Gillespie, Tr. 2930). Exide’s transportation business focuses on starting, lighting and ignition (SLI) batteries such as car and truck batteries. (Gillespie, Tr. 2930). The industrial business is further divided into two categories – motive power (mainly forklift batteries) and network power (backup battery systems). (Gillespie, Tr. 2930-2931).

Response to Finding No. 1238:

Complaint Counsel’s finding number 1238 is inaccurate. Gillespie testified that Exide is the first or second largest battery manufacturer in *various* markets around the world. (Gillespie, Tr. 2930). Exide manufactures lead-acid and lithium-ion batteries. (Gillespie, Tr. 2930).

1239. Mr. Douglas Gillespie is currently employed by Exide Technologies in the role of vice president of global procurement. (Gillespie, Tr. 2926). Mr. Gillespie has been employed by Exide since 2003. (Gillespie, Tr. 2928-2929). Mr. Gillespie has been involved in various procurement roles for over 18 years. (Gillespie, Tr. 2928-2929). As head of procurement at Exide, Mr. Gillespie’s role is to look for opportunities to manage and reduce Exide’s costs. (Gillespie, Tr. 2959). Mr. Gillespie believes that from a procurement prospective, there is an inherent risk in sole-sourcing. (Gillespie, Tr. 2945). Mr. Gillespie has been involved in the procurement of battery separators for his entire employment with Exide. (Gillespie, Tr. 2928-2929). Mr. Gillespie has been involved with negotiations with both Daramic and MPLP on numerous occasions. (Gillespie, Tr. 2929). Mr. Gillespie has been directly involved in managing Exide’s worldwide search for suppliers of battery separators. (Gillespie, Tr. 2929).

Response to Finding No. 1239:

Complaint Counsel’s finding number 1239 is incomplete. {
} (Gillespie, Tr. 3103, *in camera*). {

} (Weerts, Tr. 4483, *in camera*;
Gillespie, Tr. 3021, *in camera*). Despite multiple suppliers in the marketplace, Exide opts to single source their supply.

1240. Robert Cullen is Vice President of Sales and Marketing for the Battery Separator Business Unit of Hollingsworth & Vose (“H&V”). He has served in that capacity since

mid-year 2001, prior to which he was Director of Sales at the company. (PX0917 (Cullen, Dep. at 11, 13), *in camera*).

Response to Finding No. 1240:

Complaint Counsel's finding number 1240 is incomplete. Cullen first took a position with H&V as director of sales in 1996. (PX0917 (Cullen, Dep. at 4)).

1241. Kevin Porter is currently Director of Glass Technology at H&V. He was the Vice President of the Battery Separator Business Unit at H&V from January 1997 through September 2003. He then became Director of Research and Development for both the Battery Separator Business Unit and the Filtration Products Business Unit at H&V until the end of 2006. At that point, he changed positions and took on his current role as Director of Glass Technology. (PX0925 (Porter, Dep. at 9-15), *in camera*).

Response to Finding No. 1241:

Compliant Counsel finding number 1241 is incomplete. {

} (PX0925 (Porter, Dep. at 9), *in camera*). {

} (PX0925 (Porter, Dep. at 9), *in camera*).

{

} (PX0925 (Porter, Dep. at 9), *in camera*).

1242. James W. Douglas is the Executive Vice President of Douglas Battery Manufacturing Company in Winston-Salem, North Carolina. (Douglas, Tr. 4047-4048). Mr. Douglas is not directly involved in purchasing at Douglas Battery. (Douglas, Tr. 4087). Douglas Battery was founded in 1921. Douglas Battery produced SLI batteries through 2005, but exited that market, and now manufactures predominantly motive batteries, coal-mining batteries, and batteries for UPS and telecom. (Douglas, Tr. 4048).

Response to Finding No. 1242:

Complaint Counsel's finding number 1242 is false. Douglas, in his role as Executive Vice President of Douglas battery oversaw the entire company. The purchasing department reported to Mr. Chuck Burkhardt. (Douglas, Tr. 4087). Burkhardt reported directly to the Managing Committee, which includes both Douglas and Burkhardt. (Douglas, Tr. 4087).

1243. Guy Dauwe is currently the Managing Director at Amer-Sil. He has held that position since 2006. (PX0916 (Dauwe, Dep. at 8)). As the Managing Director, Mr. Dauwe is the head of Amer-Sil and is responsible for sales and marketing strategies and pricing strategy and policies. (PX0916 (Dauwe, Dep. at 9)). Mr. Dauwe was Amer-Sil's

Executive Vice-President of Sales and Marketing from April 2005 until he became the Managing Director. (PX0916 (Dauwe, Dep. at 8-9)).

Response to Finding No. 1243:

Respondent has no specific response but notes that Dauwe did not testify at trial.

1244. Mr. James Kung has been designing and building PE separator manufacturing lines for many years and has more experience with the process than anybody else in the world. (PX0907 (Kung, Dep. at 57), *in camera*). Mr. Kung is a member of the BFR board of directors, and was involved in building all four of their production lines. (PX0907 (Kung Dep. at 59-61), *in camera*). Mr. Kung plans on { } PX0907 (Kung Dep. at 92), *in camera*).

Response to Finding No. 1244:

Complaint Counsel's finding number 1224 is misleading. James Kung has been cited for a number of findings including the foregoing finding number 830. James Kung is totally unreliable as support for any finding. First, James Kung has substantial bias against Daramic:

- Kung { } (PX0184 at 002; PX0273 at 009, *in camera*; PX0990 at 018; PX1510 at 002, *in camera*; PX0907 (Kung, Dep. at 155), *in camera*).
- Kung asked JCI's Hall, "[W]hat I should say for this [Polypore/ Microporous] acquisition." (sic) (RX00022).
- Kung { } (PX1521 at 002, *in camera*; PX0907 (Kung, Dep. at 296), *in camera*).
- { } (PX1510 at 002, *in camera*). { } (PX1510 at 002, *in camera*).
- Kung { } (PX1521 at 002, *in camera*).

Most importantly, Kung is demonstrably not truthful. In his deposition on January 26, 2009, Kung was asked about responding to a request from EnerSys for a proposal to produce industrial separators. Kung responded that the request was not considered by the BFR Board of Directors. (PX0907 (Kung, Dep. at 263), *in camera*). Kung went on to repeat in response to

several questions that the EnerSys proposal was not discussed at a BFR Board meeting. (E.g., PX0907 (Kung, Dep. at 295-296), *in camera* (“We have no chance to make this material. So we don’t need to discuss that.”)). In direct contradiction of Kung’s testimony, Rodger Hall of JCI testified that the BFR Board had directed Kung to move forward with EnerSys on an industrial separator project and that the BFR Board had approved moving forward with the project. (Hall, Tr. 2849-52, *in camera*). The record evidence is clear that EnerSys and BFR are in discussions about BFR supplying separators to EnerSys. (FOF 689, 991, 992; RX00059, *in camera*; RX00060, *in camera*; RX00204; Burkert, Tr. 2441, *in camera*; Gagge, Tr. 2513, *in camera*; Axt, Tr. 2218, 2270, *in camera*). Kung, under oath, simply decided to lie about those discussions. Accordingly, his deposition testimony cannot be accepted as reliable.

Furthermore, it is Kung’s opinion, and therefore not fact, that he has more experience with separator lines than anyone else in the whole world. There are many other qualified people who are able to build separator lines. (Gagul, Tr. 4548). Additionally Kung’s retirement is uncertain as he stated that he thought he would retire in June of this year but has not done so, thus his retirement plans are indefinite.

1245. EnerSys is a global manufacturer of industrial batteries. (Axt, Tr. 2097). EnerSys is broken up into three businesses: (1) motive power, consisting mainly of electric forklift batteries; (2) reserve power, consisting of UPS battery backup, specialty battery backup, telecom and utilities; and (3) aerospace and defense, consisting mainly of batteries that go into submarines, tanks, in addition to fighter jets and cargo aircraft. (Axt, Tr. 2097). EnerSys is the largest industrial battery manufacturer in the world, with plants in North America, Europe, and Asia. (Axt, Tr. 2115-16). EnerSys produces batteries for both motive and UPS applications. (Axt, Tr. 2097). EnerSys produces 38 - 40 percent of the motive batteries in the North American market. (Axt, Tr. 2226).

Response to Finding No. 1245:

Complaint Counsel’s finding number 1245 is incorrectly cited. EnerSys is the largest industrial battery manufacturer in the world, with plants in North America, Europe, and Asia. (Axt, Tr. 2228).

1246. Larry Axt has been the Vice president of Global Procurement at EnerSys for 9 years. (Axt, Tr. 2097). Mr. Axt is responsible for all global procurement of raw materials and finished goods in addition to indirect material, and capital equipment. (Axt, Tr. 2097-98). His responsibilities include selection of suppliers, negotiations, and supplier performance management. (Axt, Tr. 2098). Mr. Axt is responsible for supporting EnerSys factories with separators, and he handles the selection and negotiations of separator suppliers. (Axt, Tr. 2097).

Response to Finding No. 1246:

Complaint Counsel's finding number 1246 is incomplete. Axt has shown bias against Daramic in this case. See RFOF 726-732.

1247. Mr. Mitchell Bregman is currently employed by Exide technologies in the role of president of Exide's industrial Americas division. (Bregman, Tr. 2898, *in camera*). In early 2007, Mr. Bregman was head of Exide's Global Purchasing council; a council of Exide's senior purchasing people from each division who coordinated global purchasing activities. (Bregman, Tr. 2898-2899, *in camera*). At that time, Mr. Bregman and Mr. Gillespie were responsible for negotiating With Daramic on Exide's behalf. (Bregman, Tr. 2924-2925, *in camera*).

Response to Finding No. 1247:

Complaint Counsel's finding number 1247 is incomplete. The evidence raises questions of credibility about Exide's intent (RFOF 527, 538, 550, 601), and Bregman's testimony on this issue should be disregarded.

1248. Rodger Hall is the global vice president for procurement at Johnson Controls Power Solutions ("JCI"). (Hall, Tr. 2662). Mr. Hall's responsibilities include the procurement of all purchased materials at JCI, including the purchase of PE separators. (Hall, Tr. 2663-2664). Mr. Hall is also in charge of JCI's global separator strategies. (Hall, Tr. 2664). Under Mr. Halls' leadership, JCI developed a separator sourcing strategy. (Hall, Tr. 2668). Mr. Hall sits on the board of BFR. As a board member, Mr. Hall is familiar with the cost structure of BFR because he reviews financial summaries of BFR. (Hall, Tr. 2716). In addition to Mr. Hall, JCI has one other member of the BFR board. (Hall, Tr. 2716). This person acts as { } (Hall, Tr. 2847, *in camera*).

Response to Finding No. 1248:

Complaint Counsel's finding number 1248 is incomplete. { } ((Hall, Tr. 2825, *in camera*; RX00037-02, *in camera*); RX00032, *in camera*). {

} (Hall, Tr.

2847, *in camera*).

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

DOCKET NO. 9327

**IN THE MATTER OF
POLYPORE, INTERNATIONAL, INC.**

**COMPLAINT COUNSEL'S
PROPOSED CONCLUSION OF LAW**

1. The Federal Trade Commission ("FTC") has jurisdiction over the subject matter of this proceeding and over Respondent Polypore International, Inc. ("Daramic" or "Respondent"), pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21(b).

Response to Conclusion of Law No. 1:

Respondent has no specific response to this conclusion of law.

2. The FTC has jurisdiction pursuant to Section 11 of the Clayton Act, 15 U.S.C. § 21, to bring this administrative proceeding against the Daramic/Microporous merger.

Response to Conclusion of Law No. 2:

Respondent has no specific response to this conclusion of law.

3. Daramic is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

Response to Conclusion of Law No. 3:

Respondent has no specific response to this conclusion of law.

4. Respondent was engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and affected commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Response to Conclusion of Law No. 4:

Respondent has no specific response to this conclusion of law.

5. Microporous was engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and affected commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Response to Conclusion of Law No. 5:

Respondent has no specific response to this conclusion of law.

6. The FTC is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act and Section 5 of the FTC Act. 15 U.S.C. § 21(a) and §45(a)(2).

Response to Conclusion of Law No. 6:

Respondent has no specific response to this conclusion of law.

7. On February 29, 2008, Daramic acquired Microporous Products L.P., ("Microporous"). The acquisition of Microporous ("the Acquisition") is a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Conclusion of Law No. 7:

Respondent has no specific response to this conclusion of law.

8. Section 7 of the Clayton Act prohibits any acquisition of stock or assets "where in any line of commerce... in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18.

Response to Conclusion of Law No. 8:

Respondent has no specific response to this conclusion of law.

9. Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result at the time of the acquisition by one corporation of all or any part of the stock of any other corporation. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

Response to Conclusion of Law No. 9:

This quote from the *du Pont* case, taken alone, is misleading and incomplete because it suggests that a judgment about the competitive effects of a merger or acquisition can be made quickly and without careful examination of the facts of the industry. Elsewhere in the *du Pont* opinion, the Court clarified its meaning. For example, as regards the word "incipiency," the

Court said that it “denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect.” And it said that “the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.” *E.I. du Pont de Nemours & Co.*, 353 U.S. at 597. The Court also made it clear that it would not rush into such findings, stating that “[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’” *E.I. du Pont de Nemours & Co.*, 353 U.S. at 593. Later, the Court pointed out that “[t]he market affected must be substantial” and that, “in order to establish a violation of § 7 [of the Clayton Act] the Government must prove a likelihood that competition may be ‘foreclosed in a substantial share of . . . [that market].’” *E.I. du Pont de Nemours & Co.*, 353 U.S. at 595. Seventeen years later in *United States v. General Dynamics Corp.*, 94 S. Ct. 1186, 1194 (1974), the Supreme Court’s most recent merger decision, the Court quoted from its decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38 (1962) to make the point that a careful examination of the market is required to assess the competitive impact of a merger or acquisition. The Court in *Brown Shoe* said: “Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger.” 370 U.S. at 322 n. 38. Moreover, in *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990), the court said, “The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.”

10. A *prima facie* violation of Section 7: (1) the “line of commerce” or product market; (2) the “section of the country” or geographic market; and (3) the transaction’s probable effect on concentration in the product and geographic markets. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

Response to Conclusion of Law No. 10:

This proposed conclusion is faulty because, as worded, it is not a conclusion of law but four unconnected phrases. In addition, it erroneously suggests that a *prima facie* case can be made regardless of the level of concentration involved in the relevant product and geographic markets. The cases cited, however, say that “[b]y showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.” *Baker Hughes Inc.*, 908 F.2d at 982. Or alternatively, “sufficiently large HHI figures establish the FTC’s *prima facie* case that a merger is anticompetitive.” *H.J. Heinz Co.*, 246 F.3d at 716. In *University Health*, the court said that the FTC had established a *prima facie* case by showing that the “proposed acquisition would significantly increase the concentration of an already highly concentrated market.” 938 F.2d at 1219. Of course, as the *Baker Hughes* court states explicitly and the *Heinz* and *University Health* courts state implicitly, the FTC, in order to show “undue concentration,” must first prove its relevant product and geographic markets. And establishment of a *prima facie* case does not get the FTC completely off the hook because the respondent’s rebuttal case may return the matter to the FTC and impose upon it “the burden of producing additional evidence of anticompetitive effect[s],” a burden that “merges with the ultimate burden of persuasion, which remains with the government at all times.” *Baker Hughes Inc.*, 908 F.2d at 983.

11. Finding a *prima facie* violation of Section 7 creates a rebuttable presumption of anticompetitive effects and shifts the burden of going forward with evidence to Respondent. Respondent have the burden of producing evidence that shows that the market share statistics supporting the *prima facie* case give an inaccurate account of the

Acquisition's probable effects on competition. *Baker Hughes*, 908 F.2d at 982-83; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998).

Response to Conclusion of Law No. 11:

The language of this proposed finding, standing alone, is misleading, first, because it suggests that market share data alone plays a more definitive role than is supported by the judicial decisions and, second, because it suggests that the only defense available to respondent is to show that the market share data is erroneous. In further response to this conclusion of law, Respondent references and incorporates its response to proposed conclusion of law number 10. In addition, the *Baker Hughes* court described the proper role of market concentration data when it said that “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.” *Baker Hughes Inc.*, 908 F.2d at 984. The court also said, “It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case.” *Baker Hughes Inc.*, 908 F.2d at 984. The court also cited three cases characterizing them as cases where defendants had successfully rebutted the prima facie case by showing that the acquired company either had a “weak competitive stature” (*Baker Hughes Inc.*, 908 F.2d at 984; citing *General Dynamics Corps.*, 415 U.S. at 503-04); “deteriorating market position both before and after acquisition” (*Baker Hughes Inc.*, 908 F.2d at 985; citing *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981); or “financial weakness” (*Baker Hughes Inc.*, 908 F.2d at 984; citing *United States v. International Harvester Co.*, 564 F.2d 769, 773-79 (7th Cir. 1977).

12. The appropriate lines of commerce within which to evaluate the probable competitive effects of the Acquisition are separators for flooded lead-acid batteries in the following markets: (1) deep-cycle; (2) motive; (3) Automotive (“SLP”); and (4) uninterruptable power supply stationary (“UPS”).

Response to Conclusion of Law No. 12:

This proposed conclusion of law is false because the product markets listed are not the “appropriate lines of commerce within which to evaluate the probable competitive effects of the

Acquisition.” By way of further response to this proposed conclusion of law, Respondent refers the Court to its proposed findings of fact and conclusions of law (“RFOFCOL”) numbers 39-139.

13. The appropriate geographic area within which to evaluate the probable competitive effects of the Acquisition is North America.

Response to Conclusion of Law No. 13:

This proposed conclusion of law is false because North America is not the “appropriate geographic area within which to evaluate the probable competitive effects of the Acquisition.” By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL numbers 186-223.

14. “Market shares which companies may control by merging is one of the most important factors to be considered” when analyzing the likely effects of a merger. *Brown Shoe Co. Inc., v. United States*, 370 U. S. 294, 343 (1962). A merger that significantly increases market shares and market concentration beyond already high levels is so inherently likely to lessen competition substantially that it is presumptively unlawful under Section 7 of the Clayton Act. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (U.S. 1963); *Baker Hughes*, 908 F.2d at 982-83; PPG, 798 F.2d at 1502-03; *Cardinal Health*, 12 F. Supp. 2d at 52 (“under Section 7 of the Clayton Act, a *prima facie* case can be made if the government establishes that the merged entities will have a significant percentage of the relevant market - enabling them to raise prices above competitive levels”).

Response to Conclusion of Law No. 14:

This proposed conclusion is faulty for the same reasons proposed conclusion number 11 is faulty. In response to this conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 10 and 11.

15. The Herfindahl-Hirschman Index (“HHI”) is an appropriate measure of market concentration. *E.g., University Health*, 938 F.2d at 1211 n.12 (HHI is “most prominent method” of measuring market concentration); *FTC v. Staples*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997); *Ivaco*, 704 F. Supp. at 1419.

Response to Conclusion of Law No. 15:

This proposed conclusion of law is faulty, first, to the extent that it fails to state that the HHI cannot be developed or applied until the relevant product and geographic markets have been

properly defined and, second, to the extent that it fails to state that the courts have been skeptical of market share calculations standing alone. In response to this conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 9, 10 and 11. As is pointed out in response to proposed conclusion of law number 9, the Supreme Court in *Brown Shoe* stated that while market statistics are important, “only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger.” 370 U.S. at 322 n.38. And, in *General Dynamics*, the Court pointed out an important limitation of market share and concentration data by saying, “[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company’s future ability to compete.” 415 U.S. at 498. The *Baker Hughes* court was also critical of the concept that plaintiff can establish a prima facie case simply by putting HHI numbers on the table, leaving it to the defendant to disprove the remainder of the potential allegations in the case. 908 F.2d at 986. The court said, “[t]he government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.” *Baker Hughes Inc.*, 908 F.2d at 992.

16. Complaint Counsel established its *prima facie* case by showing that the Acquisition produces a firm controlling a percentage share and HHI concentration levels in each of the four relevant markets that make the merger inherently likely to lessen competition substantially, which means that the merger is presumptively unlawful under Section of 7 of the Clayton Act. *Brown Shoe*, 370 U.S. at 343.

Response to Conclusion of Law No. 16:

This proposed conclusion is false because Complaint Counsel have improperly defined the relevant product markets and the geographic market. The proposed conclusion is also false

as to the alleged SLI market for the additional reason that, even if it were a proper product market, the acquisition did not increase Daramic's market share since Microporous was not a participant in that market. {

} The proposed conclusion is false as to the alleged deep cycle market because the acquisition did not significantly increase Daramic's market share over the market share held by Microporous prior to the acquisition. By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL numbers 39-139, 186-223 and 1422-34.

17. Complaint Counsel established that Daramic and Microporous were the number one and two competitors in the deep-cycle, motive, and UPS markets and that no other company provides effective competition. Complaint Counsel established that Microporous was at least the third best alternative for customers in the SLI market. The acquisition of Microporous by Daramic significantly increased concentration in the relevant product markets in North America, and resulted in highly concentrated markets.

Response to Conclusion of Law No. 17:

This proposed conclusion of law is false for the same reasons proposed conclusion of law number 16 is false. In further response to this conclusion of law, Respondent incorporates herein its response to proposed conclusion of law number 16. This proposed conclusion of law is also false because Microporous was not the third best alternative or any alternative source of supply for customers in the SLI market. In 2005, Microporous made one sale of sample SLI separators to Voltmaster. This had been a sample run for JCI, which refused the product. Thereafter, Microporous was able to sell it to Voltmaster. The facts pertinent to this one sale are summarized in Respondent's Response to Complaint Counsel's Findings of Fact numbers 547 and 551. By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL numbers 366-67, 372-95, 413-20, 486-90, 574-82 and 780-81.

18. Having established a *prima facie* case, the burden of production and proof shifts to the defendants to rebut this presumption of anticompetitive harm. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (U.S. 1974); *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83. “The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.” *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). Respondent has not demonstrated that the market share statistics give an inaccurate prediction of the Acquisition's probable effects on competition. “To meet their burden, the defendants must show that the market-share statistics . . . ‘give an inaccurate prediction of the proposed acquisition’s probable effect on competition.’” *Cardinal Health*, 12 F. Supp. 2d at 54 (quoting *Staples*, 970 F. Supp. at 1083); see *Baker Hughes*, 908 F.2d at 991.

Response to Conclusion of Law No. 18:

This proposed finding is false for the same reasons proposed conclusions of law numbers 16 and 17 were false, *i.e.*, it rests upon improper definitions of the relevant product markets and the geographic market. It is also false for other reasons stated in response to proposed conclusions of law numbers 16 and 17. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law 16 and 17. This proposed conclusion of law is also misleading for the same reasons proposed conclusion of law number 11 is misleading. By way of further response to this proposed conclusion of law, Respondent incorporates herein its response to proposed conclusion of law number 11. Even assuming, *arguendo*, that Complaint Counsel had established a *prima facie* case, this proposed conclusion of law is false because evidence presented by Respondent at the hearing shows that the market share statistics proffered by Complaint Counsel give an inaccurate description of the acquisition’s probable effect on competition. By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL numbers 39-139, 186-223, 273-314, 338-1122, 1159-1398, and 1422-72. Respondent further responds to this proposed conclusion of law by noting that where, as here, the *prima facie* case is not strong, even assuming, *arguendo*, that it has been established, “less of a showing is required from defendants

to rebut a less-than-compelling prima facie case.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 129, 158 (D.C. Cir. 2004).

Respondent further responds to this proposed conclusion of law by noting the *Baker Hughes* description of the change in the burden on defendants and respondents to counter the prima facie case. The court noted that in *General Dynamics*, the Supreme Court dramatically departed from its earlier decisions by abandoning any requirement that the defendant must “clearly disprove anticompetitive effect, and instead describ[ing] the rebuttal burden simply in terms of a ‘showing.’” *Baker Hughes Inc.*, 908 F.2d at 991. The *Baker Hughes* court observed that in *General Dynamics*, the court “at the very least lightened the evidentiary burden on a section 7 defendant.” 908 F.2d at 991.

19. Respondent may rebut the *prima facie* case by demonstrating that entry by other firms would likely avert the Acquisition’s probable effects on competition by acting as a constraint on Daramic’s exercise of market power. For entry to rebut the presumption of anticompetitive effects, the evidence must show not merely that a firm might enter, but that “entry into the market would likely avert anticompetitive effects from [the] acquisition.” *Staples*, 970 F. Supp. at 1086 (quoting *Baker Hughes*, 908 F.2d at 989).

Response to Conclusion of Law No. 19:

Even assuming, arguendo, that Complaint Counsel have established a prima facie case, this proposed conclusion of law is misleading because it suggests that the Respondent can rebut that case *only* by demonstrating that there are no substantial barriers to entry in the industry or that new entry would offset any alleged anticompetitive effects. *Baker Hughes*, itself, is a treatise on the impropriety of the government in that case arguing that the defendant could rebut the government’s prima facie case *only* “by a clear showing that entry into the market by competitors would be quick and effective.” 908 F.2d at 983. The court rejected both the “clear showing” and “quick and effective” claims and pointed out that the many factors that can be used to rebut a prima facie case. *Baker Hughes*, 908 F.2d at 988-90. In addition to entry, these include a showing that the acquired firm was in financial difficulty or would otherwise have been

a weak competitor. *See supra* cases discussed above in response to proposed conclusion of law number 11. Another factor that may rebut the prima facie case approved in *Baker Hughes* is a showing that the industry has sophisticated customers and the finding by the lower court that “[t]his sophistication . . . was likely to promote competition even in a highly concentrated market.” 908 F.2d at 986. Many other factors were noted by the court, including the prospect of efficiencies, excess capacity in the industry, financial condition of firms in the market (Guidelines § 3.22) and changing market conditions (Guidelines § 3.21).

All of the factors have been demonstrated by Respondent in this case: ease of entry (RFOFCOL numbers 1061-1122); Microporous was in financial difficulty at the time of the acquisition (RFOFCOL numbers 295-305, 421-29); the industry is characterized by sophisticated customers (RFOFCOL numbers 344-53, 438-680, 1332-33); Daramic has achieved efficiencies since the acquisition (RFOFCOL numbers 273-76, 430-37, 1308, 1315, 1384-85, 1466-68); there is substantial excess capacity in the industry (RFOFCOL numbers 277-94, 425, 428, 943-45, 1053, 1108, 1112-13, 1331, 1370); many firms in the industry are in poor financial condition (RFOFCOL numbers 277-94, 428, 1053, 1108, 1112-13); all aspects of the battery separator market have been severely and adversely affected by the current economic recession (RFOFCOL numbers 277-94, 428, 943-45, 1331, 1370).

20. Entry must be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of a merger. *Merger Guidelines* § 3.0; *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 427-429 (5th Cir. 2008); *see also Cardinal Health*, 12 F. Supp. 2d at 55-58 (adopting “timely, likely, and sufficient” test). In order for entry to be sufficient to restore competition, it must be entry that replaces the competition that existed prior to the acquisition and such entrants must be profitable at pre-merger prices. Even a showing of actual entry is insufficient to alleviate concern, unless that entry also indicates the likelihood of sufficient growth by the entrant to deter or counteract the anticompetitive effects of the merger. *Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1067 (2005) (noting “new entrants and fringe competitors” might not replace lost competition), *aff’d sub nom. Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *see also United Tote*, 768 F. Supp. at 1082 (“entry . . . would not constrain anti-competitive price increases by incumbents”). Respondent has offered no evidence to satisfy these requirements, and specifically have offered no evidence that any

alleged entrant will enter the relevant product markets in the North America within two years, be profitable at pre-merger prices, and fully replace Microporous as a competitive force.

Response to Conclusion of Law No. 20:

This proposed conclusion of law is faulty. The standard proposed here is inconsistent with the standard proposed in Complaint Counsel's proposed conclusions of law numbers 19 and 21. As Complaint Counsel acknowledge, that standard, drawn from *Baker Hughes*, provides that entry would be sufficient to rebut the prima facie case if it would "likely avert [the] anticompetitive effects from [the] acquisition." *Baker Hughes Inc.* at 989; *Staples*, 970 F. Supp. at 1086. Nor have the courts adopted any requirement that entry must be profitable at pre-merger prices. The court in *Chicago Bridge & Iron Co.*, 534 F.3d at 428, held that the FTC applied the correct standard when it inquired whether new entrants would be sufficient to counteract supracompetitive pricing "if supracompetitive pricing existed." (Emphasis in original).

This proposed conclusion of law is also false in its factual recitation because Respondent has offered evidence to show that new entry would occur and has occurred on a timely basis and that it would fully replace Microporous as a competitive force. By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL numbers 1061-1122, 1242-51 and 1378-83.

21. Respondent has not demonstrated that actual or potential entrants constrain Daramic's exercise of market power. Due to high barriers, entry by new manufacturers or the expansion of existing manufacturers is not likely to avert the anticompetitive effects of the Acquisition in the relevant markets.

Response to Conclusion of Law No. 21:

The factual component of this proposed conclusion of law is false as is explained in the second paragraph of Respondent's response to proposed conclusion of law number 20.

Respondent incorporates herein that portion of its response to proposed conclusion of law number 20.

22. Respondent has not presented an efficiencies defense in support of the merger.

Response to Conclusion of Law No. 22:

This proposed conclusion of law is false since Respondent has produced evidence showing that several efficiencies implemented since the acquisition of Microporous have served to lower production costs at the Piney Flats plant thereby serving to increase output at the plant, lower prices and benefit consumers. This evidence also shows that, before the acquisition, Microporous was a high cost producer whose loss would not result in an adverse effect on competition. By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL 273-76, 430-37, 1315 and 1384-85 and 1466-68.

23. Respondent has not produced any significant evidence rebutting the presumption of a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Because Respondent did not produce evidence sufficient to rebut the presumption of a violation of Section 7 of the Clayton Act, the burden of producing further evidence of anticompetitive effects did not shift to Complaint Counsel.

Response to Conclusion of Law No. 23:

Complaint Counsel's proposed conclusions of law numbers 23 through 29 are interconnected and/or duplicative, and will be answered, in part, with this "centralized" response. Complaint Counsel failed to make a prima facie case because, among other things, they failed to show proper product and geographic markets. In proposed conclusion of law number 24 Complaint Counsel refer to "actual anticompetitive effects" although they make no claim that such effects were shown. In proposed conclusions of law numbers 25 through 27 and 29, Complaint Counsel refer to likely anticompetitive effects. In proposed conclusion of law number 28, Complaint Counsel merely refer to "anticompetitive effect" with no indication whether they intend to refer to actual or likely anticompetitive effects.

Proposed conclusion of law number 23 is false because Respondent, in fact, produced significant evidence rebutting the presumption, even assuming arguendo that any such presumption was created, of a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. This evidence consisted of showings (1) that in the worldwide PE separator market, Microporous was a fringe, high cost player whose acquisition by Daramic failed to threaten competition and did not provide Daramic with any market power or enhance any alleged Daramic market power (RFOFCOL 273-76, 314, 319, 340-43, 421-29, 1308, 1384-85); (2) that entry barriers into the industry are low, actual entry has occurred and additional entry would offset any alleged anticompetitive effects (RFOFCOL 1061-1122, 1308, 1378-83); (3) {

} (RFOFCOL 344-53, 438-680, 1332-33); (4) that efficiencies that have been implemented since the acquisition have lowered the costs of production at the Piney Flats plant and have demonstrated that Microporous was a high cost producer lacking any ability to enhance competition (RFOFCOL 273-76, 430-37, 1308, 1315, 1384-85, 1466-68); (5) that Microporous at the time of the acquisition was in precarious financial condition and very likely would not have been able to continue in business if the acquisition had not occurred and, at a minimum, would have survived only as an inconsequential entity (RFOFCOL 295-305, 421-29).

Proposed conclusion of law number 25 is false because Complaint Counsel failed to show either that Daramic has increased prices unilaterally or that the acquisition increased the likelihood of its increasing prices unilaterally. Respondent produced evidence showing (1) that Daramic has not increased prices following the acquisition or that any price increases have not been out of line with pre-acquisition price increases or have been cost justified, that any price

increases have not increased profit margins compared to what they were prior to the acquisition and that any price increases have not been the result of any additional Daramic market power that resulted from the acquisition (RFOFCOL 240-57, 278-305, 344-53, 556-62, 590-96, 623-35, 770-76, 1308, 1373-77); (2) {

} (RFOFCOL 926-76); and (3) that Complaint Counsel's economist expert's testimony regarding post-acquisition price increases was defective and unreliable. (RFOFCOL 1373-77).

Proposed conclusion of law number 26 is false because Complaint Counsel failed to show any actual coordinated anticompetitive effects through tacit or express collusion or the greater likelihood of such effects as a result of the acquisition. Respondent produced evidence showing (1) {

} (2) that the alleged SLI market involves complex pricing and other marketing issues that are negotiated with customers on a one-on-one basis that prevent rivals from knowing the terms of the transactions; (3) that the result of these factors is that rivals would be unable to reach profitable terms of coordination, unable to detect violations of such terms and unable to punish any such violations; (4) that these negotiations are with sophisticated customers who can easily act to prevent any price coordination by the sellers; (5) that the low barriers to entry into this market segment operate as a major deterrent to coordinated interaction; and (6) {

}. By way of further response to this proposed conclusion of law,

Respondent refers the Court to RFOFCOL 263-64, 306-11, 336, 366-68, 372-85, 474-90, 583-89, 926-76, 1368-69 and 1370 {

}; RFOFCOL

344-53, 438-680, 1332-33 (sophisticated customers); RFOFCOL 1061-1122, 1308, 1378-83 (low barriers to entry).

By way of further response to this proposed conclusion of law, Respondent refers the Court to RFOFCOL 39-139, 186-223, 273-314, 338-1122, 1159-1398, and 1422-72 and incorporates herein its responses to proposed conclusions of law numbers 16-22.

24. Although Complaint Counsel is not required to prove the existence of actual anticompetitive effects resulting from the merger, such evidence, either in the form of unilateral post merger price increases or coordinated interaction, negates any attempt to rebut the FTC's *prima facie* case, and independently establishes a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Conclusion of Law No. 24:

This proposed conclusion of law is irrelevant since Complaint Counsel have not proved actual anticompetitive effects resulting from the merger, of any kind. Moreover, otherwise in these proposed conclusions of law Complaint Counsel make no claim that such actual effects have been proved. *See, e.g.*, proposed conclusions of law numbers 25-27, which merely refer to the likelihood of anticompetitive effects and proposed conclusion of law number 28, which merely refers to "anticompetitive effects" without indicating whether the reference is to likely or actual anticompetitive effects. Moreover, this proposed conclusion of law is faulty because it fails to make the point that any alleged unilateral post merger prices increases and/or coordinated interaction were such that would not have occurred but for the acquisition and were there caused by the acquisition. This proposed conclusion of law is also erroneous as a matter of law because it fails to acknowledge that, pursuant to Section 7 of the Clayton Act, any actual anticompetitive

effect would be required to entail a “substantial [lessening of] competition.” By way of further response to this proposed conclusion of law, Respondent incorporates herein its response to proposed conclusion of law number 23.

25. The Acquisition is likely to increase Daramic’s ability to raise prices unilaterally in the relevant markets because the Acquisition eliminates competition from Microporous, Daramic’s closest and only competitor in the deep-cycle, motive, and UPS markets, and eliminates a third competitor in the SLI market.

Response to Conclusion of Law No. 25:

The factual allegations contained in this proposed conclusion of law are false. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusion of law numbers 17 and 23.

26. The acquisition is likely to give rise to coordinated anticompetitive effects through tacit or express collusion. Section 7 of the Clayton Act seeks to prohibit excessive concentration, and the oligopolistic price coordination it portends. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and raise price. *See Heinz*, 246 F.3d at 724-25; *University Health*, 938 F.2d at 1218 n.24.

Response to Conclusion of Law No. 26:

The factual component of this proposed conclusion of law is false since the acquisition is not likely to give rise to coordinated anticompetitive effects through tacit or express collusion. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 23 and 27.

The legal component of this proposed conclusion of law is faulty because it is overly simplistic. The relevant legal authorities do not hold that coordinated interaction will always occur in industries where rivals are few. According to the *Commentary on the Merger Guidelines*, “Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group; (2) to have a means to detect deviations that would undermine the coordinated interaction; and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of

deviations It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade.” *Commentary on the Horizontal Merger Guidelines* at 18-19. Moreover, the presence of sophisticated customers in markets involving infrequent purchases, long-term contracts and bidding can frequently prevent coordinated interaction. In *Baker Hughes Inc.*, the court pointed to sophisticated buyers purchasing expensive equipment using “multiple, confidential bids for each order.” 908 F.2d at 986. The court there said that “[t]his sophistication . . . was likely to promote competition even in a highly concentrated market.” *Baker Hughes Inc.*, 908 F.2d at 986; ABA Section of Antitrust Law, *Mergers and Acquisitions* at 159-60 (3d ed. 2008) (“Courts have recognized that evidence that a small number of buyers purchase most of the product in the market indicates that sellers may not have a great deal of freedom in establishing prices and thus may be less likely to adhere to a collusive agreement. Sophisticated buyers are more likely to detect collusion and offer sellers large orders to induce defections from the agreement or to vertically integrate.”); *FTC v. Elders Grain*, 868 F.2d 901, 905 (7th Cir. 1989) (sophisticated buyers may cause sellers to cheat on any price agreement); *FTC v. R.R. Donnelley & Sons Co.*, Civ. No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361, at *10 (D.C. Cir. 1990) (“[T]he sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction.”).

27. Complaint Counsel need not show a likelihood of explicit collusion. A merger violates Section 7 of the Clayton Act if the remaining firms will be more likely to engage in conduct that is likely to result in higher prices, even if that conduct, in itself, would be entirely lawful. *Alcoa*, 377 U.S. at 280. Section 7 seeks to prevent a market structure that enhances the ability to engage in both explicit and tacit collusion. Absent extraordinary circumstances, a merger that results in an increase in concentration above certain levels “raise[s] a likelihood of ‘interdependent anticompetitive conduct.’” *PPG Indus.*, 798 F.2d at 1503 (quoting *Gen. Dynamics*, 415 U.S. at 497; see also *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 n. 24 (11th Cir.1991) (high concentration makes it “easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level”). The relative lack of competitors eases coordination of actions,

explicitly or implicitly, among the remaining few to approximate the performance of a monopolist.

Response to Conclusion of Law No. 27:

This proposed conclusion of law is irrelevant to this case because it can have application only to the alleged SLI market where the acquisition had no effect on market concentration since Microporous was not a participant in that market. In addition, this proposed conclusion of law is highly misleading because it fails to acknowledge other industry factors that may operate to offset the likelihood of coordination, whether explicit or tacit. Such factors include (1) the ability of rivals to reach terms of coordination that are profitable; (2) their ability to detect violations and (3) to impose punishment when violations occur. *Commentary on the Horizontal Merger Guidelines* at 18-19 (2006). Many other factors can have a major impact on the ability of firms even in highly concentrated industries to coordinate their conduct. For example, if, as in the alleged SLI market, firms negotiate substantial contracts one-on-one with large customers, the results of those negotiations may remain hidden, depriving competing firms of the ability to know whether any explicit or implicit understandings have been adhered to. That problem is exacerbated if the contract terms are likely to involve a complex array of prices and other factors. Another important issue is whether the coordination pertains to price or to another element of competition. An FTC theory of coordinated interaction was rejected in *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.C. Cir. 2004) where the claim was that the coordination would not relate to price but to levels of output. It is also recognized that coordinated interaction is less likely in industries, such as the alleged SLI market, which involves differentiated as opposed to homogenous products. Ease of entry, as here, is a major deterrent to coordinated interaction since anticompetitive outcomes can be readily challenged by new entrants. Finally, and importantly, sophisticated customers frequently operate as another major deterrent to seller coordination.

By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 23 and 26.

28. Complaint Counsel has offered substantial evidence of anticompetitive effects resulting from the merger, any of which would independently mandate a finding against Respondent as a matter of law.

Response to Conclusion of Law No. 28:

This proposed conclusion of law is false because Complaint Counsel have failed to offer substantial evidence of anticompetitive effects, either likely or actual, and assuming, arguendo, that any such evidence has been offered, it has been refuted by substantial evidence offered by Respondent. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 23-27.

29. The Acquisition violates Section 7 of the Clayton Act because "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. The Acquisition also constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

Response to Conclusion of Law No. 29:

This proposed conclusion of law is false. Complaint Counsel have failed to show that the acquisition violates either Section 7 of the Clayton Act or Section 5 of the FTC Act. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 9-28.

30. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2008).

Response to Conclusion of Law No. 30:

Respondent has no specific response to this conclusion of law.

31. Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

Response to Conclusion of Law No. 31:

Respondent has no specific response to this conclusion of law.

32. Prior to the Acquisition, Daramic engaged in agreements, contracts or combinations with other entities that constituted unfair methods of competition in violation of Section 5 of the FTC Act.

Response to Conclusion of Law No. 32:

This proposed conclusion of law is false. Although no agreement, contract or combination is identified, Daramic engaged in no such contract, combination or agreement that constituted unfair methods of competition in violation of Section 5 of the FTC Act.

33. To meet its burden of proof under Count II of the Complaint, Complaint Counsel must establish three elements: 1) the existence of a contract, combination, or conspiracy among two or more separate entities, that 2) unreasonably restrains trade, and 3) affects interstate or foreign commerce. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

Response to Conclusion of Law No. 33:

Respondent has no specific response to this conclusion of law.

34. Under Section 5 of the FTC Act, Complaint Counsel makes out a *prima facie* case, and gives rise to a presumption of violation, by showing: 1) Daramic's substantial market power and the anticompetitive nature of the challenged restraint; or 2) the challenged restraint is "inherently suspect," *i.e.*, presumptively anticompetitive even without a showing of market power. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (full rule of reason analysis); *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2004) (inherently suspect restraint).

Response to Conclusion of Law No. 34:

Given the facts of this case, this proposed conclusion of law is misleading and it fails to identify the proper legal standard. Although the "challenged restraint" is not identified, presumably this proposed conclusion of law relates to the agreement between Daramic and H&V, which is identified in proposed conclusion of law number 38. Respondent has produced evidence showing that that agreement was a legitimate joint sales venture. Any claim that any part of that agreement raised an antitrust question would be governed by the standards set out by the Supreme Court in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). In that case the Court referred to the "ancillary restraints" method for assessing collateral restraints in joint ventures and said

that the doctrine requires a court to determine whether it confronts “a naked restraint of trade . . . or one that is ancillary to the legitimate and competitive purposes of the business association.” 547 U.S. at 7. In *Texaco*, decided after *PolyGram*, the Court made no reference to the terms used by Complaint Counsel in this proposed conclusions of law, *i.e.*, rebuttable presumptions, the establishment of a prima facie case or to practices that are or may be “inherently suspect.”

Nor do the cases cited by Complaint Counsel in this proposed conclusion of law support their legal propositions. *PolyGram* makes no reference to the establishment of a prima facie case and it discredits the FTC’s “inherently suspect” terminology. 416 F.3d at 37. Similarly, *Visa* does not use the terms, rebuttable presumption, prima facie or inherently suspect. It does require that the government “must demonstrate that the defendant conspirators have ‘market power’ in a particular market for goods or services.” *Visa U.S.A., Inc.*, 344 F.3d at 238. Complaint Counsel, accordingly, have failed to meet the standard prescribed in the *Visa* case since they reject the PE separator market supported by Respondent and they fail to identify and prove an AGM market or H&V’s market power in that market.

35. Respondent may rebut this presumption of violation by showing a pro-competitive justification for the restraint. If the restraint is not reasonably necessary to achieve the asserted justification, or those objectives may be achieved in a less restrictive manner, the Respondent’s efficiency defense fails. *Visa*, 344 F.3d at 238; *PolyGram*, 416 F.3d at 36-38.

Response to Conclusion of Law No. 35:

This proposed conclusion of law fails to state the proper standard for the evaluation of joint ventures. That standard does not acknowledge that Complaint Counsel are entitled to any “presumption of violation.” As the Supreme Court said in *Texaco Inc. v. Dagher*, the proper procedure is: “[C]ourts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.” 547 U.S. at 7. Under this standard, the burden on the

defendant is not to “rebut this presumption of violation,” but to show that any alleged restraint “is ancillary to the legitimate and competitive purposes of the business association, and thus valid.” Or, as the court in *Visa* put it, once the government shows “substantial adverse effects on competition,” “the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint.” *Visa U.S.A., Inc.*, 344 F.3d at 238.

36. Daramic has not demonstrated a pro-competitive justification for the challenged restraint. Alternatively, the anticompetitive effects of the restraint outweigh the pro-competitive benefits of the challenged restraint.

Response to Conclusion of Law No. 36:

This proposed conclusion of law is false because Daramic has produced procompetitive justifications for the challenged restraint and has shown that the procompetitive benefits of the challenged restraint outweigh the alleged anticompetitive effects.

Daramic has shown (1) {
} (2) that the agreement involved many procompetitive activities of both companies, including participation in trade shows, soliciting customers and selling and promoting products manufactured by the other; (3) that activities pursuant to the agreement promoted the business of both companies; (4) that as part of the joint activity the two companies shared a great deal of confidential product, marking and customer information; (5) that at the time the agreement was entered into, H&V had no plans to enter the production and sale of PE separators and Daramic had no plans to enter into the production and sale of AGM separators; (6) that the non-compete provision in the agreement was reasonably ancillary to the accomplishment of its procompetitive benefits because, without the non-compete, the two companies would have been unwilling to share the confidential information necessary to the success of the joint venture.

By way of further response to this proposed conclusion of law, Respondent refers the Court to RFPFCOL 1123-32 and 1395-98.

37. Complaint Counsel has provided substantial evidence that Daramic has substantial market power, and that the challenged restraint is anticompetitive by nature, is “inherently suspect,” and is not reasonably necessary to achieve its claimed objectives.

Response to Conclusion of Law No. 37:

This proposed conclusion of law is false and misleading because, as explained in the above responses to proposed conclusions of law numbers 34 and 35, it incorporates erroneous legal standards. The proposed conclusion of law is false because Complaint Counsel have not provided substantial evidence that Daramic has substantial market power. As is pointed out in the responses to proposed conclusions of law 34 and 35, the proper legal standard is not whether the “challenged restraint is anticompetitive by nature,” whether it is “inherently suspect” or whether it is “reasonably necessary to achieve its claimed objectives.” Moreover, Respondent has produced substantial evidence to show that the alleged restraint is “ancillary to the legitimate and competitive purposes of the business association,” *Texaco Inc.*, 547 U.S. at 7, and Respondent has “provide[d] a procompetitive justification for the challenged restraint.” *Visa U.S.A., Inc.*, 344 F.3d at 238.

By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law 34 and 35 and refers the Court to RFOFCOL 1123-32 and 1395-98.

38. The agreement between Daramic and H&V is a contract, combination, or conspiracy among two or more separate entities that unreasonably restrains trade and affects interstate or foreign commerce, and constitutes a violation of Section 5 of the FTC Act.

Response to Conclusion of Law No. 38:

This proposed conclusion of law is false for all of the reasons stated in the foregoing responses to Complaint Counsel’s proposed conclusions of law 32 and 34 – 37. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses

to proposed conclusions of law 32 and 34-37 and refers the Court to RFOFCOL 1123-32 and 1395-98.

39. Prior to the Acquisition, Daramic engaged in monopolistic conduct and/or attempts to monopolize, which constituted unfair methods of competition in violation of Section 5 of the FTC Act.

Response to Conclusion of Law No. 39:

This proposed conclusion of law is false. Although no alleged monopolistic conduct and/or attempts to monopolize are identified, Daramic engaged in no such monopolistic conduct and/or attempts to monopoly that constituted unfair methods of competition in violation of Section 5 of the FTC Act.

40. To meet its burden of proof under Count III of the Complaint, Complaint Counsel may establish an offense of monopolization or attempted monopolization patterned on standards of liability under Section 2 of the Sherman Act. *Cement Inst.*, 333 U.S. at 694.

Response to Conclusion of Law No. 40:

This proposed conclusion of law is misleading and an incorrect statement of the law. It is accepted, as stated in proposed conclusion of law number 31, that conduct that violates Section 1 or 2 of the Sherman Act also violates Section 5 of the FTC Act. But that does not mean that Complaint Counsel “may establish an offense . . . *patterned on standards of liability* under Section 2 of the Sherman Act.” *Cement Institute* does not support that statement. That opinion says that “all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act.” 333 U.S. at 694. In order to prove a violation of Section 5, Complaint Counsel must first prove a violation of Section 1 or 2 of the Sherman Act.

41. Complaint Counsel makes out a *prima facie* case of monopolization, and gives rise to a presumption of violation, by demonstrating two elements: 1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

Response to Conclusion of Law No. 41:

This proposed conclusion of law is misleading. *Grinnell* states, “The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” 384 U.S. at 570-71. *Microsoft* quotes that language verbatim except it changes the fourth word of the quote to “monopolization” and deletes “under § 2 of the Sherman Act.” 253 F.3d at 50. However, *Grinnell* does not support Complaint Counsel’s formulation since it makes no reference to a “*prima facie* case of monopolization” or a “presumption of violation.”

42. Complaint Counsel makes out a *prima facie* case of attempted monopoly maintenance, and gives rise to a presumption of violation, by demonstrating four elements: 1) that the defendant possesses monopoly power, and 2) has engaged in predatory or anticompetitive conduct with 3) a specific intent to monopolize, and 4) a dangerous probability of maintaining monopoly power. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951).

Response to Conclusion of Law No. 42:

This proposed conclusion of law is misleading and an incorrect statement of the law. *Lorain Journal* makes no reference to “*prima facie* case,” “presumption of violation” or “attempted monopoly maintenance.” In fact, the opinion notes that the *Lorain Journal* enjoyed a monopoly position from 1933 to 1948 when WEOL arrived as a competitor and that the conduct of the *Lorain Journal* was an attempt to “regain” its monopoly position. *Lorain Journal Co.*, 342 U.S. at 152-53. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985), the Court said, “[i]n *Lorain Journal*, the violation of §2 was an ‘attempt to monopolize.’” (Same characterization in *LePage’s Inc. v. 3M*, 324 F.3d 141, 149, 163 (3d Cir. 2003). Neither *Lorain Journal* nor *Aspen* support Complaint Counsel’s formulation of the law.

43. Monopoly power may be inferred from Daramic's possession of a dominant share of one or more of the relevant markets defined herein, which are protected by entry barriers. *Microsoft*, 253 F.3d at 51 (citations omitted).

Response to Conclusion of Law No. 43:

This proposed conclusion of law represents an incomplete statement because it fails to acknowledge the principle definition of monopoly power that has been used by the courts and because it fails to define "dominant share." The Supreme Court has said that monopoly power is "the power to control prices or exclude competition." *E.I. du Pont de Nemours & Co.*, 351 U.S. at 391. "The courts have generally understood the monopolization offense to depend on a finding of 'monopoly' power, and they define 'monopoly' as the power to control price or to exclude competition." IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 802(c) (2008). Courts will not always accept even high market shares as evidence of monopoly power. "Market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share." *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999).

44. Conduct is exclusionary when it tends to exclude one or more competitors on some basis other than efficiency, *i.e.*, when it tends to impair the opportunities of rivals but either does not further competition on the merits or does so in an unnecessarily restrictive way. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n. 32 (citations omitted).

Response to Conclusion of Law No. 44:

This *proposed* conclusion of law is misleading and confusing, particularly when read together with proposed conclusions of law numbers 45 and 46. These three proposed conclusions of law, taken together, raise the question of which standard of liability Complaint Counsel assert. While the principles articulated in this proposed conclusion of law are a virtual quote from *Aspen*, the facts of that case, involving a unilateral refusal to deal, were very different from the alleged exclusive dealing in this case. The liability standard forming the basis for this

proposed conclusion of law undoubtedly flowed from the nature of the conduct involved in *Aspen*. Moreover, *Aspen* suggested at least two other liability standards in addition to the one seized upon by Complaint Counsel. For one, the Court noted that the jury found a violation because, based on the instructions it was given, it “concluded that there were no valid business reasons for the refusal” of Ski Co. to continue its dealings with Highlands. *Aspen Skiing Co.*, 472 U.S. at 605. For another, the opinion makes clear that the Court thought the profit-sacrifice standard applied to the case. It noted that “the evidence supports an inference that Ski Co. . . . was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.” *Aspen Skiing Co.*, 472 U.S. at 610-11. Nineteen years later in *Verizon Communications Inc. v. Trinko*, 124 S. Ct. 872 (2004), it was this latter standard of liability that was characterized by the Supreme Court as being the basis for the *Aspen* decision. In *Trinko* the Court said of *Aspen*: “The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” *Trinko*, 124 S. Ct. at 880. (Emphasis in original). For purposes of this case, the liability standard to be drawn from *Aspen* is critical. The alleged exclusive dealing that occurred in this case has not been shown to involve any short-term profit sacrifice. Of course, the Court in *Trinko* also said, “*Aspen Skiing* is at or near the outer boundary of § 2 liability.” 124 S. Ct. at 879. For all these reasons, it would appear that Complaint Counsel’s proposed *Aspen*-based liability standard contained in this proposed conclusion of law should be rejected.

The proper standard for application in this case should be drawn from the exclusive dealing section of *Microsoft* where the court said the question was whether the exclusive arrangements “help[ed] keep Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.” 253 F.3d at 71. By that standard,

Daramic's alleged conduct in this case was not exclusionary conduct pursuant to the standards of Section 2 of the Sherman Act. Even if Complaint Counsel allege the contrary, they have the burden of demonstrating that "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Microsoft*, 253 F.3d at 59.

45. Complaint Counsel bears the initial burden to show that Respondent's conduct impairs the ability of one or more significant rivals to compete effectively, and thus to constrain the exercise of monopoly power by the Daramic. If a *prima facie* case of competitive harm is successfully established, then Respondent may proffer a procompetitive justification for its conduct. *United States v. Dentsply*, 399 F.3d 181, 187 (3d Cir. 2005); *LePage's Inc. v. 3M*, 324 F.3d 141, 164 (3d Cir. 2003); *Microsoft*, 253 F.3d at 69.

Response to Conclusion of Law No. 45:

This proposed conclusion of law is defective and incomplete as a matter of law for the following reasons. First, the proposed conclusion fails to account for the fact that completely legitimate competitive effort may "impair[] the ability of one or more significant rivals to compete effectively." Second, it fails to state that Complaint Counsel's burden is to show an adverse effect on competition, not merely an adverse effect on "one or more significant rivals." As the court said in *Dentsply*, "There must be proof that competition, not merely competitors, has been harmed." 399 F.3d at 187; *see also LePage's Inc.*, 324 F.3d at 162; *Microsoft*, 253 F.3d at 58-59. Third, this proposed conclusion fails to acknowledge that in response to Respondent's evidence regarding its business justification (*Dentsply*, 399 F.3d at 187; *Microsoft*, 253 F.3d at 71; *LePage's Inc.*, 324 F.3d at 164), Complaint Counsel then have the burden of demonstrating that "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Microsoft*, 253 F.3d at 59.

It is understood that once Complaint Counsel prove the elements of monopolization or an attempt to monopolize, the defendant/respondent may prove business justification. "If those elements are established, the monopolist still retains a defense of business justification." *Dentsply*, 399 F.3d at 187; *Microsoft*, 253 F.3d at 71; *LePage's Inc.*, 324 F.3d at 164.

46. It is not necessary for Complaint Counsel to prove that a rival of Respondent has been entirely excluded from the market. It is instead sufficient to show that the competitive vigor of a significant rival has been impaired. *Microsoft*, 253 F.3d at 60; *Dentsply*, 399 F.3d at 191.

Response to Conclusion of Law No. 46:

This proposed conclusion of law and the similar statements in proposed conclusion number 47 are in error and not supported by the authorities cited. Complaint Counsel must prove of all elements of the offenses of monopolization and/or attempt to monopolize. Moreover, in a case such as this one involving exclusionary conduct claims of exclusive dealing, Complaint Counsel must show the extent of the market foreclosed and that the impact upon rivals has been sufficient to keep them “below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.” *Microsoft*, 253 F.3d at 71. It is insufficient for Complaint Counsel to show merely that a significant rival “has been impaired.” The Seventh Circuit (Judge Posner) has said that the evidence must show total exclusion of at least one significant competitor: the plaintiff in an exclusive dealing case “must prove that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market.” *Roland Machinery Co. v. Desser Industries, Inc.*, 749 F.2d 380, 394 (7th Cir. 1984).

The courts have generally focused on the extent to which competitors have been foreclosed from the market and on whether the foreclosure has resulted in competitors not being able “to pose a real threat” to the market position of the defendant. Thus, in *Microsoft* the Circuit Court noted that the district court had found that IAPs were one of the two major channels through which browsers were distributed and that Microsoft had exclusive arrangements with 14 of the top 15 access providers in North America. *Microsoft*, 253 F.3d at 70-71. It said that Microsoft had preserved its monopoly by ensuring “that the ‘majority’ of all IAP subscribers [were] offered [Internet Explorer] either as the default browser or as the only

browser.” *Microsoft*, 253 F.3d at 70-71. Accordingly, the Circuit Court looked carefully at the extent of foreclosure to determine that the impact upon Microsoft’s rivals was very substantial. Similarly, in *Dentsply* the court found that Dentsply’s dominance of sales on an exclusive basis to dealers meant that it was “impracticable [for its dealers] to rely on direct distribution to the laboratories in any significant amount” and that these competitors, as a result, did not “pose[] a real threat” to Dentsply’s monopoly. *Dentsply*, 399 F.3d at 193 (citing *Microsoft*, 253 F.3d at 71). In *LePage’s* the court found, after citing *Microsoft’s* “pose a real threat” test, that “3M’s exclusionary conduct cut LePage’s off from key retail pipelines necessary to permit it to compete profitably.” *LePage’s Inc.*, 324 F.3d at 159-60.

47. It is not necessary to show that the challenged agreements are completely exclusive; near exclusivity will suffice. *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 455 (1922); *Microsoft*, 253 F.3d at 68; *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. March 22, 2006); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 60 F. Supp.2d 502, 510-11 (M.D.N.C. 1999). Likewise, it is not necessary to show that any particular percentage of the relevant market has been foreclosed. Evidence of actual or likely competitive harm will suffice. *Microsoft*, 253 F.3d at 70; *Dentsply*, 399 F.3d at 185; *LePage’s*, 324 F.3d at 157; *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 (6th Cir. 2002).

Response to Conclusion of Law No. 47:

This proposed conclusion of law is inadequate and incorrect. The proper legal standard is set out in the response to proposed conclusion of law number 46, which is incorporated herein by way of response to this proposed conclusion of law.

The question is whether the extent of the foreclosure by the exclusive arrangement is such that competitors have been kept below the critical level necessary to enable them to “pose a real threat” to the defendant’s monopoly. The cases discussed in the response to proposed conclusion of law number 46 support that proposition and the new cases cited here by Complaint Counsel do not refute it. In the *United Shoe* case, the Supreme Court noted that United Shoe had 95% of the shoe machinery business. 258 U.S. at 455. In *R. J. Reynolds*, the court found 75%

foreclosure in a case decided on the basis of Section 1 of the Sherman Act and held that the plaintiffs would suffer “irreparable injury . . . and incalculable harm to their respective competitive positions, including threatened loss of market share and threatened loss of existing and potential customers.” 60 F. Supp. 2d at 507, 509. In *Conwood*, the court found that the defendant had engaged in a variety of tortious and other activities to interfere with competing moist snuff producers obtaining access to retail outlets and that it had “engaged in a concerted effort . . . to shut Conwood out from effective competition.” 290 F.3d at 788.

48. Daramic specifically intended that its conduct in negotiating with, and obtaining exclusionary contracts from, customers would raise its competitors’ costs and impair their ability to constrain the exercise of market power by Daramic. Respondent’s specific intent may be proven by direct evidence, or inferred from its egregious conduct. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 454-55 (1993) (“Unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize.”).

Response to Conclusion of Law No. 48:

This proposed conclusion of law contains a false statement of fact and otherwise, is an incomplete and incorrect statement of the law. According to *Spectrum Sports*, the offense of attempted monopolization has three elements, including “a specific intent to monopolize.” 506 U.S. at 456. A specific intent “to raise competitors’ cost and impair their ability to constrain the exercise of market power” is not a specific intent to monopolize and does not prove that there was a specific intent to monopolize. This proposed conclusion of law presents no authority for the proposition that exclusionary contracts, even assuming arguendo that they existed, are either unfair or predatory.

“Respondent further responds to this proposed conclusion of law by referring to RFOFCOL 541-62, 590 - 603, 610-59, 770-76, 796-802, 825-27, 1271-93, 1316-17, 1386-90, 1391-94, which refute the allegation that Daramic specifically intended that its conduct in negotiating with, and obtaining exclusionary contracts from, customers, even assuming arguendo

that such conduct occurred, would raise its competitors' costs and impair their ability to constrain the exercise of market power by Daramic.

49. Daramic was successful in exerting monopoly power that harmed competition and hence customers. *United States v. Dentsply*, 399 F.3d 181, 189-191 (3d Cir. 2005)

Response to Conclusion of Law No. 49:

This proposed conclusion of law contains a false statement of fact and a false legal premise. The exercise of monopoly power, even assuming arguendo that it existed, is not a violation of the law. "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system." *Trinko*, 540 U.S. at 407. The proposed conclusion of law is factually false because Daramic did not have monopoly power and, therefore, did not exert it. "Respondent further responds to this proposed conclusion of law by referring to RFOFCOL 190-93, 201, 240-57, 273-76, 278-305, 314, 319, 340-53, 421-29, 438-680, 556-62, 590-96, 623-35, 770-76, 926-76, 1280, 1284-89, 1308, 1316-17, 1332-33, 1373-77, 1386-90, which refute these factual claims." "By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law 16-21, 23 and 25."

50. Daramic's conduct carried a dangerous probability of maintaining its monopoly power in the relevant markets defined herein.

Response to Conclusion of Law No. 50:

This proposed conclusion of law is factually incorrect. "Respondent further responds to this proposed conclusion of law by referring to RFOFCOL 190-93, 201, 240-57, 273-76, 278-305, 314, 319, 340-53, 421-29, 438-680, 556-62, 590-96, 623-35, 770-76, 926-76, 1280, 1284-89, 1308, 1316-17, 1332-33, 1373-77, 1386-90, which contain or identify evidence that shows that Daramic did not have monopoly power in any alleged markets." "By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law 16-21, 23 and 25."

51. Cognizable efficiencies are those that offer the prospect of lower prices, greater output, or other benefits to consumers. *See, e.g., Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 395 (7th Cir. 1984). Respondent failed to demonstrate that its challenged acts and practices produced any such efficiencies.

Response to Conclusion of Law No. 51:

The factual statement in this proposed conclusion of law is false and the legal principle is misleading and at odds with the principles adopted in other cases and recommended by other authorities. The proposed legal standard does not accurately reflect the decision in *Roland Machinery*. Moreover, *Roland Machinery* was a Clayton Act section 3 case and it arose in a distribution context unlike the factual situation in this case.

In response to any claim of anticompetitive effects, Respondent has the opportunity to show that the alleged exclusive contracts had procompetitive business justifications. *Microsoft*, 253 F.3d at 71 (“procompetitive justification”); *Dentsply*, 399 F.3d at 187 (“business justification”); *LePage’s Inc.*, 324 F.3d at 164 (“defendant bears the burden of ‘persuad[ing] the jury that its conduct was justified by any normal business purpose.’”) (citing *Aspen Skiing*, 472 U.S. at 608).

Exclusive dealing arrangements have been found to have substantial business justifications. In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961), the Court found that the exclusive dealing arrangement assured Tampa Electric a steady sources of supply and enabled Nashville Coal to reduce selling expenses. In *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.), the court upheld exclusive dealing arrangements, finding that they provided “a stable source of supply,” a “stable, favorable price” and enabled the seller to engage in “production planning that was likely to lower costs.” In *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993), the court upheld exclusive dealing arrangements noting their “benign” purposes, including “assurance of supply or outlets, enhanced ability to plan, [and] reduced transaction costs.”

Respondent has produced evidence showing that the alleged exclusive arrangements in this case had the business justifications cited in these cases. By way of further response to this proposed conclusion of law, Respondent refers the Court to its proposed findings of fact numbers 240-43, 590-603, 610-712, 725-33, 770-73, 811-18, 836-40, 1271-88, 1316-17 and 1386-94.

52. Daramic's exclusionary conduct meets the standards of liability for monopolization or attempted monopolization under Section 2 of the Sherman Act, and constitutes a violation of the FTC Act.

Response to Conclusion of Law No. 52:

This proposed conclusion of law contains both errors of fact and law. As is pointed out in proposed conclusions of law number 41 and 42, respectively, the offenses of monopolization and attempt to monopolize have two and three elements, respectively, of which "exclusionary conduct" is only one. Accordingly, proof of exclusionary conduct, even assuming arguendo such proof has occurred here, is inadequate to prove the offenses of monopolization or attempt to monopolize.

As a matter of fact, this proposed conclusion of law is false because Complaint Counsel have failed to prove that Daramic engaged in any exclusionary conduct. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 39-42 and 44-50.

53. Complaint Counsel met its burden of proof in support of Count I, Count II, and Count III of the Complaint.

Response to Conclusion of Law No. 53:

This proposed conclusion of law is false in all respects. Complaint Counsel have failed to meet their burden of proof in support of Count I, Count II and Count III of the Complaint. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to the other proposed conclusions of law numbers 9-29, 32 and 34-52. By way of further response to this proposed conclusion of law, Respondent also refers the Court to its

proposed findings of fact numbers 3 through 1398 and its proposed conclusions of law 1415-1486.

54. Divestiture is the proper remedy.

Response to Conclusion of Law No. 54:

This proposed conclusion of law is completely lacking in clarity since it fails to identify the “divestiture” referred to. Moreover, this proposed conclusion of law is simultaneously too broad and, from Complaint Counsel’s point of view, presumably, too narrow. This proposed conclusion of law is too broad because divestiture of all of the assets that were acquired is unnecessary “to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.” *In the Matter of B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988), (quoting *In the Matter of RSR Corp.*, 88 F.T.C. 800, 893 (1976)). As one example, prior to the acquisition Microporous manufactured a product called Ace-Sil on one of the production lines at the Piney Flats plant. Even Complaint Counsel do not contend that Daramic made a product that competed with Ace-Sil. Therefore, since there was no competition between Ace-Sil and any product produced and sold by Daramic, divestiture of the Ace-Sil production line is not necessary to restore competition to the state in which it existed prior to the acquisition. From Complaint Counsel’s point of view, this conclusion of law is presumably too narrow because the Proposed Order seeks relief in addition to divestiture. By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law numbers 55, 56 and 57.

55. Complete divestiture of all assets acquired in the Acquisition is required to restore competition as it existed prior to the Acquisition. The Clayton Act requires that upon a finding of a Section 7 violation, “the Commission . . . shall . . . order . . . such person to cease and desist from such violations, and divest itself of the . . . assets, held.” 15 U.S.C. § 21(b).

Response to Conclusion of Law No. 55:

The statement of fact contained in this proposed conclusion of law is false and the statement regarding the portion of the Clayton Act quoted is misleading to the extent that the quote is submitted to suggest that divestiture of *all* the acquired assets is required by the Act. The relevant portion of the section of the Clayton Act as quoted by Complaint Counsel is incomplete. The relevant language reads, “the Commission . . . shall . . . order . . . such person to cease and desist from such violations and divest itself of the . . . assets, held . . . *contrary to the provisions of section[] 7 . . . of this Act, if any there be.*” (Emphasis added). The full language quoted here makes it clear that the statute itself does not require divestiture of all acquired assets but only those, “if any there be,” that are held “contrary to the provisions” of Section 7.

There are many consummated merger cases either where no divestiture has been required or only partial divestiture has been required. The FTC itself in the *Evanston* case ordered injunctive relief instead of divestiture. *In the Matter of Evanston Northwest Healthcare Corp.*, FTC Docket No. 9315, at 89-90 (Aug. 6, 2007). In *United States v. Waste Management, Inc.*, 588 F. Supp. 498, 514 (S.D.N.Y. 1983), the court ordered divestiture only of the business acquired in Dallas, rejecting the government’s argument that all of “Waste Resources,” the acquired entity, should be divested even though the acquisition had been challenged only as to Houston and Dallas and the court had found a violation only in Dallas. Many consent decrees have adopted partial divestiture as the remedy.

Nor is complete divestiture of all acquired assets required to restore competition as it existed prior to the acquisition. As noted in response to proposed conclusion of law number 54, it is not disputed that Daramic sold no product that competed with Microporous’ product, Ace-Sil. Accordingly, it is not necessary to require divestiture of the Ace-Sil production line to “restore competition as it existed prior to the acquisition.” Similarly, before the acquisition Daramic sold no product that effectively competed with Microporous’ Flex-Sil. Accordingly,

divestiture of the Flex-Sil production line is not necessary to restore competition. Since no products manufactured at the Feistritz plant were exported to the U.S. and therefore did not compete with any Daramic products in the U.S., divestiture of the Feistritz plant is not necessary to restore competition. The “line in the box” refers to portions of a production line that had been acquired by Microporous before the acquisition but had not been installed and, therefore, was not in competition with any Daramic products. Accordingly, divestiture of the “line in the box” is not required to restore competition.

By way of further response to this proposed conclusion of law, Respondent incorporates herein its responses to proposed conclusions of law 54, 56 and 57. By way of further response to this proposed conclusion of law, Respondent refers the Court to its proposed findings of fact 39-139, 181-84, 332-37, 369-412, 421-29, 544-50, 563-69, 734-64, 797, 803-04, 851-79, 1180-1201, 1294-1301, 1308, 1311, 1319, 1334-48, 1399-1408 and 1412-14 and its proposed conclusions of law 1421-28, 1462-65 and 1487-92.

56. Relief designed to restore competition as it existed prior to the Acquisition is appropriate. “In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.” *In the Matter of B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988), (quoting *In the Matter of RSR Corp.*, 88 F.T.C. 800, 893 (1976)).

Response to Conclusion of Law No. 56:

Respondent incorporates herein its response to proposed conclusion of law number 55 as its primary response to this conclusion of law, including the proposed findings of fact and conclusions of law identified in that response. That response deals with specific assets and their standing as regarding any divestiture order. In addition, Respondent points out that the proposed findings of fact referenced in the response to proposed conclusion of law number 55 establish that any competition concerns could be easily resolved by divestiture of the former PE line of Microporous in Piney Flats with the ability to produce Daramic’s HD product. Prior to the

acquisition, Microporous produced Flex-Sil and CellForce at Piney Flats and Daramic product HD. Complaint Counsel contended that all of these products were in competition in its deep cycle market. Respondent contends that CellForce and HD were not effective competitors of Flex-Sil. However, divestiture of the Microporous PE line in Piney Flats with the ability to produce HD would restore this alleged competition and would be somewhat easier to accomplish since Newco would not need to make arrangements with Daramic to purchase Ace-Sil dust in order to make CellForce.

Respondent also points out that it has produced evidence indicating the great likelihood that had the acquisition not occurred, Microporous today would be at best an extremely weak competitor in any of the alleged product markets. Indeed, the evidence indicates the strong likelihood that Microporous would not have survived the recent economic downturn. See Respondent's proposed findings of fact numbers 421-29. Accordingly, no divestiture is required to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger."

By way of further response to this proposed conclusion of law, Respondent incorporate herein its responses to proposed conclusions of law 54, 55 and 57. Respondent also refers the Court to all of Respondent's proposed findings of fact and conclusions of law cited in these responses.

57. The Order entered hereinafter is necessary and appropriate to remedy the violations of law found to exist.

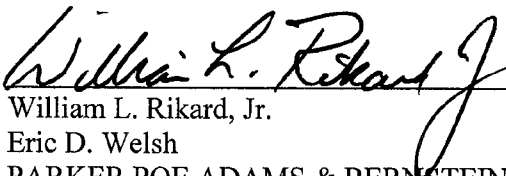
Response to Conclusion of Law No. 57:

This proposed conclusion of law is false and has no basis. Respondent incorporates herein its responses to proposed conclusions of law numbers 54-56, including Respondent's proposed findings of fact and conclusions of law referred to in those responses, which deal with the divestiture issues. Section VII of the Proposed Order relates to Count III of the Complaint

and the claim that Daramic's allegedly exclusionary contracts with certain customers enabled it to constrain Microporous' competitive abilities. Respondent has refuted these claims. By way of further response, Respondent incorporates herein its responses to proposed conclusions of law numbers 39-53 and refers the Court to all of Respondent's proposed findings of fact and conclusions of law referred to in these responses. Section VIII of the Proposed Order relates to Count II of the Complaint and the claim that the agreement between Daramic and H&V was anticompetitive. Respondent has refuted these claims. By way of further response, Respondent incorporates herein its responses to proposed conclusions of law numbers 32, 34-38 and 53 and refers the Court to all of Respondent's proposed findings of fact and conclusions of law referred to in these responses.

Dated: August 7, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law [PUBLIC] (Volumes I through III)*, 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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Federal Trade Commission
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I hereby certify that on August 7, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand delivery of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law [PUBLIC] (Volumes I through III)* upon:

The Honorable D. Michael Chappell
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I hereby certify that on August 7, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law [PUBLIC] (Volumes I through III)* upon:

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