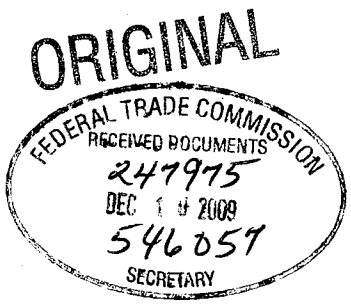

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY BRIEF ON THE REOPENED RECORD

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I. INTRODUCTION

The record demonstrates that the acquisition reduced competition in *four* markets. Respondent's "new" evidence and repeated legal arguments address only one: SLI. Respondent offers no new evidence or legal argument about the markets for motive, deep-cycle, or UPS separators. A finding that competition has been reduced by the acquisition of Microporous in any one of those markets requires a divestiture of all of the former Microporous. Respondent provides no legal argument and cites no new facts related to monopolization.

Respondent's brief does no more than restate its previous arguments about the SLI market. Indeed entire sections of Respondent's legal argument in its brief go without any reference at all to its proffered "new" evidence, but rather entirely refer to its previous findings of fact. Respondent does not discuss any of its proffers in its papers because it has failed to prove them. Instead, Respondent talks about the process of negotiating with Exide. This is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statements in ongoing negotiations should be given little or no weight. The statements are solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide. These statements are a distraction from the simple fact that Respondent failed to prove its proffers.

The record from both hearings demonstrates that Microporous was an actual competitor in SLI. (Complaint Counsel's Revised Post Trial Brief at 26-28). Prior to the acquisition Microporous bid for JCI's business, East Penn's business, and had an {

}. *Id.* Competition from Microporous caused prices to fall. *Id.* The facts

developed in the second hearing demonstrate that the acquisition of Microporous by Daramic reduced actual competition in SLI.[1] When Microporous was competing for SLI business, { }. (RX00072 at 56, *in camera*). Without Microporous, { } can get for a comparable separator in 2010 is { }. (RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). This is powerful post transaction evidence that the acquisition reduced competition in SLI.

II. FACTS AND BACKGROUND

a. The 1999 Contract and Negotiations for New Contract

Respondent argues that the negotiation between Daramic and Exide shows that Exide is a power-buyer and that the SLI market is competitive. The evidence contradicts these arguments. To begin with, within one month of its { }, Exide conceded to { }. (RX01665 at 004, *in camera*; RX01669 at 002, *in camera*). Second, Daramic was never willing to { }. (RX01669 at 002, *in camera* (Exide proposed { }); Gillespie,

[1] Respondent's assertion that Complaint Counsel does not dispute "that competition in the production and sale of battery separators in North America is healthy and vigorous" is false. The acquisition of Microporous reduced competition in all four markets, including SLI, where competition between Daramic and Entek is anemic. Indeed Daramic is reducing SLI capacity in the market. However Complaint Counsel does agree that North America is the proper geographic market in which to analyze the competitive effects of the merger.

Tr. 5808-5810, *in camera*; *see also* CCFOF 1321[2]). Third, Daramic's proposed {

}. (Gillespie, Tr. 5807-5808, *in camera*; *see also* CCFOF 1326-1327). Fourth, all of Daramic's proposed {

}. (CCFOF 1316-1322).

Other { } related requests from Exide have met a similar fate, highlighting where the strength in the negotiation lies. For example, {

}. (RX01665 at 002, *in camera*; RX1250 at 001, *in camera*; RX01668 at 002, *in camera*). Daramic refused to provide Exide with {

}. (RX01668 at 002, *in camera*; RX01687, *in camera*). Second, Exide sought to have {

}. (RX01665 at 002, *in camera*). Daramic refused to agree to this {

}.

[2] Complaint Counsel refers to its findings of fact in this brief as "CCFOF," Respondent's findings of findings of fact as "RFOF," and Complaint Counsel's reply findings as "CCRF."

(RX01668 at 002, *in camera*). Third, Exide sought a {

}. (RX01668 at 002, *in camera*).

Exide had requested that Daramic {

}. (RX01714 at 003, *in camera*; RX01720 at 039, *in camera*). Similarly, Daramic never agreed to Exide's request for {

}. (RX1714, *in camera*). In fact, contrary to Mr. Toth's testimony that Daramic offered Exide {

}. (RX1714, *in camera*). In addition, {

}. (RX01665 at 002-003, *in camera*). Both of those alleged "demands" were dropped by Exide in its most recent contract offer to Daramic. (RX01687, *in camera*).

Respondent has argued that it has offered { } to Exide. These terms are not concessions at all, as they are contained in the current North American Supply Agreement. {

}. (RX01668 at 002, *in camera*; RX01720, *in camera*; RX01714 at 003-004, *in camera*). The North American Supply Agreement is the same {

}. (CCFOF 1270, 1326-1327).

With respect to Respondent's claims that the negotiations demonstrate {

}. (*See* Gillespie, Tr. 5826-5828, 5838, 5867-5868, *in camera* {

}.

b. { }

Respondent argues that the { } from Exide shows that Exide is a power-buyer and that the SLI market is competitive. Yet the facts show that it is Daramic that wields the power. {

}. (CCFOF 1283-1290, 1328-1333). {

}. (CCFOF 1337-1339). {

}. (CCFOF 1328-1331). Indeed Daramic is using the {

}.

Respondent argues that it was willing to {

}. (CCFOF 1267-1268, 1271; Gillespie, Tr. 5795-5796, 5803-5805, *in camera*). Even if it were a concession, Daramic has reneged on a previous agreement between the two companies to {

}. (CCFOF 1337-1339). Significantly, Daramic has linked any {

}. (CCFOF 1343).

Daramic also {

}. (CCFOF 1334-1336). {

}. (CCFOF 1256-1257).

These facts demonstrate that Exide holds no power over Daramic at all. Moreover, these facts demonstrate that the SLI market is not competitive, since, if the

market were competitive, Daramic would simply {

}.

c. {

Respondent argues that the facts show that {

}. First, *to this day* Exide has not made any decision to move { } its SLI separator purchases for { } to another supplier. (CCFOF 1252-1257, 1278-1280). The evidence shows that {

}. (CCFOF 1254). The evidence also shows that {

}. (CCFOF 1272). Mr. Gillespie testified that {

}. (CCFOF 1255-1256).

d. {

Respondent argues that its decision to { } is evidence that Exide is exerting power in the current negotiations. However, the evidence at the hearing was that {

}. (CCFOF 1292, 1294-1295, 1297-1302). Most strikingly, Daramic analyzed various {

}. (RX01692 at 2, *in camera*; *see also*

CCFOF 1304-1306). Thus Exide's behavior has had no impact on {

}.

e. Respondent's Overstatements are Contrary to the Evidence

Respondent's hyperbolic assertions about its negotiations with Exide are unsupported and frequently contradicted by record evidence. For example, Respondent asserts that powerful buyers {

} (Respondent's Post Reopened Hearing Brief at 1 ("Respondent's Brief")). Complaint Counsel has searched the November 12 hearing record and exhibits in vain for any mention of any such { }. The only evidence offered at all on the issue was (1) when Mr. Gillespie was asked by Complaint Counsel whether Exide is {

} and he responded that "[t]he simple answer is 'no.'" (Gillespie, Tr. 5832, *in camera*); and (2) when Mr. Gillespie testified that the {

} (Gillespie, Tr. 5823, *in camera*).

Respondent's brief is rife with such inaccuracies. Respondent insists that it will { } (Respondent's Brief at 2). {

}. (CCFOF 1252-1257, 1305). { } because there is no other supplier, now that Microporous was swallowed up by Daramic.

Respondent also insists that Exide "admits" that it has placed purchase orders for { } of product. (Respondent's Brief at 2, 4, and 12). In fact, Mr. Gillespie

specifically denied that the amount ordered is { } worth of separators. (Gillespie, Tr. 5861-5862, *in camera*). The only evidence of this "admission" cited by Respondent is the hearsay statement of Mr. Seibert, which merely reflects his own state of mind. (Seibert, Tr. 5677-5678, *in camera*). Mr. Seibert's state of mind is not relevant to { }.[3]

Significantly, the record evidence shows that Daramic has only agreed to { } worth of separators to Exide. (Gillespie, Tr. 5799, *in camera*). More directly the evidence also shows that Exide is not { }. (Gillespie, Tr. 5832, *in camera*).

Respondent argues repeatedly that { }. (Respondent's Brief at 2, 10, and 11). This supposed threat is actually a document in evidence. That letter does not say anything about { } (RX01681-001, *in camera*). Mr. Gillespie also testified that Exide { } (Gillespie, Tr. 5839, *in camera* (emphasis added)).

[3] Respondent relies heavily on hearsay statements that it claims were made by either Mr. Gillespie, Mr. Ulsh, and Messrs Seibert and Toth. (Respondent's Brief at 1,6, 7, 8, 9, 10, 11, 12, 15, 16, and 17; RFOF 1507, 1519, 1525, 1540, 1547, 1558-1560, 1563-1567, 1570-1572, 1576, 1582-1594, 1596-1600, 1610, 1614-1615, 1619). Because of Complaint Counsel's standing objection, Respondent stipulated that these hearsay statements were offered only for *Respondent's* state of mind. These statements cannot be credited for the truth of the matter asserted (e.g. that Daramic had to { } Respondent's Brief at 8, or that { } *Id.*). These statements are only relevant if the assertions made by the out of court declarants are true. Respondent's state of mind is not relevant to the proffers or to any of the issues in this case.

Respondent curiously characterizes Exide's consistent refusal to {

} (Respondent's Brief at 10). Yet Respondent's own brief concedes that Exide {

}. (Respondent's Brief at 10).

III. LEGAL ARGUMENT

a. Respondent's Arguments Are Related Only to SLI

The record demonstrates that the acquisition reduced competition in *four* markets. Respondent's "new" evidence and repeated legal arguments address only one: SLI. Respondent offers no new evidence or legal argument about the markets for motive, deep-cycle, or UPS separators. A finding that competition has been reduced by the acquisition of Microporous in any one of those markets requires a divestiture of all of the former Microporous. Moreover, it is striking that Respondent provides no arguments and cites no facts related to the monopolization counts.

b. Respondent Merely Reiterates its Previous Arguments and Relies on Evidence Introduced at the Previous Hearing

Respondent's brief does no more than restate its previous arguments about the SLI market. Indeed entire sections of Respondent's legal argument in its brief go without any reference at all to its proffered "new" evidence, but rather entirely refer to its previous findings of fact. (*See* Sections A and B of Respondent's Brief at 18-21). Section A of Respondent's brief has only one cite to "new" evidence, pointing only to Mr. Gillespie's testimony that { }. (Respondent's Brief at 18). This is not a "new" fact at all. (*See* Gillespie, Tr. 2965; 3021-3022, *in camera*).

Nor was this a fact in any of Respondent's proffers. The remainder of Respondent's cites are to its previous findings. (Respondent's Brief at 18.) Section B of Respondent's Brief is devoid of any cite to a new fact, except the bare and baseless assertion that it adduced evidence at both hearings that "competition is intense in the North American SLI segment."

Respondent openly admits that it is reiterating its previous arguments in its Brief. Respondent begins by arguing that "[a]s was established by the evidence presented at the initial hearing...." (Respondent's Brief at 1). Respondent goes on to admit that "[a]s set forth fully in Respondent's Initial Post-Trial briefing..." and that it "has presented much legal and factual information regarding the coordinated interaction issue in its [earlier pleadings]" and simply re-summarizes those arguments in its brief. (*Id.* at 18, 22).

The recitation of the "new" facts in Respondent's brief is no more than a one-sided description of an on-going negotiation between Daramic and Exide. Respondent's characterization of this negotiation depends on a finding that Mr. Gillespie is not credible, while Respondent's witnesses are credible.

Respondent urges three grounds for finding Mr. Gillespie is not credible, none of which hold up under scrutiny: {

}. Contrary to Respondent's innuendos, Mr. Gillespie testified truthfully in every instance.

{

}. (CCFOF 1261-1262). {

}. (CCFOF 1264). {

}. (CCFOF 1268). {

}. (CCFOF 1269). Furthermore, Exide's behavior with regard to the { } was consistent with past dealings between Daramic and Exide. (CCFOF 1273).

Respondent then argues that Mr. Gillespie's testimony that Exide is in a better position { } than in prior years is not credible because, it argues, Exide has less "positive free cash flow" than prior years. (RFOF 1548). Yet all of Mr. Gillespie's statements about Exide's financial ability are true and are corroborated by Exide's fiscal second quarter results. (CCRF 1548). These results showed that that Exide's cash position actually *increased* by 57% in the fiscal second quarter from $69.5 million to $109.2 million, and that gross margins *increased* from 17.7% to 20.6% versus the prior year. (RX01726 at 005-006, 009). Exide's second quarter results showed that Exide actually "generated positive free cash flow" in the quarter, while at the same time funding capital investments and restructuring to the tune of $70.7 million. (RX01726 at 004, 006). {

}. (Gillespie, Tr. 5844, *in camera*; RX01726 at 005-006, 009).

Respondent also alleges that Mr. Gillespie's testimony on November 12, 2009 contradicted his prior testimony in May about Exide's work {

}. This allegation is also contradicted by the facts. Mr. Gillespie's November testimony that Exide has {

}. (Gillespie, Tr. 3034-3036, *in camera*). {

}. (Gillespie, Tr. 3024-3025, *in camera*).

c. The Acquisition of Microporous Reduced Actual Competition in SLI

Microporous was an actual competitor in SLI. (Complaint Counsel's Revised Post Trial Brief at 26-28). Microporous bid for JCI's business, {

}. (*Id.*) Competition from Microporous caused prices to fall. (*Id.*)

The "new" facts demonstrate that the acquisition of Microporous by Daramic reduced actual competition in SLI. In 2007, when an independent Microporous was busy competing in the market for SLI battery separators, {

}. (Gilchrist, Tr. 423, 466-467, *in camera*; Roe, Tr. 1685-1686, *in camera*; Hall, Tr. 2884, *in camera*; RX00072, *in camera*). {

}. (RX00072 at 56, *in camera*). Today, after the competitive influence of Microporous has been lost, the best offer {

}. (RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*).

Accordingly, the evidence demonstrates that in the North American market for SLI separators there has been an <u>increase</u> in prices of more than {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). This is powerful post transaction evidence that the acquisition reduced actual competition in the market for flooded lead-acid SLI battery separators.

d. Respondent's Argument that Microporous was Too Small to Compete with it and Entek is Contradicted by the Evidence

Respondent's unsupported assertion that Microporous was too small to compete with it and Entek is contradicted by its RFOF 1558, 1612, and 1614 showing that it was { }. According to Mr. Toth, Respondent seriously considered { } and, therefore, seriously considered competing in North America with {

}. (Toth, Tr. 5772, *in camera*). While Respondent is now managing

industry capacity[4] by idling its Owensboro facility, Microporous planned to *add* capacity. In fact, Microporous planned to add 22 million square meters of capacity, precisely what it would have needed to { }. (CCFOF 609, 863; s*ee also* CCRF 1529 ({ })).[5] Moreover, even if Microporous competed with only one 11 million square meter line, it would still be capable of {

}.

In view of {

},

Respondent's unsupported assertion that Microporous would be unable to compete with it and Entek in SLI is speculation that is contradicted by the actual facts. Nevertheless, Daramic fails to cite any law for the proposition that the Clayton Act was not designed to protect even small competitors. But indeed, as *Brown Shoe* warns us, "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Microporous may have been small, but it sure struck Daramic with fear, and customers have suffered from the loss of Microporous's competition.

---

[4] Respondent complains about the economic climate and claims that excess capacity will lead to more robust competition. It is useful to note the ruling of the Commission in *In re B.F. Goodrich*, 110 F.T.C. 207 (1988). "The probative value of performance evidence is also limited by its susceptibility to transitory economic conditions, such as a recession. For example, the fact that profits are low in an industry with excess capacity does not necessarily mean that industry pricing is competitive." *Id.* at 130. The Commission continued later, discussing evidence regarding the price competition which took place during a recession, "[t]here is no guarantee that the price competition that respondents have identified will continue, [when] industry demand is expanding again, and PVC producers are once again operating at relatively high capacity levels." *Id.* at 134. There is no legitimate conclusion to be drawn based upon limited effects which may occur during the severe recession we find ourselves in today.

[5] Respondent's assertion at page 18 of its brief that "no installation steps had been taken" by Microporous for the new line is contradicted by the facts. Microporous took a number of steps to install the new line. (CCRF 375).

e. The Evidence Presented at the November Hearing Shows that the Necessary Conditions for Coordinated Interaction Exist in the SLI Separator Market

In the SLI market, in which Entek is now Daramic's only competitor, there is also a strong presumption of coordinated effects. Merger law "rests upon the theory that, 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 achieve profits above competitive levels." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). "Because the FTC has established a *prima facie* case, the burden is on [Respondent] to demonstrate 'structural barriers,' unique to this industry, that are sufficient to defeat the 'ordinary presumption'" of coordination in such a "highly concentrated market." *FTC v. CCC Holdings Inc., et al.*, 605 F. Supp. 2d 26, 60 (D. D.C. 2009) *quoting Heinz*, 246 F.3d at 725; *see also Merger Guidelines*, 2.1 (Coordinated Interaction).

Even in the November hearing Respondent has offered nothing to defeat this presumption and did not even try to show any "structural barriers" to coordination. Rather, Respondent argues that because {

}, that this somehow shows that competition between Daramic and Entek is fierce. Yet, neither the law, nor economics, nor the facts support such a theory. First, the evidence does not show any effort at all {

}. Third, as Dr. Simpson explained the risks of coordination increase with concentration, and the acquisition of Microporous increased concentration. (PX0033 at 020-021, *in camera*).

{

} (Hall, Tr. 2666-2667, 2692). Absent Microporous, Daramic and Entek had been {

}. (Hall, Tr. 2873-2874, *in camera*, RX00044 at 002, *in camera*). {

}. (Hall, Tr. 2873-2874, *in camera*). Now that Microporous is gone, the market will return to the unhealthy state it was in prior to the entry of Microporous.

Daramic's argument that competition in the SLI market is vigorous requires evidence that {

}. (CCFOF 1326-1327). {

} and has no idea what such a { } would be. (CCFOF 1312-1315). Daramic has never offered a {

}. (CCFOF 1316-1320, 1325). The evidence demonstrates that the

market price in the SLI separator market has increased by more than {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera* ({

}). In short, { } add to the strong presumption that a merger from three to two in the SLI market will lead to anticompetitive effects. Daramic has simply failed to rebut this presumption and the additional evidence that supports it.

f. Power Buyers are Not Present in Any Market for Flooded Lead-Acid Battery Separators but Even if They Were the Market Has Not Benefited from Their Presence

In *Baker Hughes*, the court said that the sophisticated buyers' ability to "closely examine available options and typically insist on receiving *multiple confidential bids for each order*" was what is likely to promote competition, not simply the bare presence of large customers alone. 908 F.2d at 986 (emphasis added). In *Baker Hughes'* four firm US market, the district court noted that "[c]ustomers normally [sought] bids from two or three suppliers. . . ." *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 8 (D.D.C 1990). Here, in three out of four markets there are no options for separator customers, and in SLI there is but one other. (CCFOF 1251, 1255-1257, 1342). There is nothing close to the "multiple" options that both the district and circuit courts found critical to their analysis in any of the battery separator markets. Thus, Respondent's use of the language from *Baker Hughes* is misplaced.

The Fifth Circuit and this Court in *Chicago Bridge* addressed a situation very like the one the Court confronts here. There, the court noted the inapplicability of *Baker Hughes* where there is dearth of adequate supply sources which undermines the basic

premise for a power buyer argument. *Chicago Bridge & Iron Company N.V. v. FTC*, 534 F.3d 410, 439 440 (5th Cir. 2008). The court distinguished *Baker Hughes* and held it inapplicable "where there [are not] ample available alternatives for customers in a market with [high] entry barriers." The court went on to note, "unlike *Baker Hughes*, pricing data for the four markets are mostly confidential from bid to bid, and thus buyers are generally unable to ascertain whether CB&I is imposing supracompetitive prices on any particular bid weakening buyers' ability to demand competitive prices." *Chicago Bridge,* 534 F.3d 439-440.. In the present case, the Court is faced with an identical set of circumstances. Complaint Counsel has shown the high entry barriers and lack of existing supply options in today's separator markets. (CCFOF 817-936; 258-323). The elimination of Microporous has served to further limit the alternatives in SLI and completely eliminate them in each of the three other markets.

The foundation of a proposed defense based on a power buyer argument is the procompetitive impact such buyers can have, even in concentrated markets. *Baker Hughes Inc.*, 908 F.2d at 986; *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991) That is to say, the presence of powerful buyers has the effect of ***lowering the market price*** for the good in question. (*See* 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: an Analysis of Antitrust Principles and their Application 943 (2nd ed. 2000)). The argument, at its most potent, therefore, depends on a showing that the market price is kept in check, benefitting the large and small customers alike. Here, there is no evidence of procompetitive activity since the acquisition of Microporous; in fact, just the opposite has occurred. As discussed above, when an independent Microporous was actively competing in the market for SLI battery

separators, {

}. (Gilchrist, Tr. 423, 466-467, *in camera*; Roe, Tr. 1685-1686, *in camera*; Hall, Tr. 2884, *in camera*; RX00072, *in camera*). While {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). Therefore, the evidence regarding the market price for the only separator market that is not a complete monopoly today shows an increase in prices of more than {

}. (RX00072 at 56, *in camera*; RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). This is hardly the power-buyer-induced, procompetitive impact envisioned by commentators or the courts.

In *Cardinal Health* the court analyzed the power buyer argument and found the power of the buyers in the relevant market insufficient to rebut the government's prima facie case. *FTC v. Cardinal Health*, 12 F.Supp. 2d 34 (D.D.C. 1998). The merging parties were large US drug wholesalers. The four wholesaler defendants in the case controlled almost 80% of the wholesale pharmaceutical distribution market in the US. *Id.* at 40. The court noted three types of customers that could be at competitive risk as a result of the combination; small retail drug store chains, institutional customers (Hospitals), and independent pharmacies. Each of these consumer profiles possessed some bargaining power in its negotiations with the defendants. Yet, the court was not willing to rely on the buyers' ability to frustrate anticompetitive price increases in approving the merger. On the contrary, the court stated that although it recognized the

evidence of significant power on the part of *some* buyers, it nonetheless found that smaller, less sophisticated customers existed alongside the more powerful buyers, making the relevant market "considerably fragmented." This fragmentation resulted in the bargaining ability of the power buyers being not fully representative of customers within the market, and therefore of insufficient disciplining force for the market as a whole. *Id.* at 61. The court concluded, "[i]n the end, although this Court finds that buyer power does exist in whole [sic] market. . . . and is worthy of consideration, it alone cannot rebut the Government's *prima facie* case." *Id.*

Areeda and Hovenkamp considered the power buyer argument within a fragmented market as well:

> There is a high probability that only large buyers will be able to derive the benefit of their bargaining position. Large-buyer bargaining pressure will not always lead to general reductions to competitive levels, and even then there will be some time lapse before any such reductions occur. Also, the greater the opportunity for concealment, the less likely that small buyers will derive any significant benefit. Thus, a common consequence of large-buyer bargaining pressure is likely to be recurrent and more systematic price discrimination in which large buyers obtain lower prices than smaller buyers, but adverse price effects on small buyers alone is sufficient to invoke [section] 7's prohibitions.

4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: an Analysis of Antitrust Principles and their Application 943 (2nd ed. 2000).

Each of the flooded lead-acid separator markets alleged in this case contain both large and small purchasers.[6] Respondent has gone to considerable lengths to depict Exide as a powerful customer, but has failed to put on any evidence at all regarding the ability of its smaller customers to gain favorable pricing and service. It is noteworthy that

[6] According to Daramic's own documents, there are { } (*See, e.g.*, PX0044 at 006-009).

Exide, {

}. (Respondent's Brief at 26). {

} (Respondent's Brief at 12). Daramic's remaining customers are all even smaller.

Complaint Counsel's opposition to the Microporous acquisition is based not simply on the merger's affect on one customer, but on its affect on the markets for separators themselves. As such, no argument limited to the impact of Polypore's acquisition of Microporous on just one or two customers can alleviate the anticompetitive impact shown, and predicted, by the evidence.

Respondent claims that {

}. This too is unsupported, misleading, and contradicted by the evidence. From well before the contract negotiations even began, {

}. (CCFOF 1249). {

}. (*See e.g.*, CCFOF 1337-1339). {

. (CCFOF 1338). {

}.

In *Archer-Daniels*, the court noted with approval the contracts that dominated the market for HFCS[7], as having "meet or release" clauses which gave the customers the ability to shop their orders around, and play their suppliers "off one another." 781 F. Supp. at 1419. In fact, it was precisely this factor that led the court to support the defense's power buyer claim. *Id.* at 1419, 1422. By having the ability to force its supplier to lower its offering price due to the customers' ability to shift orders, the buyers wielded sufficient power to chasten the HFCS suppliers even when the concentration figures would suggest that the suppliers actually had market power. *Id.* at 1418. {

}. Furthermore, to the extent such intransigence is indicative of power in a supplier/customer relationship, it is important to note that Daramic has demanded {

}. (CCFOF 1316-1319, 1325).[8] {

}. (CCFOF 1324). One wonders how Daramic could continuously insist on {

}.

[7] High Fructose Corn Syrup.

[8] {

. (CCFOF 1281-1282). That offer was not even considered by Daramic. (CCFOF 1303).

Finally, Respondent exerts considerable effort in attempting to causally link {

}. (CCFOF 1292, 1294-1295, 1297-1302). {

}. (RX01692 at 2, *in camera*; *see also* CCFOF 1304-1306).[9]

But the most odd thing about Daramic's argument is that it seems to think that its reduction of output by idling plants {

} helps its case. But why should we be surprised that a monopolist is reducing output? That is what monopolists do to raise prices! This is classic antitrust theory. *See National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, 116 (1984) ("just as any monopolist increases revenues by reducing output"). As the U.S. Supreme Court explained in *Brown Shoe*, 370 U.S. at 346 n72:

> "expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity,

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[9] {

}. (CCFOF 1330). {

. (RPTB at 11).

> jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry."

Mr. Toth's admission {

} tells us what is happening here. (CCFOF 1292, 1296). Too much capacity allows prices to move down. Reducing output, which is now easier that Daramic controls one of its former competitors, Microporous, allows Daramic to keep prices higher than competitive levels. Thus, Daramic's evidence actually adds to Complaint Counsel's case and is not a defense at all. But as *Brown Shoe* teaches us, this additional evidence in Complaint Counsel's favor goes far beyond what is necessary to undo a merger that led to only two competitors in SLI and only one monopolist in deep-cycle, motive, and UPS lead-acid battery separators. This evidence goes far beyond the threshold of "incipiency" of concentration that *Brown Shoe* established as the government's burden of proof. 370 U.S. at 346.

IV. CONCLUSION

For the reasons stated above, as is fully supported by the evidence both at the initial trial and the second hearing in this matter, Daramic's acquisition of Microporous and its anti-competitive conduct are illegal. The public deserves a complete remedy to restore competition and prevent further harm to competition.

Dated: December 10, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Reply Post-Trial Brief on the Reopened Record with:

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Federal Trade Commission
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I hereby certify that on December 10, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Reply Post-Trial Brief on the Reopened Record with:

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