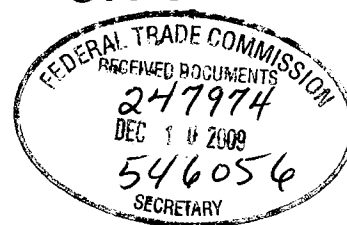


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL



In the Matter of)
)
Polypore International, Inc.,)
 a corporation.)
)

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL REPLY
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON THE REOPENED RECORD

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DECEMBER 10, 2009

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I. EXHIBIT AND WITNESS INDICES

II. PROCEDURAL BACKGROUND

1494. On June 22, 2009, after a five-week hearing in this proceeding, the record was closed.

Response to Finding No. 1494:

Complaint Counsel has no specific response.

1495. On September 25, 2009, Respondent, Polypore International, Inc. ("Polypore or Respondent") moved for a second time to re-open the record in this proceeding to permit the introduction of new and additional evidence (the "Second Motion to Re-open"). By its Second Motion to Re-open, Respondent sought leave to introduce new and additional evidence regarding (1) {

and (2) {
}, set forth in four proffers.

Response to Finding No. 1495:

Complaint Counsel has no specific response for Respondent's first sentence in this Finding of Fact. Complaint Counsel does not believe that Exide's conduct is an issue in this case, unlike the actual issues which are Respondent's merger to a monopoly in the Motive, UPS, and Deep-cycle markets, a decrease from three to two firms in the SLI market, Respondent's anticompetitive behavior, attempt to monopolize, and further monopoly power.

1496. After briefing, the Honorable D. Michael Chappell granted Respondent's Second Motion to Re-open.

Response to Finding No. 1496:

Complaint Counsel has no specific response.

1497. On November 12, 2009, in connection with the Second Motion to Re-open, a hearing was held before Administrative Law Judge Chappell. At the November 12 hearing, Respondent presented additional evidence to the Court through witnesses and exhibits regarding the four proffers. Respondent called two witnesses: Mr. Robert Toth ("Toth"), Chief Executive Officer of Respondent and Mr. Harry D. Seibert ("Seibert"), Vice President and Business Director for Respondent's Daramic subsidiary. Respondent also cross-examined Mr. Douglas Gillespie ("Gillespie"), Vice President of Global Procurement for Exide, who was called by Complaint Counsel as their witness. Respondent introduced 46 exhibits which were admitted into evidence, some over Complaint Counsel's objections. (Tr. 5632-5642, 5812, 5841; Pre. Tr. 10-11, 14-20). Complaint Counsel called only Gillespie in rebuttal. The record of the November 12, 2009 hearing was closed by Order dated November 23, 2009.

Response to Finding No. 1497:

Complaint Counsel has no specific response.

1498. Respondent incorporates herein the definitions set forth in its Proposed Findings of Fact and Conclusions of Law, submitted on July 10, 2009.

Response to Finding No. 1498:

Complaint Counsel incorporates its responses, if any, to Respondent's definitions set forth in its reply to Respondent's Proposed Findings of Fact and Conclusions of Law, submitted on July 10, 2009.

III. {

A. { }

1499. On May 28 and May 29, 2009, Gillespie testified in this proceeding. (JX-9).

Response to Finding No. 1499:

Complaint Counsel has no specific response.

1500. At the time of the hearing this past spring,

. (RX01720, *in camera*). {

. (Gillespie, Tr. 5807-08, *in camera*; see also RFOF 524, 530, 531).

Response to Finding No. 1500:

Exide currently pays { } for SLI separators in North

America under the North America Supply Agreement. (Gillespie, Tr. 3018-3020, 3059, *in camera*; see also Gillespie, Tr. 5807-5808, *in camera* ({

}).

1501. {
}. (JX-9, *in camera*).

Response to Finding No. 1501:

Complaint Counsel has no specific response.

1502. {
}. (RX01119, *in camera*;
Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*).

Response to Finding No. 1502:

With respect to this finding of fact, these citations do not support the assertions. The citations to the trial transcript do not remotely relate to {
}. The documents cited do not support Respondent's contentions. (RX01119, *in camera*; RX01120, *in camera*). Furthermore, Respondent's never stated nor does the citation demonstrate what year {
} (RX01119, *in camera*; Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*). Certainly, Exide did not constitute {

} Exide's relative share of Respondent's business. (Seibert, Tr. 5673, *in camera*).

1503. {
}. (Gillespie, Tr. 5855-56, *in camera*).

Response to Finding No. 1503:

To the extent that Respondent is asserting that the industrial battery business is insignificant to Exide, they are incorrect. Exide's industrial battery manufacturing facilities accounted for more than 35% of Exide's net sales in its most recent quarter. (RX01726 at 006,

015; *see also* Gillespie, Tr. 5863, *in camera* ({
})).

1504. At the time of the hearing this past summer, {
Tr. 5646-48, *in camera*; RX01721, *in camera*). (Seibert,

Response to Finding No. 1504:

{
}. In
2007, Exide issued a Request for Proposal (“RFP”) to battery separator manufacturers around the
world. (Gillespie Tr. 2962). {

}. (PX0922 (Roe, IH at 228, *in camera*)). {

}. (PX1028 at
058-060, *in camera*; Roe, Tr. 1785-1786, *in camera*; *see also* Gillespie, Tr. 2966). Furthermore,
{

}. (RX01666, *in camera*; RX01667, *in camera*; RX01668, *in camera*; RX01669,
in camera; RX01683, *in camera*; RX01687, *in camera*; RX01713, *in camera*; RX01714, *in*
camera; RX01721, *in camera*).

a. { }

1505. {
}. (RX01721 at
002, *in camera*; Seibert, Tr. 5648, *in camera*).

Response to Finding No. 1505:

Complaint Counsel has no specific response.

1506. {

. (Seibert, Tr. 5648-49, 5662-63, *in camera*).

. (Seibert, Tr. 5682, *in camera*). Even this year,

. (Seibert, Tr. 5681-83, *in camera*; RX01724, *in camera*).

. (Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*).

{

Response to Finding No. 1506:

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.

Although Respondent claims that {

}. (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In

fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller, and that firms can maintain their production lines. Most Microporous customers did not have actual supply contracts with Microporous. (Trevathan, Tr. 3773; Gilchrist, Tr. 614). {

} (RX00116 at 004, *in camera*). {

} square meters of separators from Entek on an annual basis without a contract. (Hall, Tr. 2686-2687, 2690).

To the extent that Respondent is asserting that the {

} In fact, when Respondent's counsel

questioned Mr. Gillespie on this subject he stated the

} (Gillespie, Tr. 5849-5850, *in camera*). Moreover, Exide's

{

} (Gillespie, Tr. 5792, 5860, *in camera*). {

} (Gillespie, Tr. 5844-5845, 5860, *in camera*;

RX01724-001, *in camera*).

1507. {

. (Toth, Tr. 5648-49, *in camera*). {

} (Toth, Tr. 5749-50, *in camera*).

Response to Finding No. 1507:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5748-5750, *in camera*).

To the extent that Respondent is asserting that {

} (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller and that firms can maintain their production lines. Most

Microporous customers did not have actual supply contracts with Microporous. (Trevathan, Tr. 3773; Gilchrist, Tr. 614). {

} (RX00116 at

004, *in camera*). From 2004-2007, JCI purchased over 100 million square meters of separators from Entek on an annual basis without a contract. (Hall, Tr. 2686-2687, 2690).

1508. {

. (Seibert, Tr. 5649, 5658, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*; RX01669 at 002, *in camera*; RX01713, *in camera*; RX01718, *in camera*; RX01714 at 001 (“

}).”), *in camera*).

Response to Finding No. 1508:

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.

The allegation about the { } is outside the scope of the proffered facts, because it is not evidence that supports any of the four proffers.

{

}. (See e.g., RX01713-003, *in camera* {(

}; see also RX01666 at 002, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*; RX01669 at 002, *in camera*; RX01683 at 001, *in camera*; RX01718 at 002, *in*

camera; RX01714 at 002, *in camera*). Mr. Seibert testified that all of the {
}. (PX5076 (Seibert, Dep. at 33-34), *in camera*).¹
{
} (PX5076 (Seibert, Dep. at 30-31), *in camera*). As
recently as Daramic's October 2, 2009 {

}. (RX01714 at 001-003, *in camera*). Moreover, Mr. Seibert testified at trial that
Daramic has not { }.
(Seibert, Tr. 5725, *in camera*).

1509. { }.
(Seibert, Tr. 5651, *in camera*).
. (Seibert, Tr. 5668, *in camera*).

Response to Finding No. 1509:

Any proposed { } is simply a reflection of the fact that Exide currently
pays { } for SLI separators in North America. (Gillespie, Tr.
3018-3020, 3059, *in camera*). {

}. (Hauswald, Tr. 763 ({
}); Bregman, Tr. 2901, *in camera*; Gillespie, Tr. 3018-
3020, *in camera*; see also PX1026, *in camera*). {

¹ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, *in camera*).

} (Gillespie, Tr. 5807-5808, *in camera*).

Moreover, {

} (RX01714 at 001-003, *in camera*;

Gillespie, Tr. 5814, *in camera*; see also CCFOF 1316-1320).

Respondent's allegations that its {

} (CCFOF 1321; Seibert, Tr. 5668, *in camera*).

1510. {

5668, *in camera*).

. (Seibert, Tr.

." (Seibert, Tr. 5668, *in camera*).

Response to Finding No. 1510:

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.

{

} The fact that parties

are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See* CCRF 1512).

Moreover, {

} (See CCRF 1509).

Based on Mr. Seibert's testimony it is clear that Daramic does not have to {

} (CCFOF 1321; Seibert, Tr. 5668-5669, *in camera*); (RX01669 at 002, *in camera*

(Exide proposed {

}); Gillespie, Tr.

5808-5810, *in camera*; see also CCFOF 1321).

To the extent that Respondent alleges that any { offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors.

All three potential SLI suppliers in North America (Daramic, Entek and Microporous) were actively competing for {

} (Gilchrist, Tr. 423, 466-467, *in camera*).

During this same time period, {

} (Roe, Tr.

1685-1686, *in camera*; Hall, Tr. 2884, *in camera*). {

} (RX00072, *in camera*).

{

} (RX00072 at 54-61, *in camera*). {

} (RX00072 at 56, *in camera*). In comparison, the best {
offered to Exide by Daramic for {

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

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

1511. This Court finds Seibert to be a credible witness. Seibert's testimony is consistent with Respondent's exhibits. This Court credits Seibert's testimony in this matter. In contrast, for the reasons stated herein and previously, this Court does not find Gillespie to be a credible witness. The evidence adduced during the hearing on November 12 and May 28 and 29, 2009 demonstrates that Exide has attempted to manipulate this proceeding by intentionally refraining from certain relevant conduct until after the hearing record had been closed. Gillespie's testimony on May 28 and 29, 2009 was rehearsed with Complaint Counsel, including Exide's "recommendation" of relief. (RFOF 602). Accordingly, this Court does not credit Gillespie's testimony.

Response to Finding No. 1511:

Respondent's ludicrous statements are outside of the scope and are only dealing with alleged facts that arose in the first hearing in this matter. 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.

{
}. The fact that parties
are in negotiations and thus far have been unable to reach an agreement does not provide any
evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence

establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (See CCRF 1512).

Respondent's allegation that Exide has attempted to manipulate this proceeding is inaccurate. At no time did Exide intentionally refrain from certain relevant conduct until after the hearing record closed. (See CCRF 1543).

The determination of the credibility of Mr. Seibert and Mr. Gillespie is a legal conclusion, not a factual assertion. However, Mr. Seibert is not a credible witness and has been caught by Complaint Counsel on several occasions changing his story. (See CCFOF 1345-1347). One example of Mr. Seibert's lack of credibility relates to {

}. (PX5076 (Seibert, Dep. at 27), *in camera*). At the end of the deposition, after a lengthy break and under redirect, Mr. Seibert testified that {

}. (PX5076 (Seibert, Dep. at 102), *in camera*).

In his deposition testimony, Mr. Seibert made no mention of {

}. Yet, at trial, Mr. Seibert testified that {

} (Seibert, Tr. 5703, *in camera*). Mr.

Seibert's testimony at trial, that he had communicated at his deposition that Daramic had

{ }. (Seibert, Tr. 5703, *in camera*; PX5076 (Seibert, Dep. at 102), *in camera*).

Respondent's bare assertions regarding Mr. Gillespie's credibility are not only unsupported by citations to the voluminous record, but merely speculation and conjecture regarding Exide's intentions. Mr. Gillespie has given three depositions and several days of testimony at trial, yet Respondent can not cite to any lies that would directly affect his

credibility. Instead, Respondent had made an unfounded assertion about a neutral third party's credibility.

b. { }

1512. After Gillespie testified in this hearing on May 28 and 29, 2009,

{ (Seibert, Tr. 5650, *in camera*; RX01665, *in camera*). {

at 001, *in camera*). } (RX01665

Response to Finding No. 1512:

Respondent's assertion regarding {

} Proof that Exide was not able to dictate its alleged demands to Daramic can be found in the fact that during the course of negotiations, Exide {

}.

(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). Daramic refused to agree to this {

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

Third, Exide sought a {

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

Moreover, contrary to Respondent's contention that Exide was able to dictate terms to Daramic, 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*). {

}. (RX01665 at 002-003, *in*

camera). {

}. (RX01687, *in camera*).

1513. {

. (Seibert, Tr. 5650-51, 5697, 5669-70, *in camera*; RX01665 at 002-003, *in camera*).

Response to Finding No. 1513:

Respondent's use of {

} is a gross overstatement of what occurred. In fact,

{

}. (See CCRF 1512; *see, e.g.*,

RX01687 at 003, *in camera* ({

});

RX01714 at 003, *in camera* ({

}).

To the extent that Respondent alleges that Daramic conceded to Exide's alleged "demand[s]" with regards to { } for a new contract, such allegations are not true. First, Exide's {

}. (RX01665 at 004, *in camera*). But within one month's time, Exide indicated that it would be willing to {

}. (RX01669 at 002, *in camera*). Second,

Daramic was never willing to {

}. (See CCFOF 1321). Third, Daramic's proposed {

}. (Gillespie, Tr.

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

}. (CCFOF 1316-1322).

1514. In addition, {

}. (RX01665 at 003, *in camera*).
Tr. 2934, *in camera*), and is further evidence that {
, (Gillespie,
} and therefore, contrary to Complaint Counsel's assertions, there are no
significant barriers to entry for battery separators due to testing, whether for automotive,
motive or some other application or use.

Response to Finding No. 1514:

Respondent's assertion that Mr. Gillespie's {

}. (Gillespie, Tr. 2934, *in camera*). {

}. (RX01665 at 003, *in camera*).

In fact, contrary to Mr. Toth's testimony that Daramic offered Exide {

}. (RX1714, *in camera*).

The assertions made by Respondent's about the time it takes to test different separator end-uses in the third sentence of this finding is outside of the scope of the four proffers of the second hearing; thus, is improperly included in these findings of fact.

1515. {
}. (Seibert, Tr. 5670, *in camera*; RX01697,
in camera).

Response to Finding No. 1515:

{

}. (*See*

CCRF 1509). Moreover, Daramic has not {

}. (See CCRF 1509).

1516. At the hearing,

” (Gillespie, Tr. 5852, *in camera*). {

. (RX01665 at 001, *in camera*).

. This Court finds Gillespie’s testimony not to be credible and further finds that Exide has attempted to manipulate this proceeding to its benefit.

Response to Finding No. 1516:

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. Moreover, this finding calls for a legal conclusion, which is improper.

Respondent’s assertion Exide’s {

} (RX01665 at 001, *in camera*). {

}. (RX01665, *in camera*).

Moreover, Respondent’s allege that Mr. Gillespie’s testimony is in some way inconsistent with the { }; therefore, his testimony should be discounted. However, Mr. Gillespie’s testimony is entirely consistent with the actions Exide took. At trial Mr. Gillespie stated that {

}. (Gillespie, Tr. 5852, *in camera*). None of Mr. Gillespie's testimony that Respondent cited discusses why {
}. Respondent is simply ignoring the record evidence and developing its own story from wild speculation and conjecture as to the true reason for the {
}.

Respondent's last sentence is a legal conclusion and not a factual conclusion. Moreover, the assertion made in Respondent's last sentence is unsupported by any evidence.

B. {
1517. {
}. (RX01713, *in camera*; RX01667, *in camera*; Seibert, Tr. 5665, *in camera*). {
}. (RX01713 at 002, *in camera*).

. (RX01713 at 003; Seibert, Tr. 5657, *in camera*).

Response to Finding No. 1517:

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. Moreover, this finding calls for a legal conclusion, which is improper.

{
}. (See CCRF 1509). Moreover, Daramic has not {

}. (See CCRF 1509).

Importantly, Daramic continued to {

}. (See generally, CCFOF 1069-1078). {

}. (RX01714 at 001-003,

in camera). {

}. (Gillespie, Tr. 5814-5815, 5865-5866, *in*

camera).

a. { }

1518. {

. (Seibert, Tr. 5651-53, 5655, *in camera*;

RX01617, *in camera*).

Response to Finding No. 1518:

Complaint Counsel has no specific response.

1519. {

. (Seibert, Tr. 5651-52, 5670, *in camera*). {

5652, *in camera*). {
Tr. 5652, *in camera*).

. (Seibert, Tr.
}. (Seibert,

. (Seibert, Tr. 5658, *in camera*).

Response to Finding No. 1519:

The citation in the third sentence does not reference Mr. Gillespie agreeing with Daramic's rationale. (Seibert, Tr. 5652, *in camera*).

Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5651-5652, 5658, 5670 *in camera*). The statements attributed to Mr. Gillespie are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are

inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009). Complaint Counsel and Respondent agreed that any testimony provided by Mr. Seibert or Mr. Toth regarding statements made by Exide officials would be admitted solely for the state of mind of Mr. Seibert or Mr. Toth, and not for the truth of the matter asserted. (Seibert, Tr. 5660-5661, *in camera*; Toth, Tr. 5740, *in camera*).

Per the Court's June 16, 2009 Order on Post Trial Briefs, the parties shall

“not cite to testimony for the truth of the matter asserted if the testimony was admitted over objection for a purpose other than for the truth of the matter asserted. If such testimony is cited, the party must indicate in its brief or proposed findings that the testimony was elicited for a purpose other than for the truth of the matter asserted.”

(Order on Post Trial Briefs, dated June 16, 2009). Respondent's proposed finding violates this provision of the Court's order in two ways. First, it cites to Mr. Seibert's testimony for the truth of statements made by Mr. Gillespie. Second, it fails to indicate that the statement of Mr. Gillespie was elicited solely for the state of mind of Mr. Seibert. In addition in a separate provision, the Court's order states that the parties shall “not cite to evidence that was admitted for a limited purpose for any purpose other than the theory for which it was admitted. (Order on Post Trial Briefs, dated June 16, 2009). Respondent's proposed finding violates this provision of the Court's order by citing Mr. Seibert's testimony for a purpose other than his state of mind, the theory for which it was admitted.

Although Respondent claims that {

} (PX5076 (Seibert, Dep. Tr. 26, *in camera*)). In

fact, the record indicates that a large portion of all battery separator purchases are completed without a contractual relationship between the buyer and the seller and firms can maintain their production lines. (*See* CCRF 1506).

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.

To the extent that Respondent alleges that Daramic conceded to Exide's alleged { } for a new contract, such allegations are not true. First, Exide's { }.

(RX01665 at 004, *in camera*). But within one month's time, Exide indicated that it would be willing to {

} (RX01669 at 002, *in camera*). Second, Daramic's proposed {

}.

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

} (CCFOF 1316-1322). Fourth,

Respondent's allegations that its {

} (See CCRF 1509).

To the extent that Respondent alleges that any { } offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts showing the SLI market was much more competitive with three competitors than it currently is with only two competitors.

{

} (RX00072 at 054-061, *in camera*). {

} (RX00072 at 056, *in camera*). In comparison, the {
} offered to Exide by Daramic for {

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

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

b. {

1522. {

. (RX01668, *in camera*; RX01669, *in camera*; Seibert, Tr. 5658-59, 5662, *in camera*). {

. (RX01668 at 002, *in camera*; Seibert, Tr. 5659-60, *in camera*;
Gillespie, Tr. 5839, *in camera*).

Response to Finding No. 1522:

Respondent's assertion that there had been { } 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.

Respondent fails to acknowledge that Exide's {

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

Additionally, on the same {

}.
}

(RX01668 at 002, *in camera*). Moreover, {

} (RX01704 at 001, *in*

camera). Furthermore, {

}. (RX01687 at 002, *in camera*).

However, none of Exide's scenarios mattered because all of Daramic's proposed {

}. (CCFOF 1316-1322; *see e.g.*, RX01713-003, *in*

camera {

}; Toth, Tr. 5750-5751, *in*

camera; Seibert, Tr. 5663-5664 ({

}; *see also*

RX01666 at 002, *in camera*; RX01667 at 002, *in camera*; RX1668 at 002, *in camera*; RX01683 at 001, *in camera*; RX01718 at 002, *in camera*; RX01714 at 002, *in camera*).

1523. At the same time

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

{
Seibert, Tr. 5734, *in camera*).

Response to Finding No. 1523:

Respondent fails to acknowledge that Exide's {

}. (*See* CCRF 1522).

To the extent that Respondent alleges that Daramic conceded to Exide's alleged { } for a new contract, such allegations are not true. (See CCRF 1521).
{ } (See

CCRF 1509). Respondent's allegations that {

} (See CCFOF 1321).

To the extent that Respondent alleges that any { } offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors. (See also CCRF 1521). {

} (Gillespie, Tr. 5814-5815, 5865-5866, *in camera*). Mr. Seibert confirmed at trial that {

} (Seibert, Tr. 5726, *in camera*²; see also CCRF 1527).

1524. Upon learning that {

. (Seibert, Tr. 5660, *in camera*).

. (RX01720 at 035, *in camera*; Seibert, Tr. 5660, *in camera*). {

. (Seibert, Tr. 5660, *in camera*).

Response to Finding No. 1524:

Respondent's assertion that { } is self-serving testimonial evidence regarding contentious negotiations between Daramic and Exide.

² Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5725-5726, *in camera*).

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.

Respondent fails to acknowledge that Exide's {

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

Additionally, on the same {

}.

(RX01668 at 002, *in camera*). Moreover, Mr. Ulsh in a letter to Mr. Toth, {

} (RX01704 at 001, *in*

camera). Furthermore, {

}. (RX01687 at 002, *in camera*).

Moreover, Polypore's own document anticipated a {

}. (RX01692 at 002, *in camera*).

Daramic expects to {

}. (CCFOF 1253 – 1255, 1305 - 1306). However, Daramic has never {

}. (CCFOF 1312 - 1315). Because Daramic is {

}. (CCFOF 1321). Finally, Daramic has

repeatedly refused to offer to supply Exide with {

}. (CCFOF 1317).

1525. {

. (Seibert, Tr. 5660-61, *in camera*).

{
 . (Seibert, Tr. 5661, *in camera*).

Response to Finding No. 1525:

Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5660-5661 *in camera*). The statements attributed to Mr. Gillespie are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

Respondent fails to acknowledge that Exide's {
 } . (See CCRF 1524).

Polypore's own document anticipated a {
 } . (See CCRF 1524).

At trial Mr. Seibert was asked if Exide had ever informed him that it intended to {

} . (PX5076 (Seibert, Dep. at 48-49), *in camera*). Mr. Seibert admitted that {

} PX5076 (Seibert, Dep. at 49), *in camera*). What Mr. Seibert
does know is that {

} . (PX5076 (Seibert, Dep. at 74), *in camera*). Mr. Gillespie testified that {

} . (Gillespie, Tr. 5826, 5838, *in camera*). Moreover, Exide has {

} . (Gillespie, Tr. 5868, *in camera*).

1526. In subsequent discussions, {

. (Seibert, Tr. 5662-63, 5666, *in camera*; Toth, Tr. 5749-50, *in camera*; RX01714 at 002, *in camera*; RX01718 at 002, *in camera*). In addition,

. (Seibert, Tr. 5663-65, *in camera*; Toth, Tr. 5750-51, 5760-61, *in camera*; RX01718 at 002, *in camera*; RX01683, *in camera*; RX01714 at 002, *in camera*). {
}

Response to Finding No. 1526:

Respondent's assertion that it {

} 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.

{

} The fact that parties are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See* CCRF 1512).

} (CCFOF 1317, 1322; *see generally*, CCFOF 1069-1078). {

} (*See* CCRF 1509).

1527. {

. (Seibert, Tr. 5732-34, *in camera*).

Response to Finding No. 1527:

Respondent's assertion that {

} 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.

{

} The fact that parties are in negotiations and thus far have been unable to reach an agreement does not provide any evidence that Exide wields power in its negotiations with Daramic. In fact, the evidence establishes that the failure of Exide and Daramic to reach a supply agreement is because Daramic wields power over Exide. (*See CCRF 1512*).

Mr. Seibert testified that all of the {

}. (PX5076 (Seibert, Dep. at 33-34), *in camera*).³ {

} (PX5076 (Seibert, Dep. at 30-31), *in camera*). As recently as Daramic's October 2, 2009 {

}: (RX01714 at

³ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, *in camera*).

001-003, *in camera*). Mr. Seibert testified at trial that Daramic has not {

}. (Seibert, Tr. 5725, *in camera*).

{

}. (See

CCRF 1509). Furthermore, Respondent's allegations that {

}. (See CCRF 1524;

CCFOF 1321).

To the extent that Respondent alleges that any { offered by Daramic to Exide is an indication that the SLI market is currently acting in a competitive fashion, such allegations are contradicted by facts which show that the SLI market was much more competitive with three competitors than it currently is with only two competitors. (*See also* CCRF 1521).

Lastly, Daramic has never {

}. (CCFOF 1312 - 1315). {

}. (Seibert, Tr. 5722, *in camera*). Mr. Seibert

could not testify as to {

} (PX5076 (Seibert, Dep. at 101), *in camera*). Mr. Seibert confirmed at trial that {

}. (Seibert, Tr. 5726, *in camera*).⁴ Mr. Seibert was unable to even {

}. (Seibert, Tr. 5725,

⁴ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5725-5726, *in camera*).

in camera). Mr. Seibert could not testify about {
} (Seibert, Tr. 5725, *in camera*).

Moreover, Mr. Seibert testified that {
}

(PX5076 (Seibert, Dep. at 101), *in camera*). Mr. Gillespie testified that {

} (Gillespie, Tr. 5814-5815, *in camera*).

1528. {

. (Seibert, Tr. 5645, *in camera*; Gillespie, Tr. 5851, *in camera*; RX01665, *in camera*;
RX01669 at 002, *in camera*; RX01687, *in camera*).

Response to Finding No. 1528:

The fact that the parties are in negotiations and thus far have been unable to reach an
agreement does not provide any evidence that Exide yields power in negotiations with Daramic.

{ } In October 2009, after

Daramic {

} (Gillespie, Tr. 5815, *in*

camera). According to Mr. Gillespie, Daramic's immediate response was that it {

} (Gillespie,

Tr. 5865-5866, *in camera*).

C. { }

1529. After the record was closed on June 22, 2009, {

(RX01676, *in camera*; Seibert, Tr. 5674, *in camera*; Gillespie, Tr. 5845, *in camera*).

(Seibert, Tr. 5673-74, 5676-77, *in camera*; Gillespie, Tr. 5845-46, *in camera*; RX01676, *in camera*). {

. (RX01676, *in camera*; JX-9, *in camera*; Gillespie, Tr. 5839, 5843, *in camera*). Specifically, {

} (RX01676, *in camera*).

Response to Finding No. 1529:

The contention that Exide's { } began "after the record was closed" is wrong. Exide first { } prior to the close of the record. (RX01676 at 001, *in camera*). Furthermore, Exide had previously informed Daramic of its intention to {

}. (CCFOF 1261-1262, 1267-1268). {

}. (CCFOF 1262, 1265-1266). Additionally, on June 2, 2009 Mr. Seibert

acknowledged that Daramic had received { } (CCFOF 1264; PX5076 (Seibert, Dep. at 10-11, *in camera*).

Moreover, to the extent that Respondent alleges that Exide will in fact have { }, such allegation is contradicted by the facts in the record. In fact, Daramic {

} (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

} (Gillespie, Tr. 5799, *in camera*).

Furthermore, Respondent's allegations that Exide {

} (CCFOF 1267-1268). Mr. Gillespie testified that {

} (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

{

} (CCFOF 1276).

1530. {

. (RX01667 at 001, *in camera*; RX01670 at 001, *in camera*; RX01671 at 001, *in camera*; Seibert, Tr. 5675-76, *in camera*; Gillespie, Tr. 5844, *in camera*).

Response to Finding No. 1530:

The contention that Daramic was not aware of the {

}. During the first half of 2009, Exide informed Daramic of its intention to {

}.

(CCFOF 1261-1262, 1267-1268). Daramic knew precisely {

}. (RX01720 at 019, *in camera*). Moreover, on June 2,

2009 Mr. Seibert acknowledged that Daramic had received {

}. (CCFOF 1264; PX5076 (Seibert, Dep. at 10-11, *in camera*).

1531. {

. (Seibert, Tr. 5673-74, 5679, *in camera*). {

. (Gillespie, Tr. 5842-43, *in camera*).

. (Gillespie, Tr. 5843, *in camera*; Toth, Tr. 5752-53, *in camera*; RX01686, *in camera*).

Response to Finding No. 1531:

To the extent that Respondent alleges that Exide will in fact have {

}, such allegation is contradicted by the facts in the record. In fact,

Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

}. (Gillespie, Tr. 5799, *in camera*).

To the extent that Respondent contends that Exide does not {

} (Gillespie, Tr. 5859, *in camera*).

Furthermore, Respondent's allegations that Exide {

}. (CCFOF

1267-1268). Mr. Gillespie testified that {

}. (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

Moreover, the statements attributed to Mr. Ulsh are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

1532. Based on past practice,

. (Seibert, Tr. 5671, *in camera*; JX-9, *in camera*). In contrast, {

. (RX01676, *in camera*; JX-9, *in camera*; Seibert, Tr. 5673-74, *in camera*; Gillespie, Tr. 5839, *in camera*).

Response to Finding No. 1532:

{

}. (Gillespie, Tr. 5806, 5833, *in camera*).

To the extent that Respondent alleges that Exide will in fact have {
}, such allegation is contradicted by the facts in the
record. Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

}. (Gillespie, Tr. 5799, *in camera*).

Respondent's allegations that Exide {

}. (CCFOF

1267-1268). Mr. Gillespie testified that {

}. (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

1533. {

. (Seibert, Tr. 5671, *in*

camera). {

. (Seibert, Tr. 5672, *in*

camera; RX01723, *in camera*).

. (Seibert, Tr.

5673, *in camera*; RX01708 (

), *in camera*.)

Response to Finding No. 1533:

{

} . (Seibert, Tr. 5672, *in camera*). {

}

(CCFOF 1260). {

} . (CCFOF 1276).

1534. {

camera). {

. (Seibert, Tr. 5678-79, 5709-10, *in*

in camera; Seibert, Tr. 5672, *in camera*).

. (RX01698,

. (RX01699, *in camera*; Seibert, Tr. 5672-73, *in camera*).

Response to Finding No. 1534:

To the extent that Respondent alleges that Exide will in fact have {

}, such allegation is contradicted by the facts in the

record. Daramic {

} . (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

}

(CCFOF 1288).

{

} . (CCFOF 1276).

1535. {

, (Seibert, Tr. 5674, *in*

camera), { } (Seibert,
Tr. 5683, *in camera*). {
}. (Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*). {
. (RX01723, *in camera*; Gillespie, Tr. 5837, *in camera*).

Response to Finding No. 1535:

To the extent that Respondent alleges that Exide will in fact have {
}, such allegation is contradicted by the facts in the record. In fact,
Daramic {
}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288).

To the extent that Respondent alleges that it was unaware of the {
}. During the first half of
2009, Exide had informed Daramic of its intention to {
}. (CCFOF 1261-1262, 1267-1268).

Daramic knew precisely {
}.
(RX01720 at 019, *in camera*). Moreover, on June 2, 2009 Mr. Seibert acknowledged that
Daramic had received { } (CCFOF 1264; PX5076
(Seibert, Dep. at 10-11, *in camera*).

{
}. (CCFOF 1271). Despite this,
Daramic is not allowing Exide the option of {

}

(CCFOF 1271; RX01693 at 001, *in camera* {

}).

{

}. (CCFOF 1276).

1536. Moreover,

(Seibert, Tr. 5681-82, *in camera*). In addition, {

(Seibert, Tr. 5682-83, *in camera*; RX01724, *in camera*). {

}. (Gillespie, Tr. 5849-50, *in camera*).

{

. (RX01724, *in camera*; Seibert, Tr. 5683, *in camera*).

For example,

(RX01724, *in camera*). Similarly,

. (RX01724, *in camera*). {

}.

Response to Finding No. 1536:

The statement that Exide's {

}. The validity and

trustworthiness of Respondent's one-sided statements in the ongoing dispute over {

} 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.

Mr. Gillespie testified that {

}. (Gillespie, Tr. 5849-5850, *in camera*). {

}

(RX01693 at 002, *in camera* (emphasis added)). {

}. (CCFOF 1261, 1283, 1288).

{

}. (Gillespie, Tr. 5799, 5804-5805, 58221-5823, *in camera*).

1537. {

. (Seibert, Tr. 5683, *in camera*).

.” (RX01717, *in camera*; Gillespie, Tr. 5848-49, *in camera*; Seibert, Tr. 5683-84, *in camera*). Here,

. (Seibert, Tr. 5676-77, 5732, *in camera*).

Response to Finding No. 1537:

{

} (RX01693 at 002, *in camera* (emphasis added)). This is corroborated by Mr. Gillespie’s testimony that {

}. (Gillespie, Tr. 5849-5850, *in camera*). {

}. (CCFOF 1261, 1283, 1288).

To the extent that Respondent alleges that it was unaware of the {

}. During the first half of

2009, Exide had informed Daramic of its intention to {

}. (CCFOF 1261-1262, 1267-1268).

Daramic knew precisely {

}.
}

(RX01720 at 019, *in camera*). Moreover, on June 2, 2009 Mr. Seibert acknowledged that

Daramic had received {

}. (CCFOF 1264; PX5076

(Seibert, Dep. at 10-11, *in camera*).

{

}. (CCFOF 1262). {

}. (Gillespie, Tr.

5792-5793, *in camera*). {

}. (Gillespie, Tr. 5830-5831, *in camera*).

{

}. (Gillespie, Tr. 5831-5832, *in camera*).

1538. {

* * *

}.
(Gillespie, 5842-43, *in camera*).

Response to Finding No. 1538:

To the extent that Respondent alleges that Exide will in fact have {
}, such allegation is contradicted by the facts in the
record. Daramic {

}. (Gillespie, Tr. 5860, *in camera*; CCFOF 1283-1288). {

}. (Gillespie, Tr. 5799, *in camera*).

Respondent's allegation that Exide {

}. (CCFOF 1267-

1268). Mr. Gillespie testified that {

}. (Gillespie, Tr. 5818, 5823, 5829, *in camera*).

{

}. (CCFOF 1276).

1539. {

. (Seibert, Tr. 5680-81, *in camera*).

Response to Finding No. 1539:

{

} (Gillespie, Tr. 5860, *in camera*; PX5076 (Seibert, Dep. at 38, *in camera*); CCFOF 1283-1288). {

} (Gillespie, Tr. 5822, *in camera*; see also Gillespie, Tr. 5803, *in camera*). {

} (Gillespie, Tr. 5799, *in camera*; Seibert, Tr. 5706-5707, *in camera*).

1540. {

. (Seibert, Tr. 5677-78, *in camera*). {
}. (RX01693, *in camera*; Seibert, Tr. 5679-80, *in camera*).

{

.” (Gillespie, Tr. 5862, *in camera*). Yet

. (Gillespie, Tr. 5846, *in camera*).

{

} (Gillespie, Tr. 5849, *in camera*). In any event,

. (Seibert, Tr. 5672, *in camera*).

Response to Finding No. 1540:

The statement in the first sentence attributed to Mr. Gillespie is being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, is inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519). Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5677-5678, *in camera*). Mr. Gillespie's testimony cited by Respondent with respect to his discussion with Daramic is hearsay and cannot be offered for the truth of the matter asserted. (Gillespie, Tr. 5849, *in camera*).

{

} (Gillespie, Tr. 5861, *in camera*).

Contrary to Respondent's assertion, Mr. Gillespie did not {

}. (CCFOF 1267, 1272). {

}.

(Gillespie, Tr. 5792-5793, *in camera*).

{

}. (Gillespie, Tr. 5860, *in camera*;

CCFOF 1283-1288). {

}. .

(Gillespie, Tr. 5799, *in camera*; Seibert, Tr. 5706-5707, *in camera*).

1541. {

. (Seibert, Tr. 5684-85, *in camera*;

Gillespie, Tr. 5840-41, *in camera*; RX01681, *in camera*).

. (Gillespie, Tr. 5840,

in camera).

.” (RX01681, *in camera*). {

. (Gillespie, Tr. 5839, *in camera*). Again, Gillespie’s
testimony is not credible.

Response to Finding No. 1541:

{

}. (CCFOF 1283). {

}. (CCFOF 1286). {

}. (CCFOF 1283, 1285-1286). {

}. .

(CCFOF 1328-1330). {

}. (Gillespie, Tr. 5822, *in camera*; see also Gillespie, Tr. 5803, *in camera*).

{

}.

(RX01681, *in camera*).

Contrary to Respondent's spurious allegation, there is nothing inconsistent between {

} (Gillespie, Tr. 5839, *in camera*

(emphasis added)). It is simply disingenuous for Respondent to pull a few words from Mr. Gillespie's testimony out of context, and then have the audacity to use the redacted quote to attack his credibility.

1542. {

. (Gillespie, Tr. 5836-37, *in camera*).

. (Gillespie, Tr. 5843; RX01726).

Response to Finding No. 1542:

This finding is outside of the scope of the proffered facts, because it is not evidence that supports any of the four proffers. In fact, Mr. Seibert clearly testified that {

}. (Seibert, Tr. 5701, *in camera*; see also CCFOF 1258).

{

}. (Gillespie, Tr. 5822, *in camera*). {

}. (Gillespie, Tr. 5836, *in camera*). {

} that Exide's Industrial Energy segment informed investors as recently as November 5, 2009 that it believes that "a slow recovery is underway." (RX01726 at 006). {

}. (Gillespie, Tr. 5800, 5832, *in camera*). {

}. (Gillespie, Tr. 5866-5867, *in camera*).

{

}. (Gillespie, Tr. 5821-5822, 5867, *in camera*). {

}. (Gillespie, Tr. 5805, 5822-5823, *in camera*). {

}. (CCFOF

1341-1342).

{

}. (CCFOF 1276).

1543. {

Response to Finding No. 1543:

Respondent's unsupported allegations are entirely without basis. {

}. (CCFOF 1261-1266). {

}. (CCFOF 1261-1262). {

}.

(Gillespie, Tr. 5792, 5860, *in camera*; CCFOF 1262). {

}. (CCFOF 1264). {

}. (RX01676 at 001,

in camera; CCFOF 1265). Furthermore, Daramic knew precisely {

} (RX01720 at 019, *in camera*).

{

} (Gillespie, Tr. 5832, *in camera*). {

} (Gillespie, Tr. 5832, *in*

camera). {

}.
}

(Gillespie, Tr. 5832, *in camera*). {

} (Gillespie, Tr. 5800, 5832, *in camera*).

{

} (Gillespie, Tr. 5813, 5832, *in camera*; CCFOF 1267-1268). {

} (RX01679 at 002, *in camera*).

{

}. (See CCRF 1604).

1544. {

. (RX01679, *in camera*; RX01693, *in camera*).

Response to Finding No. 1544:

{

}.
}

(RX01720 at 019, *in camera*).

{

}.
}

(Gillespie, Tr. 5805, *in camera*). {

}. (CCFOF 1267-1270). {

}. (Gillespie, Tr. 5859, *in camera*). According to Mr.

Gillespie, {

} (Gillespie, Tr. 5859, *in camera*).

{

}. (Seibert, Tr. 5672-5673, *in camera*; CCFOF 1288).

1545. {

005, *in camera*).

.” (RX01720 at

Response to Finding No. 1545:

{

}. (RX01720 at 019, *in camera*).

1546. {

. (RX01693, *in camera*;
RX01680, *in camera*; RX01685, *in camera*; Seibert, Tr. 5681, 5684, *in camera*).

{

. (Seibert, Tr. 5734-35, *in camera*). Further, the Court finds that

Response to Finding No. 1546:

{

}.

(RX01720 at 019, *in camera*).

{

}. (CCFOF

1273). { ,

}. (CCFOF 1273). {

}. (CCFOF 1264, 1267-1268, 1270).

{

}. (CCFOF 1337-1339). {

}. (Gillespie, Tr. 5813, *in camera*). {

}.

(Gillespie, Tr. 5813, 5830-5833, *in camera*).

1547. {

. (Seibert, Tr. 5684, 5707, 5715, 5723, *in camera*; RX01685, *in camera*). {

. (Seibert, Tr. 5681, 5722, *in camera*).

Response to Finding No. 1547:

Mr. Seibert's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5681-5722, *in camera*). {

}

(PX5075 (Toth, Dep. at 28, *in camera* ({

}); CCFOF 1330).

{

}. (Seibert, Tr. 5681, 5722, *in camera*).

1548. {

. (Gillespie, Tr. 5807, 5843-44, *in camera*). Gillespie's testimony here, and elsewhere, is not credible. According to Exide's second quarter results, Exide's sales of transportation and industrial batteries are down 29% and 26%, respectively. (Gillespie, Tr. 5843-44; RX01726). Moreover, Exide's free cash has declined 129% from last year, which Gillespie does not dispute. (Gillespie, Tr. 5844).

. (Gillespie, Tr. 5862, *in camera*). This Court does not find Gillespie to be a credible witness.

Response to Finding No. 1548:

Respondent's attempt to besmirch Mr. Gillespie's credibility by arguing that Exide is a financially troubled firm is simply not accurate. {

}. (Gillespie, Tr. 5843, 5861, *in camera*). All of Mr. Gillespie's statements about Exide's financial ability are true and are corroborated by Exide's fiscal second quarter results which 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). {

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

Given that Exide's cash position is actually much better than it has been in the recent past, Respondent is left trying to use sleight of hand to attack Mr. Gillespie's credibility by citing to an unusual accounting term known as Free Cash Flow. However, even Respondent's citation to free cash flow falls flat, as Exide's second quarter results showed that Exide actually "generated positive free cash flow" in the quarter, while at the same time managing to fund capital investments and restructuring to the tune of \$70.7 million. (RX01726 at 004, 006). Finally, Respondent's last sentence is a legal conclusion unsupported by the evidence.

D. {

1549. {

camera). {

camera). {

in camera; RX01704, *in camera*).

Accordingly, {

." (RX01704, *in camera*; Gillespie, Tr. 5838, *in*

. (Gillespie, Tr. 5838, *in*

). (Toth, Tr. 5750-51,

. (Gillespie, Tr. 5838-39, *in camera*).

Response to Finding No. 1549:

{

}. (RX01687 at

002, *in camera*). {

}. (RX01668 at

002, *in camera* ({

}); RX01669 at 002, *in camera* ({

}). {

}. (Gillespie, Tr. 5810, 5825-

5826, 5829, *in camera*; *see also* CCFOF 1256-1257).

{

}. (Gillespie, Tr. 5838, *in camera*). {

}. (Gillespie, Tr. 5838, 5868, *in camera*). {

}. {

{

}. (CCFOF 1317).

The statements attributed to Mr. Ulsh are being offered for the truth of the matter asserted, not for the state of mind of the one testifying to the statement, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1519).

Respondent's last sentence is unsupported by any evidence and is contradicted by testimony and documentary evidence.

1550. Previously, Respondent provided evidence demonstrating that even in Complaint Counsel's SLI market in North America, {
(RFOF 927). {

(RX01668, *in camera*). {

Response to Finding No. 1550:

The first and last sentence of this finding are outside of the scope of the proffered facts as they address issues that are unrelated to the proffered facts. {

927).

{

}. (See CCRF 1549 above).

{

}.
}

(CCFOF 1262-1265, Gillespie, Tr. 5862, *in camera*). {

}

1551. {

Response to Finding No. 1551:

Respondent's finding of fact is a legal conclusion unsupported by the evidence.

{

}. (Hall, Tr.

2748, *in camera*). {

}. (See CCRF

1549 above).

{

}.
}

{

}. (RX00072 at 054-

061, *in camera*). {

}

(RX00072 at 056, *in camera*). In comparison, the best { } offered to Exide by Daramic for

{

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

}. (RX00072 at 056, *in camera*; RX01668 at 002; Seibert, Tr. 5656, *in camera*).

1552. Similarly,

camera). {

. (RX01687 at 002, *in*

Response to Finding No. 1552:

{

}. (Gillespie, Tr. 5829, *in camera*; see also CCFOF

279, 283-284, 462, 471, 788-789). {

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

}.
}

{

}. (Gillespie, Tr. 5825-5826, *in camera*).

{

}. (Gillespie, Tr. 5826-5827, *in*

camera). {

}. (Gillespie, Tr. 5829, *in camera*).

{

}. (Gillespie, Tr. 5828, *in camera*).

{

} (Gillespie, Tr. 5818, *in*

camera). {

} (Gillespie, Tr. 5829-5830, *in camera*). {

}. (Gillespie, Tr. 5829, *in camera*). {

}. (CCFOF 132-1324; 1281-1282, 1315). {

}. (Gillespie, Tr. 5869-5871, *in camera*; CCFOF 1315).

{

}. (CCFOF 1334-1336, 1341-1342).

1553. Based on the foregoing, including specifically

Response to Finding No. 1553:

Respondent's allegations are legal conclusions, unsupported by the evidence. (See CCRF 1549-1552 above).

E. {Toth Reaches Out to Exide's CEO}

1554. Respondent's Chief Executive Officer, Robert Toth ("Toth"), testified at the hearing on November 12, 2009. Toth's testimony went uncontradicted by Complaint Counsel. This Court finds Toth to be a credible witness and credits his testimony in this hearing.

Response to Finding No. 1554:

This finding states a legal conclusion. Moreover, Respondent does not state the pages of Mr. Toth's testimony that it claims "went uncontradicted." Despite these shortcomings, Mr.

Toth was contradicted by Mr. Gillespie regarding Exide's willingness to {

. Mr. Toth testified that {

} (Toth, Tr. 5762, *in camera*). However, Mr. Gillespie testified that {

}. (CCFOF

1281). In October 2009, after Daramic {

}. (Gillespie, Tr. 5815, *in camera*). A purchase order is a "firm commitment" and "by definition" is also a contract. (Gillespie, Tr. 5815, 5865-5866, *in camera*). Mr. Gillespie testified that Exide {

}. (Gillespie, Tr.

5815-5816, 5865-5866, *in camera*).

In addition, Complaint Counsel's responses to Respondent's proposed findings 1589 and 1601 also provide evidence undermines Mr. Toth's credibility.

1555. {

. (Toth, Tr. 5737-38, 5776, *in camera*).

{

. (Toth, Tr. 5777, *in camera*).

Response to Finding No. 1555:

This finding contradicts Respondent's third proffer. According to the finding, it was {

}.
}

In addition, this finding's suggestion that {

} is

contradicted by the evidence. Polypore, through its corporate finance personnel and its Daramic business unit, began {

}. (PX5075 (Toth, Dep. at 8-9), *in camera*; Toth,

Tr. 5775-5777, *in camera*). Mr. Toth, Polypore's CEO recalled {

}. (PX5075 (Toth, Dep. at 9), *in camera*; Toth,

Tr. 5775-5777, *in camera*). Likewise, the finding's suggestion that Respondent's decision

{

}. (Seibert, Tr. 5718-5719, *in camera*). When asked what the {

} (PX5076, Seibert Dep. at 84-85, *in*

camera).

1556. Around the same time,

. (Toth, Tr. 5737-39,

5741, *in camera*; Seibert, Tr. 5645, *in camera*).

Response to Finding No. 1556:

This finding reflects self-serving testimony 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.

Moreover, {

} (CCFOF 1074).

{

} (CCFOF 1069-

1078). {

} (CCFOF 1317, 1322).

a. {

-

1557. {

. (Toth, Tr. 5738-39, *in camera*).

Response to Finding No. 1557:

This finding reflects 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.

1558. {

. (Toth, Tr. 5739, *in camera*). From the very beginning, {

. (Toth, Tr. 5739, *in camera*).

Response to Finding No. 1558:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5739, *in camera*).

Mr. Toth lied to Mr. Gillespie when he told him that the {

} . In

fact, Polypore intended on {

}.

(RX01692 at 002, *in camera*). Moreover, {

} . (CCFOF 1292). Respondent

was considering {

} . (CCFOF 1293-1295). Daramic had only {

} . (CCFOF 1298). The testimonial and documentary evidence proves that Respondent was going to {

} . (CCFOF 1299-1302,

1304-1306). In fact, even under the scenario in which {

} . (RX01692 at 002, *in camera*; *see also* CCFOF 1306).

In addition, this finding's contention that Daramic was {

} . (CCRF 421-428).

1559. At that time,

. (Toth, Tr. 5739-40, *in*

camera).

Response to Finding No. 1559:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5739-5740, *in camera*).

This finding contradicts Respondent's third proffer that {

}. As the finding makes clear, {

}. (See CCRF 1558). The finding's self-serving testimonial evidence that {

} is irrelevant to the proffers. 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. The decision to {

}. (CCFOF 1297-1298).

1560. {

. (Toth, Tr. 5739-40, *in*

camera).

Response to Finding No. 1560:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5739-40, *in camera*).

This finding provides the self-serving testimonial evidence of Mr. Toth regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Mr. Toth'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.

In addition, the finding's statement that {
 } are being offered for the truth of the matter asserted, not for the state of mind of Mr. Toth, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see also* CCRF 1566). Notwithstanding Respondent's attempt to use Mr. Gillespie's statement in this finding for the truth of the matter asserted after agreeing that it was only being "offered for the state of mind of Mr. Toth," Respondent misstates Mr. Toth's testimony. (Toth, Tr. 5740, *in camera*). Mr. Toth {

}

(Toth, Tr. 5740, *in camera*). Mr. Gillespie is responsible for Exide's separator purchases, not Mr. Ulsh. (Gillespie Tr. 5788-5789, *in camera*).

1561. {

. (RX01685, *in camera*).

Response to Finding No. 1561:

This finding is outside the scope of the proffered facts because it is not evidence that supports any of the four proffers. Specifically, it does not support the allegation that Exide decided to move { } of its PE separator purchases for { } to another supplier. Nor does it support the allegation that it appears unlikely that Daramic {

}. (Toth, Tr. 5742, *in camera*).

Response to Finding No. 1563:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5741, 5742, *in camera*).

The finding provides 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.

Moreover, Respondent's statement that {
} is not supported by the evidence. There is simply no evidence to support Respondent's suggestion in this proposed finding and in RFF1560 that {

}. (Toth, Tr. 5740-5742, *in camera*; see also CCRF 1560).

1564. {

. (Toth, Tr. 5742, 5744 *in camera*). {

Response to Finding No. 1564:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5742, 5744, *in camera*).

This finding provides only 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.

Moreover, Respondent's conclusion that {

} First, there is simply no evidence regarding the reason for the alleged {

}.⁵ If, in fact, there was {

} could have been for a myriad of reasons, none of which have anything to do with {
}. Perhaps there was a family emergency. The record is silent. If this fact was central to Respondent's proffers, Respondent should have deposed Mr. Ulsh, or called Mr. Ulsh to testify. But rather than learn the truth, Respondent prefers to make wild, unsupported conclusions. Notwithstanding Respondent's spurious allegations, {

}. (Toth, Tr. 5744).

Second, the evidence establishes that {

}. (See e.g., Gillespie, Tr. 5822-5823 {

⁵ Mr. Toth testified that {
finding, in an attempt to demean {

}. (Toth, Tr. 5742, *in camera*). However, Respondent's
}

};

CCFOF 1317 (Daramic has repeatedly refused to {

}); CCFOF

1059 {

}; CCFOF 1064 {

} (PX1050, *in camera*; Bregman Tr. 2901-2902, *in*

camera)); CCFOF 1067 (Exide believes that negotiations with Daramic are {

}. (Gillespie, Tr. 3002, *in camera*). In fact, while there is no evidence that {

}. (*See generally*, CCFOF

1079-1088; *see also* (PX0265 at 004, *in camera*; PX0194 at 022, *in camera* {(

}).

1565. At that time,

. (Toth, Tr. 5742-43, *in camera*; RX01712 at 001, *in camera*).

Response to Finding No. 1565:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5742-5743, *in camera*).

This finding provides only self-serving testimonial and documentary 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.

In addition, Respondent's citation to October 23, 2009 redacted email as evidence to support what Mr. Toth said to { } should be viewed with a large degree of skepticism. The October 23, 2009 redacted email from Mr. Toth to {

}.
}

(RX01681, *in camera*). It is obvious that RX01712, Mr. Toth's self-serving redacted email that contemplates a {

}.
}

1566. {

. (Toth, Tr. 5742-43, *in camera*).

(Toth, Tr. 5744, *in camera*).

}.
}

Response to Finding No. 1566:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5742-5743, 5744, *in camera*).

This finding provides only 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.

In addition, the finding's statement that Mr. Ulsh and {

} are being offered for the truth of the matter asserted, not for the state of mind of Mr. Toth, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *see* CCRF 1519).

Even if one were to assume the alleged hearsay statements were true, Respondent obviously ignored the admonition, and {

}. (CCFOF 1287, 1338, 1335-1336).

1567. {

. (Toth, Tr. 5743-44, *in camera*).

Response to Finding No. 1567:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5743-5744, *in camera*).

This finding contradicts Respondent's third proffer that {

}. As the finding makes clear, Daramic had {

} . (See CCRF 1558). The finding's self-serving testimonial
evidence that {
} is evidence that the
{

} . (CCFOF 1297-1298). Likewise, the validity and trustworthiness of
Respondent's one-sided statement that {
} should be given little or no weight since it related to ongoing
negotiations. The statements are solely intended to further Respondent's negotiation and
litigation posture in its unresolved dispute with Exide.

1568. {
} . (RX01704, *in camera*).

Response to Finding No. 1568:

The finding's statement of what Mr. Ulsh agreed to is being offered for the truth of the
matter asserted, not for the state of mind of Mr. Toth, and thus, are inadmissible hearsay and
should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; CCRF 1566).

b. {
}

1569. {
} . (Toth, Tr. 5745, *in camera*; RX01703, *in camera*).

Response to Finding No. 1569:

This finding contradicts Respondent's third proffer that {
} regarding its separator purchases from Daramic. The three
{

}

(RX01703, *in camera*). According to the finding, Mr. Toth met {

}. (RX01703, *in camera*).

{

}. (CCFOF 1292). Respondent was considering {

}. (CCFOF

1293-1295). The testimonial and documentary evidence proves that Respondent was going to

{

}. (CCFOF 1299-1302; 1304-1306). In fact, even

under the scenario in which {

}. (CCFOF 1306).

Moreover, the agenda states that {

}. (RX01703, *in camera*). Mr.

Toth conceded that on the stand. (Toth, Tr. 5777-5778, *in camera*). Yet, Respondent has told

this Court {

}. (RFOF 421; RFOF 425 - RFOF 426).

Obviously, Respondent's earlier findings are incorrect. Daramic's contemplation of {

} is strong evidence that, but for the merger, Microporous

would have been viable and would it would have been an aggressive competitor taking share

from Daramic.

1570. {

} . (Toth, Tr. 5745-46, *in camera*).

Response to Finding No. 1570:

See Response to Finding No. 1569, above.

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5745-5746, *in camera*).

1571. {

. (Toth, Tr. 5745-46, *in camera*). As Toth explained:

Response to Finding No. 1571:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5745-5746, *in camera*).

This finding's statement that Daramic desired to retain a {

} . {

} . (CCFOF 1312-1313, 1315-1318, 1320, 1322). {

} . (CCFOF 1317).

In fact, Mr. Toth's testimony was that {

} (Toth, Tr. 5746, *in camera*. Emphasis added).

But, as noted above, Daramic did not just seek a {

} . Moreover, {

}. (RX01867 at 002, *in camera*, see also CCFOF 1279-1280). Thus, for Mr. Toth to testify that he was willing to accept a { } is disingenuous because { }.

1572. { }.
(Toth, Tr. 5746-47, *in camera*).

Response to Finding No. 1572:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5746-5747, *in camera*).

This finding is outside the scope of the proffered facts because it is not evidence that supports any of the four proffers. Specifically, it does not support the allegation that Exide decided to move { } of its PE separator purchases for { } to another supplier, or that Exide will in fact have { } worth of separators in storage. Nor, does it support the allegation that it appears unlikely that Daramic will retain any small amount of business from Exide in { }. It also does not support the allegation that Daramic decided to { } because of Exide's actions.

To the extent this finding is intended to suggest that the Daramic business is { }.

{ } (CCFOF 6; PX2160 at 83). Moreover, Daramic's financial statements provide strong evidence that the business is profitable. (CCRF 278).

1573. { }.
(Toth, Tr. 5746-47, *in camera*).

Response to Finding No. 1573:

This finding is outside the scope of the proffered facts because it is not evidence that supports any of the four proffers. Specifically, it does not support the allegation that Exide decided to move { } of its PE separator purchases for { } to another supplier, or that Exide will in fact have { } worth of separators in storage. Nor, does it support the allegation that it appears unlikely that Daramic will retain any small amount of business from Exide in { }. It also does not support the allegation that Daramic decided to { } because of Exide's actions.

This finding provides only 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.

1574. {

. (Toth, Tr. 5746-47, *in camera*).

Response to Finding No. 1574:

See Response to Finding No. 1571. The finding's statement that Daramic sought to retain { }.

(CCFOF 1312-1313, 1315-1318, 1320, 1322). Daramic has repeatedly refused to {

}. (CCFOF 1317).

Moreover, if Daramic sought to retain

} (CCFOF 1281, 1315). {

} (Gillespie, Tr.

5815, *in camera*). A purchase order is a “firm commitment” and “by definition” is also a contract. (Gillespie, Tr. 5815, 5865-5866, *in camera*). Mr. Gillespie testified that Exide {

} (Gillespie, Tr. 5815-5816, *in camera*).

1575. Consequently, {

. (Toth, Tr. 5746, *in camera*). As Toth elaborated at the November 12, 2009 hearing, “

.” (Toth, Tr. 5746, *in camera*)(emphasis added).

Response to Finding No. 1575:

The finding’s statement that {

} is self-serving testimonial

evidence regarding contentious negotiations between Daramic and Exide and is not supported by the evidence. First, Daramic’s {

} Exide’s {

} (RX01665 at 004, *in camera*). But,

} (RX01669 at 002, *in camera*). In contrast,

{

}.
}

(RX00072 at 56, *in camera*). {

}.⁶ (RX00072 at 056, *in camera*; RX01668 at 002; Seibert, Tr. 5656, *in camera*).

Second, Daramic was never willing to {

}. (RX01669 at 002, *in camera* (Exide proposed {

}); Gillespie, Tr. 5808-5810, *in camera*; see

also CCFOF 1321). Third, Daramic's {

}. (Gillespie, Tr. 5807-5808, *in*

camera; see *also* CCFOF 1326-1327). Fourth, all of Daramic's proposed {

}. (CCFOF 1316-1322).

In addition to the above, Daramic offered other {

⁶ All three potential SLI suppliers in North America (Daramic, Entek and Microporous) were actively competing for {
}. (Gilchrist, Tr. 423, 466-467, *in camera*). During this same time period, {
(Roe, Tr. 1685-1686, *in camera*; Hall, Tr. 2884, *in camera*). {
}. (RX00072, *in camera*).

} (RX01665 at 002, *in camera*; RX1250 at 001, *in camera*; RX01668 at 002, *in camera*). {

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

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

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

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

Moreover, { }

{

} (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, most of the contractual terms that Daramic has offered to Exide are {

(Gillespie, Tr. 5864-5865, *in camera*).

} (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).

Regarding Mr. Toth's testimony relating to his desire to {

}. (See CCRF 1571).

1576. {

(Toth, Tr. 5772, *in camera*).

. (Toth, Tr. 5747, *in camera*).

Response to Finding No. 1576:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5747, 5772, *in camera*).

This finding contradicts Respondent's third proffer that Daramic {
}. (See

also CCRF 1555, 1558-1559, 1567, 1569). The {

} (See

also RX01703, *in camera* (handwritten meeting agenda)). The finding does not include a

scenario whereby {

} (CCFOF 1292). The testimonial and documentary evidence proves that Respondent was going to {

} (CCFOF 1299-1302, 1304-1306). In fact, even under the scenario in which {
}. (CCFOF 1306).

In addition, the finding states that one of the {

} Yet, Respondent has told this Court that as a standalone entity, Microporous would {

} (RFOF 421, 425-426). Today, Respondent concedes that {
}. (Toth, Tr. 5777-5778, *in camera*; RX01703, *in camera*). Obviously, Respondent's earlier findings are incorrect. {

} is strong evidence that, but for the merger, Microporous would have been viable and it would have been an aggressive competitor taking share from Daramic.

1577. First, {

(Toth, Tr. 5748, *in camera*).

Response to Finding No. 1577:

Complaint Counsel has no specific response.

1578. {
 . (RX01706, *in camera*; Toth, Tr. 5747-49, *in camera*).

Response to Finding No. 1578:

Complaint Counsel has no specific response.

1579. {
 . (Toth, Tr. 5747, *in camera*).

Response to Finding No. 1579:

Complaint Counsel has no specific response.

1580. {
 . (Toth, Tr. 5780, *in camera*).

Response to Finding No. 1580:

Complaint Counsel notes that this finding's contention that switching production from
{
 } is
inconsistent with Respondent's previous findings that {

}. (See RFOF 180
and CCRF 180).

1581. {
 . (Toth, Tr.
5747-48, *in camera*).

Response to Finding No. 1581:

This finding contradicts Respondent's third proffer that {
}. (See
also CCRF 1555, 1558-1559, 1567, 1569). Even with {

}. (CCFOF 1298). The testimonial and documentary evidence proves that Respondent was going to {

}. (CCFOF 1299-1302, 1304-1306). In fact, even under the scenario in which {

}. (CCFOF 1306).

1582. Finally, {

(Toth, Tr. 5748-49, *in camera*).

}.
}

Response to Finding No. 1582:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5748-5749, *in camera*).

This finding contradicts Respondent's third proffer that {

}. As the finding makes clear, Daramic had {

}. (See also CCRF 1555, 1558-1559, 1567, 1569, 1581). The finding's self-serving testimonial evidence that {

} is irrelevant to the proffers. 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. The decision to {

} (CCFOF

1297-1298).

1583. {

. (Toth, Tr. 5749, *in camera*). Clearly, {

. (PX5075 at 008, *in camera*).

Response to Finding No. 1583:

See Response to Finding No. 1582, above.

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5749, *in camera*; PX5075 (Toth, Dep. at 39)).

1584. {

5749-50, *in camera*).

. (Toth, Tr.

Response to Finding No. 1584:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5749-5750, *in camera*).

This finding's contention that Daramic {
} is contradicted by record
evidence. First, Mr. Seibert admitted {

} (PX5076 (Seibert, Dep. at 81), *in camera*). Yet, there is no evidence
that the {

} Second, {

} (Gillespie, Tr. 5815, *in camera*).

A purchase order is a “firm commitment” and “by definition” is also a contract. (Gillespie, Tr. 5815, 5865-5866, *in camera*). Mr. Gillespie testified that Exide {

}. (Gillespie, Tr. 5815-5816, *in camera*). This should have allowed Daramic to {

}. (See also CCRF 1555, 1558-1559, 1567, 1569, 1581). The testimonial and documentary evidence proves that Respondent was going to {

}. (CCFOF 1299-1302, 1304-1306). In fact, even under the scenario in which {

(CCFOF 1306).

1585. {

. (Toth, Tr. 5749-50, *in camera*).

. (Toth, Tr. 5749-50, *in camera*). {

Response to Finding No. 1585:

Mr. Toth’s testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5749-5750, *in camera*).

This finding provides only 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.

In addition, the finding's allegation of what Mr. Ulsh said is being offered for the truth of the matter asserted, not for the state of mind of Mr. Toth, and thus, is inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *See* CCRF 1566).

With regard to the finding's alleged concession that {

} (CCFOF 1312-

1313, 1315-1318, 1320, 1322). Furthermore, it fails to acknowledge that Daramic has

{

} (CCFOF 1317). In addition, it fails to state that Daramic's

{

} RX01714 at 002-003,

in camera).

As to the finding's statement that Exide has economic power and is in control of the negotiations and the relationship, this is a legal conclusion. Moreover, it shows no such thing because {

} In fact, if Exide

did have such power in its negotiations with Daramic, then Exide would have been able to {

} (Gillespie, Tr.

5864, *in camera*; RX01669 at 002, *in camera* ({

}); RX01687 at

002, *in camera*). Finally, if Exide indeed had economic power , Exide would not be {

} . (See CCFOF

1338, 1344).

1586. Although,

. (Toth, Tr.

5750-51, *in camera*).

Response to Finding No. 1586:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5750-5751, *in camera*).

This finding is outside the scope of the proffered facts because it is not evidence that supports any of the four proffers. This finding provides only 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.

In addition, the finding's allegations of what Mr. Ulsh said are being offered for the truth of the matter asserted, not for the state of mind of Mr. Toth, and thus, are inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; *See* CCRF 1566). Notwithstanding the inadmissible and inappropriate use of hearsay in this finding regarding Mr. Ulsh's statement that {

} . (CCFOF 1068-1079, 1312, 1317).

{

}. (CCFOF 1316-1322). {

} (Gillespie, Tr.

5822). Such behavior is direct evidence of seller power.

1587. {

camera). { . (Toth, Tr. 5751-52, 5755, in

}.}

Response to Finding No. 1587:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5751-5752, 5755, in camera).

This finding's statement that Daramic was {

}. The

current North American Supply Agreement is the same {

}.}

(CCFOF 1270, 1326-1327). Moreover, {

} . (Compare RX01669 at 002, *in camera*, with RX00072 at 056, *in camera*; see also CCRF 1575). With regard to the other alleged { } the evidence contradicts Respondent's assertion. (See CCRF 1575). {

}

(RX01668 at 002, *in camera*; RX01720, *in camera*; RX01714 at 003-004, *in camera*). Similarly, Daramic never agreed to Exide's request for {

} . (RX01714, *in camera*). In fact, contrary to Mr. Toth's testimony that Daramic offered Exide {

}

(RX01714, *in camera*).

With regard to the last statement in this finding that the alleged facts show {

} this is a legal conclusion. In reality this finding provides only 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. The documentary evidence, cited above, dispels Respondent's alleged facts and conclusion.

1588. Moreover,

. (Toth, Tr. 5752, *in camera*).

Response to Finding No. 1588:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5752, *in camera*).

The finding's allegation that Toth was offering {

} (Gillespie, Tr. 5795, *in camera*).

Exide did this in an {

} (CCFOF 1267-

1272). Exide {

}.

(CCFOF 1273-1274).

Daramic seemed to indicate that the {

}. In September 2009,

Daramic wrote Exide and told it {

} (RX01685 at 001, *in camera*; CCFOF 1337). However,

whatever {

were subsequently thrown out the door. In its October

20th letter to Exide, {

}

(RX01693 at 001, *in camera*). Daramic informed Exide that the {

}. (RX01693 at 001, *in camera*). Mr. Gillespie

testified that having been in procurement for close to twenty years, the clear understanding of a

{

} . (Gillespie, Tr. 5805, *in camera*). However, Daramic's actions indicate that {
}

(Gillespie, Tr. 5805). Finally, any so-called {

} . (CCFOF 1343; see also PX0223 at 004, *in camera* {
}

1589. {

. (Toth, Tr. 5753-54, *in camera*).

Response to Finding No. 1589:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5753-5754, *in camera*).

This finding, which states that Mr. Toth told Mr. Ulsh that {

} . The problem with this suggestion is that Daramic had already {

} . (RX01694 at 002-003, *in camera* {

} *see also*

CCFOF 1306). Thus, Mr. Toth knew that at the time he and Mr. Ulsh met that Daramic was going to {

}. (CCFOF 1299-1302, 1304-1306). Mr.

Toth is not a credible witness because he intentionally misled Mr. Ulsh from Exide.

1590. {

. (Toth, Tr. 5755-56, *in camera*).

. (Toth, Tr. 5756, 5758, *in camera*). {
}. (RX01712 at 002, *in camera*).

Response to Finding No. 1590:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5755-5756, 5758 *in camera*).

This finding, which states that Mr. Toth {

} is contrary to the record evidence. {

}. (RX01687 at 002, *in camera*; Gillespie, Tr. 5812-5813, *in camera*). {

}. (Gillespie, Tr. 5864, *in camera*; RX01669 at 002, *in camera* ({

}); RX01687 at 002, *in camera*). Moreover, after the October 1, 2009 meeting between Mr. Toth and Mr. Ulsh, Daramic {

}.

(Gillespie, Tr. 5815, *in camera*; CCFOF 1281).

With regard to the finding's language that Mr. Toth stated { } that statement was made in a redacted email over three weeks after Mr. Toth and Mr. Ulsh met. (RX01712 at 002, *in camera*). Moreover, the { } statement was made after {

} (CCFOF 1280-1282). After

{

} is disingenuous, self-serving, and possibly manufactured evidence regarding contentious negotiations between Daramic and Exide. The validity and trustworthiness of Respondent's one-sided statement in ongoing negotiations should be given little or no weight. The statement is solely intended to further Respondent's negotiation and litigation posture in its unresolved dispute with Exide.

1591. Thereafter, {

. (Toth, Tr. 5756-59, *in camera*).

Response to Finding No. 1591:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5756-5759, *in camera*).

This finding's contention that there was a { } is belied by the fact that { }. (See CCRF 1590, above).

Moreover, Respondent admits that {

} (RFOF 1595). Thus, the {

}.
}

The finding's contention that Mr. Ulsh {

} is being offered for the truth of the matter asserted,

not for the state of mind of Mr. Toth, and thus, is inadmissible hearsay and should be stricken.

(Order on Post Trial Briefs, dated June 16, 2009; CCRF 1566). The suggestion in this and other

of Respondent's findings that reference Mr. Ulsh is that for some reason Mr. Ulsh {

} . However, Respondent does not provide any evidence regarding the reason

why, or any evidence that Mr. Ulsh {

} . Rather than depose Mr. Ulsh or call

him as a witness to testify about the negotiations, Respondent attempts to inappropriately

discredit Mr. Ulsh and, as Exide's CEO, by association Exide, through innuendo, supposition,

and hearsay.

1592. {

. (Toth, Tr. 5756, 5758-59, *in camera*).

Response to Finding No. 1592:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5756, 5758-5759, *in camera*).

This finding's contention that Toth believed a {

} is contrary to the evidence. First,

Respondent concedes that Toth's meeting with Ulsh concluded {

}. (RFOF 1595). Second, the {

} . Exide had made a {

} . Exide's {

} (RX01665 at 004, *in camera*). But, {
} (RX01669 at 002, *in camera*). Thus, the
evidence contradicts the finding as it relates to SLI.
With regard to non-SLI separators, {
} Daramic was never willing to {
} (RX01669 at 002, *in camera* (Exide proposed
{
}); Gillespie, Tr. 5808-5810, *in
camera; see also* CCFOF 1321). Likewise, Exide sought a {
}.
(RX01668 at 002, *in camera*).

1593. {

. (Toth, Tr. 5760-61, 5780, *in
camera*).

Response to Finding No. 1593:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5760-5761, 5780, *in camera*).

This finding's citation does not support the proposition. The finding is mostly argument with only one cite at the end. Moreover, this finding contradicts Respondent's previous findings

that {

} (RFOF 1590) and there was a {

} (RFOF 1591). Had there been such {

}. In fact, had Mr. Toth actually {

}. (CCFOF 1316-1322). But to this day, Daramic has never {

}.
}

(CCFOF 1312-1313, 1315-1318, 1320, 1322). Daramic has {

}. (CCFOF 1317).

1594. {

. (Toth, Tr. 5760-61, *in camera*; Gillespie, Tr. 5838-39, 5867-68, *in camera*).

{

Response to Finding No. 1594:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5760-5761, *in camera*).

This finding contradicts Respondent's previous findings that {

} (RFOF 1590) and there

was a {

} (RFOF 1591). With regard to Respondent's statement that {

}.
}

(RX01687 at 002, *in camera*; Gillespie, Tr. 5812-5813, *in camera*). Daramic has not {

};

(Gillespie, Tr. 5864, *in camera*; RX01669 at 002, *in camera* ({

RX01687 at 002, *in camera*). Moreover, after the October 1, 2009 meeting between Mr. Toth and Mr. Ulsh, Daramic {

}. (Gillespie, Tr. 5815, *in camera*;

CCFOF 1281).

With regard to Mr. Ulsh's statement, it is being offered for the truth of the matter asserted, not for the state of mind of Mr. Toth, and thus, is inadmissible hearsay and should be stricken. (Order on Post Trial Briefs, dated June 16, 2009; CCRF 1566). In addition, the finding's contention that

{ is not supported by the evidence cited. Moreover, it is wrong. Mr. Gillespie never testified that it had { } and there is no evidence to support such a proposition. In fact, Mr. Gillespie specifically testified that Exide had {

}. (Gillespie, Tr. 5868, *in camera*). Finally, the finding's contention that Exide's { } is contrary to the evidence. {

};

(RX01687 at 002, *in camera*; See also CCFOF 1279 - 1280). Daramic was unwilling to accept Exide's proposal. (CCRF 1594). However, with respect to non-SLI separators, Exide's {

} (RX01687 at 002).

1595. {

. (Toth, Tr. 5760-61, *in camera*; PX5075 at 007, *in camera*).

Response to Finding No. 1595:

Complaint Counsel agrees that the October 1, 2009 meeting { }

However, within one week of the October 1, 2009 meeting, Exide had {

} (RX01687 at 002, *in camera*;

See also CCFOF 1279 - 1280).

F. { }

1596. {

. (RX01714, *in camera*; Toth, Tr. 5761-62, *in camera*). {

in camera).

. (RX01714 at 002,

(RX01714, *in camera*).

Response to Finding No. 1596:

{

} 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. Respondent's unwillingness to either depose Mr. Ulsh, or call

Mr. Ulsh as a witness in the November 12th hearing to corroborate Mr. Toth's version of the October 1st is telling.

Mr. Toth's testimony cited by Respondent with respect to his discussion with Mr. Ulsh is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5761-5762, *in camera*).

{

} (Toth, Tr. 5749-5750, *in camera*). {

}. (Toth, Tr. 5759-5760, *in camera*). {

}. (Toth, Tr. 5761, *in camera*).

{

}. (RFOF 1595). {

}.

(RX01714 at 002-003, *in camera*). {

} (CCFOF 1317).

{

} (RX01668 at 002, *in camera*;

RX01720, *in camera*; RX01714 at 003-004, *in camera*).

{

} (RX01714, *in camera*).

1597. {

(RX01687 at 002, *in camera*; Toth, Tr. 5761-62, *in camera*).

Response to Finding No. 1597:

Mr. Toth's testimony cited by Respondent with respect to his discussion with Mr. Ulsh is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5761-5762, *in camera*).

{

}. (RX01687 at 002, *in*

camera). {

. (RX01714 at 002, *in*

camera ({

)). {

}.
(Gillespie, Tr. 5812-5813, *in camera*).

{

{

}. (Gillespie, Tr. 5865-5866, *in camera*). {

} (Gillespie, Tr. 5865-5866, *in camera*).

1598. {

. (RX01687 at 002, *in camera*; Seibert, Tr. 5686, *in camera*; Gillespie, Tr. 5852-53, *in camera*).

Tr. 5687, *in camera*; RX01687, *in camera*). {

. (Seibert,

} . (RX01687 at 003, *in camera*; Seibert, Tr. 5686-87, *in camera*). {
(Seibert, Tr. 5690, *in camera*). }

. (RX01712, *in camera*).

Response to Finding No. 1598:

Respondent's references to

} 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.

Mr. Seibert's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5686-5687, *in camera*). Mr. Gillespie's testimony cited by Respondent with respect to what was said on July 20 is hearsay and cannot be offered for the truth of the matter asserted. (Gillespie, Tr. 5852-5853, *in camera*).

{

}.
}

(RX01687 at 002, *in camera*).

(Gillespie, Tr. 5812-5813, *in camera*).

{

} (Gillespie, Tr. 5865-5866, *in camera*). {

} (Gillespie, Tr. 5865-5866, *in camera*).

{

} (RX01668 at 002, *in camera*; RX01720, *in camera*).

{

} (RX01687 at 009, *in*

camera). {

}.
}

1599. {

. (Seibert, Tr. 5690-91, *in camera*). {
}. (Toth, Tr. 5762-63, *in camera*;
RX01693, *in camera*; RX01712, *in camera*; Seibert, Tr. 5691, *in camera*; Gillespie, Tr. 5854-55, *in camera*).

Response to Finding No. 1599:

Respondent's description of the { } is nothing more than 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.

Mr. Seibert's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Seibert, Tr. 5690-5691, *in camera*). Mr. Toth's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5762-5763, *in camera*). Mr. Gillespie's testimony cited by Respondent with respect to what was said in one of the last conversations with Daramic is hearsay and cannot be offered for the truth of the matter asserted. (Gillespie, Tr. 5852-5853, *in camera*).

{

} (CCFOF 1324).

{

} (Gillespie, Tr. 5865-5866, *in camera*). {

} (Gillespie, Tr. 5865-5866, *in camera*).

{

}. (Gillespie, Tr. 5863, *in camera*). {

} (Gillespie, Tr. 5863, *in camera*). {

} (Gillespie, Tr. 5817-5818, *in camera*). {

}. (CCFOF 1334-1336).

1600. {

. (RX01712, *in camera*; Toth, Tr. 5762-63, *in camera*).

{

. (RX01712, *in camera*).

Response to Finding No. 1600:

{

} (RX01681,

in camera). {

}.
}

Mr. Toth's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5762-5763, *in camera*).

{

} (RX01687 at 002, *in camera*).

} (Gillespie, Tr. 5812-5813, *in camera*).

{

} (Gillespie, Tr. 5865-5866, *in camera*). {

} (Gillespie, Tr. 5865-5866, *in camera*).

{

}. (Gillespie, Tr. 5865-5866, *in camera*).

1601. {

. (RX01681, *in camera*; Toth, Tr. 5763-64, *in camera*). {

Response to Finding No. 1601:

{

}. (Toth, Tr. 5763-5764, *in camera*; RX01681, *in camera*). {

}. (RX01681, *in camera*; RX01712, *in camera*). Mr.

Toth's testimony, here, and elsewhere, is not credible.

{

} (RX01665 at 002-

003, *in camera*). {

} (RX01687, *in camera*).

Moreover, during the course of negotiations, Exide {

} (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). Daramic refused to agree to this {

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

a {

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

Contrary to Respondent's contention that Exide has superior economic power and has been able to dictate terms to Daramic, 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 {

}. (Toth, Tr. 5751-5752, *in camera*; RX1714, *in camera*). Mr. Toth's testimony, here, and elsewhere, is not credible.

{

} (Gillespie, Tr. 5818, *in camera*). {

} (Gillespie, Tr. 5829-5830, *in camera*). {

} (Gillespie, Tr. 5829-5830, *in camera*). {

}. (Gillespie, Tr. 5829, *in camera*). {

}. (CCFOF 1332 -1324; 1281-1282, 1315).

{

}. (Gillespie, Tr. 5869-5871, *in camera*; CCFOF 1315). {

} (CCFOF 1334-1336, 1341-

1342).

{

}.
}

(Gillespie, Tr. 5838, *in camera*). {

} (Gillespie, Tr. 5825-5826, 5829, *in camera*).

Thus, Respondent's proffer that Exide has decided to move { } of its PE separator purchases for { } to another supplier is not accurate.

{

} (See CCRF

1597).

1602. {

. (Gillespie, Tr. 5851, *in camera*).

5852, *in camera*).

. (Gillespie, Tr.

Response to Finding No. 1602:

{

} (See CCRF 1509 above).

{

}. (See CCRF 1597).

{

} (Gillespie, Tr. 5839, *in camera* (emphasis added); *see also* CCRF 1541).

1603. {

Tr. 5723 (“{
camera).

. (Seibert,
}.”), *in*

Response to Finding No. 1603:

{

} (Gillespie, Tr. 5810, *in camera*). In fact, Mr.

Seibert admitted this fact himself in his deposition. (PX5076 (Seibert, Dep. at 74), *in camera*).

Moreover, Mr. Toth informed investors that Daramic anticipates maintaining a supply position with Exide in 2010 and beyond with or without a contract. (CCFOF 1309).

1604. {

. (Gillespie, Tr. 5870, *in camera*). {

.” (RX01693, *in camera*; see also RX01685 (“{
camera). .”), *in*

Response to Finding No. 1604:

{

1281); { } (CCFOF
1288); { } (CCFOF 1283-
(CCFOF 1328-1330); { }
(CCFOF 1334-1336); { }

}. (Gillespie, Tr. 5817-5818, *in camera*; CCFOF 1341-1342).

{

}. (Hall, Tr. 2689-2690, *in camera*; Gillespie, Tr.
5815, 5865-5866, 5870-5871, *in camera*). {

}. (Gillespie, Tr. 5870-5871, *in camera*). {

}.

{

}. (Gillespie, Tr. 5865-5866, *in camera*).

1605. {

. (Seibert, Tr. 5691, *in camera*). {

}. (Seibert, Tr. 5691, *in camera*; Toth,

Tr. 5762-63, *in camera*).

Response to Finding No. 1605:

{

}. (See CCRF 1604 above). {

}. (RX01687 at 002, *in camera*;

Gillespie, Tr. 5812-5813, *in camera*). {

}. (Gillespie, Tr. 5864, *in*

camera; RX01669 at 002, *in camera* ({
camera).

}); RX01687 at 002, *in*

{

}. (Gillespie, Tr. 5815, *in*

camera; CCFOF 1281). A purchase order is a “firm commitment” and “by definition” is also a
contract. (Gillespie, Tr. 5815, 5865-5866, *in camera*). Mr. Gillespie testified that Exide {

}. (Gillespie, Tr. 5815-5816, *in camera*).

{

}. (Gillespie, Tr.

5865-5866, *in camera* ({

)). {

}.
{

{

}. (PX5076

(Seibert, Dep. at 81), *in camera*). {

} . (CCFOF 1305-1306; Toth, Tr. 5768-5769, *in camera*; Seibert, Tr. 5724).

Mr. Toth told investors as much. (Toth, Tr. 5769, *in camera* (“sounds like something I would have said.”); *see also* CCFOF 1309).

IV. { }

1606. {
 . (Toth, Tr. 5737, *in camera*).

. (RX01701, *in camera*; RX01702, *in camera*).

Response to Finding No. 1606:

Complaint Counsel has no specific response.

1607. {
 . (Toth, Tr. 5737, *in camera*). In addition, {
 } . (Toth, Tr. 5737, *in camera*;
RX01706, *in camera*).

Response to Finding No. 1607:

According to Respondent {

} (Respondent’s Post-Trial

Brief for Reopened Hearing at 11). {

} . The facts

simply do not support Respondent’s creative casting. {

} something

Daramic has refused to do. (CCFOF 1283, 1285-1287, 1290). {

} . (CCFOF 1263, 1266). {

} . (CCFOF 1264). {

} . (CCFOF 1266). {

} (CCFOF 1281-1282). {

}.
}

1608. {

. (Seibert, Tr. 5673, *in camera*; Toth, Tr. 5737, *in camera*).

Response to Finding No. 1608:

Complaint Counsel has no specific response.

1609. {

. (RX01719, *in camera*; Seibert, Tr. 5701-03, *in camera*).

Response to Finding No. 1609:

Respondent's reliance on RX01719 is transparent and self serving. When asked directly at his deposition whether {

} (CCFOF 1345-1347). What is more, RX01719 is particularly noteworthy in that it {

} (RX01719 at 001-002, *in camera*). The markets for flooded lead-acid battery separators have become less competitive as a result of the Acquisition, not more so. The current Exide/Daramic contract negotiations are perfectly illustrative of this point. In 2007, when an independent Microporous was busy disrupting the market for flooded lead-acid battery separators, {

} (Gilchrist, Tr. 423; 466-467, *in camera*; Roe, Tr. 1685-1686; 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 Exide could secure for the equivalent separator from Daramic is { }.
(RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*). Therefore, the evidence we have regarding the market price for the only separator market that is not a complete monopoly today shows an { }.
(RX00072 at 56, *in camera*; RX01668 at 002; Seibert, Tr. 5656, *in camera*).

1610. {
. (Toth, Tr. 5739-40, *in camera*).

Response to Finding No. 1610:

Mr. Toth's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5762-5763, *in camera*). This entire finding is based on hearsay statements not offered for the truth of the matter asserted, violates the court's order, and should be stricken.

{
}. (CCFOF 1292, 1304-1306). {

}. (RX01687 at 002, *in camera*).

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

({
}); RX01669 at 002, *in camera* ({
}). {

} . (Gillespie, Tr. 5810, 5825-5826, 5829, *in camera*; see also CCFOF 1256-1257).

1611. {
camera; Seibert, Tr. 5692-93, *in camera*). { . (Toth, Tr. 5737, *in camera*).
} . (Seibert, Tr. 5692, *in camera*).

Response to Finding No. 1611:

Complaint Counsel notes only that {
}. (CCFOF 1292).

1612. {
(RX01692, *in camera*; Toth, Tr. 5772, *in camera*).

Response to Finding No. 1612:

This finding is intentionally misleading. The fact is, all the options considered by the
{
}. (RX01692 at 001-002, *in camera*).

1613. {

}. (Seibert, Tr.
5718-19, *in camera*).

Response to Finding No. 1613:

There is no evidence that {
}. Even the passage of testimony
quoted above does not support this false claim. {
}. (CCFOF 1292).

{
}. (CCFOF 1300, 1302, 1304-1306). Polypore's
internal documents state that {

}. (RX01692 at 001-002, *in camera*). Mr. Seibert himself testified that {
}. (Siebert, Tr. 5718-1519, *in camera*).

1614. As Toth testified,
. (Toth, Tr. 5747-49, 5772,
5739-40, *in camera*).

Response to Finding No. 1614:

Mr. Toth's testimony cited by Respondent with respect to his discussions with Exide is hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5747-5749, 5739-5740, *in camera*).

1615. {
. (Seibert, Tr. 5694, *in camera*; Toth, Tr. 5766, *in camera*).

Response to Finding No. 1615:

Mr. Toth's testimony cited by Respondent with respect to his discussions with Exide and the Polypore Board are hearsay and cannot be offered for the truth of the matters asserted. (Toth, Tr. 5764-5767, *in camera*).

Respondent's allegation that {

}. (RX01687 at 002, *in camera*; Gillespie, Tr. 5812-

5813, *in camera*). (Moreover, Daramic refused to even consider {

}.

(Gillespie, Tr. 5865-5866, RX01693 at 002, *in camera*).

1616. {

. (RX01696, *in camera*; Toth, Tr. 5764-67, *in camera*;

Seibert, Tr. 5694-95, *in camera*).

Response to Finding No. 1616:

Complaint Counsel has no specific response.

1617. {

. (Toth, Tr. 5766-67, *in*

camera).

Response to Finding No. 1617:

Complaint Counsel has no specific response.

1618. {

. (Toth, Tr. 5766, *in camera*).

Response to Finding No. 1618:

Complaint Counsel has no specific response.

1619. {

. (Toth, Tr. 5765, *in camera*).

Response to Finding No. 1619:

Mr. Toth's testimony cited by Respondent with respect to his discussions with the Polypore Board are hearsay and cannot be offered for the truth of the matter asserted. (Toth, Tr. 5765, *in camera*).

1620. {
}. (Toth, Tr. 5766, *in camera*).

Response to Finding No. 1620:

Daramic has chosen to {
}. No force has been applied.

On the contrary, {
}. (See Response to Finding No. 1607).

1621. {
}.
(Toth, Tr. 5767, *in camera*).

Response to Finding No. 1621:

Complaint Counsel has no specific response.

1622. Currently, {
}.
(RX01707 at 003, *in camera*).

Response to Finding No. 1622:

{
}. (CCFOF 1263). Mr. Siebert acknowledged receipt of Exide's plans in June of 2009.
(CCFOF 1264). {

} (CCFOF 1281-1282). Exide has informed Daramic
that it intends to {
}. (Gillespie, Tr. 5810, *in camera*). In fact, Mr. Gillespie testified
that Exide expects to {

} (Gillespie, Tr. 5825-5826, *in*

camera). Exide has consistently informed Daramic that it {

} (Gillespie, Tr. 5864-5865, *in camera*).

Between July and October 2009, Mr. Gillespie {

} (Gillespie, Tr. 5864, *in camera*; RX01669 at 002, *in camera* ({

); RX01687 at 002, *in camera*). Moreover, on September 30, 2009,

Exide's CEO, Mr. Gordon Ulsh, informed Mr. Toth that {

} (RX01704 at 001, *in camera*).

{

} (RX01687 at 002, *in camera*; Gillespie, Tr.

5812-5813, *in camera*).

1623. Based on the foregoing, the Court finds that

. The Court further finds that these facts manifest that

{

Response to Finding No. 1623:

This finding is actually an unfounded conclusory statement. The preceding responses clearly show that Daramic had the power in its relationship with Exide.

V. CONCLUSIONS OF LAW

1624. As previously found in RFOFCOL 1436, Courts and the FTC must not rely on market shares and concentration alone to determine whether a violation of Section 7 has occurred. The Merger Guidelines state that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger.” (Sec. 2.0). The Guidelines further provide that “market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger.” (Sec. 1.52). The courts have agreed that concentration data “[are] not conclusive indicators of anticompetitive effect.” United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). “[E]vidence of a high market share does not require a district court to conclude that there is an antitrust violation” (United States v. Syufy Enterprises, 903 F.2d 659, 665 n.6 (9th Cir. 1990)), because market share statistics can be “misleading as to actual future competitive effect.” United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984). As the D.C. Circuit said, “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.” United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

1625. As this Court has previously found, Microporous was not an actual participant or uncommitted entrant in Complaint Counsel’s SLI market in North America prior to the merger. RFOFCOL 1437-39. No evidence was presented at the hearing on November 12, 2009 to alter this conclusion.

Response to Conclusion of Law No. 1625:

This Conclusion of Law is an improper and factually inaccurate inference. Complaint Counsel has established Microporous’ competitive significance in the SLI market in North America, and the threat it posed to Daramic’s dominance in the North American SLI market. (See CCFOF 526-643).

1626. Evidence was introduced, however, at the November 12 hearing further demonstrating to this Court that competition is robust in Complaint Counsel’s alleged SLI North America market and that

Response to Conclusion of Law No. 1626:

The reason for the reopening of the hearing record was for the court to hear evidence in support of the four recognized proffers from Respondent’s Second Motion to Reopen the Hearing Record. Much to the dismay of the Court, Respondent failed to support a single one of its proffers.

1627. As found previously by this Court,

. (RFOF 306).

Now,

Response to Conclusion of Law No. 1627:

There is no evidence that Exide will move a significant share of its business from Daramic. What has been established is {

}. (CCFOF 1249, 1251). {

}. (RX01687 at 002, *in camera*; Gillespie, Tr. 5812-5813, *in camera*).

1628. {

. (RX01719, *in camera*). All of this evidence demonstrates that even after the merger, competition in North America among separator suppliers is vigorous.

Response to Conclusion of Law No. 1628:

Evidence adduced at the November 12th hearing demonstrates that Daramic's acquisition of Microporous diminished competition in the North American SLI market. (See e.g., CCRF

1510). {

}. (PX 5076 (Seibert, Dep. At

27), *in camera*). {

}. {

(CCFOF 1345 – 1347). {

}. (See CCRF 1509).

1629. It is appropriate for this Court to consider post-acquisition evidence to determine that the acquisition had no anticompetitive effect. See e.g. *United States v. Int'l Harvester Co.*, 564 F.2d 769 (7th Cir. 1977) (post acquisition evidence showed no anticompetitive conduct); *Lektro-Vend. Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (post acquisition evidence showed that defendant's profits and market shares declined); *Vaney v. Coleman Co.*, 385 F. Supp. 1337 (D.N.H. 1974) (post-acquisition evidence showed that defendant lost market share); *United States v. Falstaff Brewing Corp.*, 383 F.Supp. 1020 (D.R.I. 1974) (evidence showed a decline in market share and profits). From the evidence before this Court, the merger has had no anticompetitive effect in this alleged market. The Court's conclusion here is buttressed by the fact that

Response to Conclusion of Law No. 1629:

Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight. *In re Chi. Bridge & Iron Co. N.V.*, 139 F.T.C. 553, 583 n.97 (F.T.C. 2005); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *B.F. Goodrich Co.*, 110 F.T.C. 207, 341 (1988).

1630. The evidence from the November 12, 2009 hearing further demonstrates that the conditions for coordinated interaction do not exist in the alleged SLI market. 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).

Response to Conclusion of Law No. 1630:

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.

1631. Here, at the hearing on November 12, 2009, Complaint Counsel offered no evidence to the Court to show that these conditions can be met. Rather, ample evidence was presented to this Court, both through testimony and exhibits, demonstrating just the opposite. Indeed, {

Response to Conclusion of Law No. 1631:

Assuming, *arguendo*, that respondent's claims regarding Exide's plans for its SLI requirements, {

}. (See CCFOF 1256). Punishing Exide is as easy as threatening the supply of any one of these other separator types, {

} (See CCFOF 1341-1342).

1632. As this Court has previously concluded, the presence of powerful customers in markets involving infrequent purchases, long-term contracts and bidding can frequently prevent coordinated interaction. (*See* RFOFCOL 1441; *Baker Hughes Inc.*, 908 F.2d at 986 (“[t]his sophistication . . . was likely to promote competition even in a highly concentrated market.”); 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) (powerful 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.”)).

Response to Conclusion of Law No. 1632:

“[C]ourts have not considered the “sophisticated customer” defense as itself independently adequate to rebut a prima facie case.” *Chicago Bridge & Iron Co., v. FTC*, 534 F.3d 410, 440 (5th Cir. 2008). The existence of power buyers does not necessarily mean a merger won't have anticompetitive effects. Smaller to mid-sized customers without significant

bargaining power can be impermissibly harmed by anticompetitive mergers even when power buyers within the same market could effectively protect themselves. *United States v. United Tote*, 768 F. Supp. 1064, 1085 (D. Del. 1991).

1633. The evidence presented at the November 12 hearing and before readily demonstrates to this Court that {

. Power buyers such as { } make coordinated interaction unlikely.

Response to Conclusion of Law No. 1633:

Respondent's COL No. 1503 does not reference a recognized legal authority and consists merely of a restatement of its Proposed Findings of Fact.

1634. Moreover, it has been demonstrated convincingly in this hearing that {

Response to Conclusion of Law No. 1634:

Respondent's COL No. 1504 does not reference a recognized legal authority and consists merely of a restatement of its Proposed Findings of Fact.

1635. Complaint Counsel's argument that { } is not a powerful buyer because it does not have "{ }" is incorrect. The courts have not required a minimum market share when making "powerful buyer" determinations. (*See, e.g., Federal Trade Commission v. Elders Grain*, 868 F.2d 901 (7th Cir. 1989); *United States v. Baker Hughes, Inc.*, 908 F.2d 918 (D.C. Cir. 1990); *In the Matter of Owens-Illinois, Inc.*, 115 F.T.C. 170 (1992); *United States v. Archer-Daniels-Midland Co.*, 781 F.Supp. 1400 (S. Dist. Iowa, 1991)). In fact, if Complaint Counsel's statement were true, there could be only one powerful buyer in each market – a suggestion that is contrary to existing case law. Even the Horizontal Merger Guidelines, which recognize the "power buyer" defense, do not require that

a powerful buyer have a requisite share of the relevant purchases. Rather, the Guidelines note that “[b]uyer size alone is not the determining characteristic.” (Sec. 2.12).

1636. Based on the Court’s foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore’s acquisition of Microporous would harm competition because of coordinated interaction.

1637. The evidence adduced at the November 12 hearing further refutes Complaint Counsel’s unilateral effects theory. As this Court previously found, where the FTC focus in a merger case is on the alleged dominance of the merged entity, the FTC must show that the “merger may result in a single firm that so dominates a market that it is able to maintain prices above the level that would prevail if the market were competitive” and it must show that such increased prices are accompanied by “lower output.” *In the Matter of Chicago Bridge & Iron Co.*, Dkt. No. 9300 at 7 (Jan. 6, 2005). *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997). (RFOFCOL 1448).

Response to Conclusion of Law No. 1637:

The Acquisition is likely to increase Daramic’s ability to unilaterally increase prices in the relevant markets because the acquisition eliminates competition from Microporous, Daramic’s closest and only competitor in deep-cycle, motive and UPS markets, while eliminating a third competitor in the North American SLI market. 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”).

1638. The testimony and exhibits introduced at the November 12 hearing demonstrate Daramic’s complete lack of ability to unilaterally increase price. In fact, the evidence demonstrates just the opposite:

Monopoly power is “the power to control prices or exclude competition.” *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Daramic has no ability to control prices or exclude competition.

Response to Conclusion of Law No. 1638:

Evidence adduced at the November 12th hearing demonstrates that Daramic's acquisition of Microporous diminished competition in the North American SLI market. (See e.g., CCRF 1510). { . (PX 5076 (Seibert, Dep. At 27), *in camera*). {

. (See CCRF 1509). {

. (CCFOF 1312-1320).

1639. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that the evidence adduced by Complaint Counsel is insufficient to show that Polypore's acquisition of Microporous would harm competition because of anticompetitive unilateral effects.

Response to Finding No. 1639:

The proposed conclusion is a summary of several invalid conclusions proposed by Respondent. (See CCRF 1637 – 1638, above). As a result, it should be rejected as well.

1640. The evidence adduced at the November 12 hearing further demonstrates that Daramic does not have monopoly power in Complaint Counsel's SLI market. As found previously, Dr. Simpson's data shows

. (RFOF 1287, 1388) By themselves, those figures are too low to find monopoly power. Here, however, the evidence shows that {

. Accordingly,

Response to Finding No. 1640:

The proposed conclusion is factually and legally unsupported. Respondent's proposed findings from the original hearing are flawed. (See CCRF 1271-1272, 1277, 1281, 1285, 1388-1392). Respondent cites no authority for its assertion that "[b]y themselves, those figures are too

low to find monopoly power.” Monopoly power can exist even when a firm holds a market share of less than 50 percent. (See, e.g., *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 562 F.Supp.2d 392, 400-03 (E.D.N.Y. 2008) (collecting cases); see also CCRF 1285). Similarly, Respondent’s assertion that {

} lacks evidentiary support. No evidence concerning 2009 market share statistics was introduced at either hearing in this matter. (See CC Rehearing Brief at 16-17). To the extent that {

} (See CCFOF 1261-1266, 1271). Moreover, while market share evidence may be “the primary indicator of the existence of a dangerous probability” of achieving monopoly power, it is “not the sole one.” (*Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990)). Certainly the direct evidence of Daramic’s ability to control prices and exclude competition is more probative than relying on market share evidence alone, which is at best an indirect measure of monopoly power. (See *In re Payment Card Fee Litigation*, 562 F.Supp.2d at 400-02; see also CCRF 1638, above).

Finally, Respondent fails to address the central issue of liability for its past conduct. Complaint Counsel has alleged that Daramic attempted to maintain monopoly power in the North American market for SLI separators. (CC Rehearing Brief at 14-19). Whether Daramic succeeds or fails is beside the point – the attempt itself is the offense. (See, e.g., *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 474-75 (5th Cir. 2000); *Areeda* ¶¶806b, ¶807i; CC Rehearing Brief at 17). In sum, the evidence is more than sufficient to establish Respondent’s conduct in this market has violated Section 5 of the FTC Act.

1641. Finally, additional evidence was introduced at the November 12 hearing supporting this Court’s previous finding that there are no substantial barriers to entry into the production of battery separators. (RFOFCOL 1453-57). First, {

1209, 1212), {

, (RFOF

Response to Finding No. 1641:

The proposed conclusion is invalid on numerous levels. First, the record reflects that substantial barriers to entry exist in all four relevant markets, including the SLI market. (*See* CCFOF 817-1043; CCRF 1061-1122). And despite Respondent’s repetitive claim that new entry is imminent, the history of this industry – particularly as recorded in Daramic’s own documents – proves that the only new entrant of any competitive significance in years (MPLP) was taken over by Daramic itself. (*See* CCFOF 697; PX0482 at 002; PX0238 at 001 (noting that MPLP’s expansion in 2008 was “an element we [Daramic] have not faced in many years,” and “unlike prior years, we have a true legitimate big competitor entering the market (MP)”); *see also* CCFOF 529, 547-548, 552, 588, 642, 692-696).

Second, Respondent attempts to create the mistaken impression that {
}. (*See* Gillespie, Tr. 5849, *in camera*
{
}). The obvious flaws in its argument are
Respondent’s assumption about }
which no longer applies, and that Daramic is not in fact willing to {
}. (*See* Gillespie, Tr. 5861-5862, *in camera*; CCFOF 1260, 1283).

Third, Respondent’s reasoning that {
} ignores a number of factors unique
to Exide’s decision-making. Most importantly, {

}. (See CCFOF 1267-1270). {

}. (See Gillespie, Tr. 5830-5832, *in camera*).

1642. Second, {

Response to Finding No. 1642:

The proposed conclusion is incorrect and beyond the scope of the November 12 hearing. (See-CCRF 1514).

1643. Based on the Court's foregoing findings of fact and the applicable legal standards and principles set forth herein, the Court concludes that Complaint Counsel has not shown that there are significant barriers to entry into the production of and sale of battery separators.

Response to Finding No. 1643:

The proposed conclusion is a summary of two invalid conclusions proposed by Respondent. (See CCRF 1641 – 1642, above). As a result, it should be rejected as well.

VI. CONCLUSION

For the reasons stated above, and in Respondent's previous submissions, the Court finds that Complaint Counsel have not proven their claims and the acquisition between Polypore and Microporous Products has not, and will not, cause competitive harm in the worldwide PE separator market. Accordingly, the Court dismisses the FTC's claims with prejudice.

Response to Conclusion

Upon consideration of Respondent's proposed findings and Complaint Counsel's responses the court finds that Complaint Counsel has proven its allegations in the Complaint and the Relief requested shall be granted.

Dated: December 10, 2009

Respectfully Submitted,



JLR

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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 Post-Trial Reply Proposed Findings of Fact and Conclusions of Law on the Reopened Record with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

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 Post-Trial Reply Proposed Findings of Fact and Conclusions of Law on the Reopened Record with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oyalj@ftc.gov

I hereby certify that on December 10, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing public version of Complaint Counsel's Reply Proposed Findings of Fact and Conclusions of Law on the Reopened Record with:

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