No. 11-10375-EE

In the
United States Court of Appeals
for the Eleventh Circuit

POLYPORE INTERNATIONAL, INC.,
a corporation,
Petitioner,

versus

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Order and Opinion of the Federal Trade Commission

BRIEF FOR PETITIONER

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Polypore International, Inc. (NYSE: PPO), is a publicly traded company with no parent corporation. Warburg Pincus LLC and FMR LLC each own more than 10% of petitioner's stock. The persons and entities required to be listed by 11th Cir. R. 26.1 are as follows:

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Daramic Austria GmbH

Daramic Battery Separator India Private Limited

Daramic Holding, LLC

Daramic Holding SAS

Daramic International, Inc.

Daramic, LLC

Daramic SAS

Daramic Separadores de Baterias Ltda.

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STATEMENT REGARDING ORAL ARGUMENT

In light of the complexity of the issues involved and the extensive administrative record, petitioner submits that the Court's consideration of the petition for review would benefit from oral argument. Petitioner therefore respectfully requests that the Court grant oral argument in this case.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

INTRODUCTION

This important case tests the authority of the Federal Trade Commission ("FTC" or "Commission") under the antitrust laws to unwind a merger based primarily on the alleged loss of *potential competition*, not current competition. Because such claims are inherently speculative, and because competition-promoting transactions can be deterred by the threat of mistaken antitrust challenge, the Supreme Court has imposed an exacting burden of proof in potential competition cases—and, as a result, such merger cases have been exceedingly rare in the last three decades.

Here, the FTC tried to evade its burden of proof by wrongfully treating the merging companies as current competitors in the largest market at issue. Compounding this legal contortion, the FTC tilted the tables by applying a *presumption of liability* supposed to be reserved only for mergers of current competitors, and it committed several other legal errors in analyzing the competitive effects of the challenged transaction.

Equally egregious was the FTC's error in fashioning the remedy. All the alleged competitive harms found by the agency were confined to North America, and the Commission specifically found that producers of the relevant products located outside North America were not credible alternatives for North American customers. Yet in direct conflict with its findings, the FTC ordered petitioner to

divest a production plant in Feistritz, Austria, that had never produced the relevant products at the time of the acquisition and was constructed to serve customers in Europe, not in North America.

These errors justify complete reversal of the Final Order and Opinion. At a minimum, the requirement to divest the Feistritz plant should be vacated as illogical, unreasonable, and beyond the authority of the FTC.

JURISDICTIONAL STATEMENT

The FTC exercised jurisdiction pursuant to 15 U.S.C. §§ 44 & 45. The Commission's Final Order and Opinion issued on November 5, 2010, and was served on petitioner on November 29. Pursuant to 15 U.S.C. § 45(c), petitioner timely filed the petition for review on January 28, 2011. Petitioner engages in interstate commerce and conducts business in this Circuit. This Court has jurisdiction under 15 U.S.C. § 45(c).

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission erred in analyzing competitive effects concerning SLI battery separators?

2. Whether the Commission erred in analyzing relevant market and competitive effects regarding separators used in deep-cycle and motive batteries?

3. Whether the Commission erred in ordering petitioner to divest a production facility in Feistritz, Austria?

STATEMENT OF THE CASE

A. Proceedings Below

This case involves an antitrust challenge to the consummated acquisition of Microporous Products L.P. ("Microporous") by petitioner Polypore International, Inc. ("petitioner" or "Polypore"). In its Final Order and Opinion, the Commission concluded that the challenged transaction violated section 7 of the Clayton Act, 15 U.S.C. § 18, which proscribes acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly," in one or more relevant markets. (Doc. 377 at 9-36.)[1]

Polypore acquired Microporous on February 29, 2008. (*Id.* at 1-2.) The transaction was not subject to the notice and waiting-period requirements of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, due to the low value of the deal. The FTC filed an administrative complaint challenging the acquisition on September 29, 2008. (Doc. 377 at 6.) As relevant here, the FTC charged that the combination violated Clayton Act section 7 by substantially lessening competition in markets for the manufacture and sale in North America of battery separators used in three

[1] The rulings below are cited by reference to the document numbers in the FTC's Certified List. The public version of the Commission's Opinion is cited as "Doc. 377" and its Final Order as "Doc. 368"; the public version of the ALJ's Initial Decision of March 1, 2010, is cited as "Doc. 342." Pages of trial testimony are cited as "Tr. __ (Name of witness)," FTC exhibits as "PX__," and Polypore exhibits as "RX__."

types of batteries: (1) automotive batteries—also referred to as "starter, lighting, and ignition," or "SLI," batteries; (2) "deep-cycle" batteries; and (3) "motive power" batteries. (*Id.*)[2]

Polypore denied the allegations and a trial was held before an administrative law judge ("ALJ"), who ruled in favor of the FTC. (*Id.* at 7; *see* Doc. 342.)[3] The ALJ ordered Polypore to divest all Microporous assets, including a newly constructed production plant in Feistritz, Austria, that was not yet operational when acquired. (Doc. 377 at 8; Doc. 342 at 328-41, 348-76.) On appeal, the Commission agreed that the acquisition violated section 7 and upheld divestiture of the Austrian plant, even though (1) market participants in all relevant markets found by the FTC were limited to plants located within North America, and (2) the Austrian plant had never produced battery separators and was constructed to serve customers in Europe, not North America. (Doc. 377 at 2, 36-41.)

[2] The FTC also claimed that the acquisition violated section 5 of the FTC Act, 15 U.S.C. § 45, but the Commission applied only the legal standards of section 7 (*see* Doc. 377 at 9-11), and the ALJ specifically concluded that the section 5 claim was redundant and "does not require an independent analysis" (Doc. 342 at 199 (quoting authorities)).

[3] The ALJ made three other rulings (*see* Doc. 377 at 7-8; Doc. 342 at 252-53, 264, 300-28), none of which is at issue before this Court.

B. Statement of Facts

Battery separators are membranes installed between the positive and negative plates in flooded lead-acid batteries to prevent short circuits and to regulate the flow of electrical current between the plates. (Doc. 342 at 13, Finding 17.) Prior to the acquisition, through its "Daramic" business unit, petitioner Polypore primarily manufactured pure polyethylene, or "PE," battery separators for use in automotive and motive power batteries. (Doc. 377 at 3 (citing ALJ Finding 42).) Automotive batteries—also called "SLI" batteries—are used in cars, trucks, buses, boats, and jet skis; motive power batteries are used in mobile industrial machines, such as forklifts and mining equipment. (*Id.*) Daramic also manufactured a much smaller volume of latex-coated PE-based battery separators ("Daramic HD") for use mostly in deep-cycle batteries. (*Id.*) Deep-cycle batteries are used in equipment that requires a lower amperage draw over a longer period of time, such as golf carts and floor scrubbers. (*Id.* at 2.) At the time of the acquisition, Daramic operated two production plants in the United States and five overseas in Europe and Asia. (*Id.*)

The acquired firm, Microporous, was much smaller than Daramic. It manufactured pure rubber battery separators ("Flex-Sil") for use in deep-cycle batteries and a line of rubberized PE-based separators ("CellForce") primarily for use in motive power batteries. (*Id.*) Before the acquisition, Microporous operated

one plant in Piney Flats, Tennessee, and had constructed a plant in Feistritz, Austria, which was not yet operational but was intended to serve only customers in Europe. (*See id.* at 38.) Microporous had also purchased equipment for an additional production line (a "line in boxes") for installation either at Piney Flats or Feistritz. (*Id.* at 2.)

Entek is a major competitor in the production of pure polyethylene SLI separators, with plants in the U.S. and the U.K. (*Id.* at 4; Doc. 342 at 18, Findings 47-48.) Entek also used to make PE separators for motive power batteries. (*See* Doc. 342 at 163, 165, Findings 1029 & 1040.) In addition, there are numerous other foreign manufacturers of battery separators, including several in China, other parts of Asia, and Europe. (*See id.* at 167-70; Doc. 377 at 4.)

The FTC identified three relevant product markets at issue—SLI, deep-cycle, and motive power battery separators—and ruled that the geographic scope of each was limited to North America and included only sales to customers in North American and only separator manufacturing plants in North America. (Doc. 377 at 11-19.) Despite evidence that U.S. separator makers viewed Asian manufacturers as a competitive threat in North America and that large battery manufacturers in North America have the incentive and ability to sponsor separator supply from

overseas firms,[4] the FTC concluded that no separator plants located outside North America participate in the relevant markets today because of cost and quality issues. (*Id.* at 19.)

In the North American market for SLI battery separators, the FTC found that Entek accounted for around 52% of sales and Daramic 48%. It found that Daramic and Microporous were the only two participants in the North American markets for deep-cycle and motive power battery separators, with Microporous accounting for around 90% of deep-cycle separator sales and Daramic around 90% of motive power separator sales. (*Id.* at 20.) Of the three alleged relevant markets, the market for SLI separators (of which Microporous had a zero share) was by far the largest, accounting for three-quarters of the sales at issue. (*Id.* at 3, n.7.)

Major customers for battery separators in North America include Johnson Controls, Inc. ("JCI"), the largest manufacturer of SLI batteries, with production facilities in North America, Europe, and China; Exide, a diversified battery manufacturer with production facilities around the world; EnerSys, the global leader in motive power batteries, with production facilities in the United States, Mexico, China, and Europe; Trojan Battery Company, the global leader in deep-cycle batteries and Microporous's largest customer, accounting for 43% of

[4] (*See* Tr. 4524-25, *in camera* (Weerts); Doc. 342 at 61 (Finding 340), 64-65 (Findings 359 & 363), 170-74 (Findings 1079-1111); Tr. 5168-70, *in camera* (Kahwaty); RX0945 at 55-58, 177, *in camera* (Polypore's expert report).)

Microporous's total sales; East Penn Battery; Crown Battery; Douglas Battery (in the process of being acquired by EnerSys), which makes motive power and deep-cycle batteries; and U.S. Battery, which produces batteries primarily for deep-cycle applications. (*See* Doc. 377 at 5-6 & nn.10-11; Doc. 342 at 18-21.)

Microporous was not a manufacturer of SLI battery separators, as defined by the FTC, and it lacked experience and reputation in the production of pure PE separators, like those typically required for SLI batteries. The FTC introduced evidence indicating that Microporous had considered producing SLI separators and had preliminary discussions with SLI battery makers, but these discussions went nowhere. Microporous engaged in potential development efforts with JCI, but those efforts collapsed in 2007 and JCI turned to Entek instead. (Doc. 342 at 106 (Finding 651), 111-12 (Findings 689-691), 118 (Findings 734 & 736), 125 (Finding 781), & 254; Tr. 3792-95 (McDonald); RX0077.) The ALJ also found that Microporous had contacts with Exide over a possible supply relationship in response to a general RFP to the industry, but those discussions had also stalled prior to the acquisition, and no contract had been signed. (See Doc. 342 at 255 (citing Finding 715); id. at 112, Findings 694 & 696.) The evidence indicated that Microporous did not believe it would ever supply Exide. (*See* Tr. 3839-47 (McDonald); Tr. 3760 (Trevathan); RX0283 at 001; RX0285.) And although it had brief discussions with East Penn Battery regarding PE-based separators for

some unspecified applications, those discussions did not proceed beyond preliminary stages. (*See* Doc. 342 at 256 (citing Findings 720-721); Tr. 3623 (Trevathan); Tr. 503, *in camera* (Gilchrist).)

Microporous's board of directors did not approve of the company's developing a PE separator business for SLI applications. In a memorandum sent in November 2007, the Microporous board instructed the company's CEO that he was not to commit Microporous to a PE separator business without express approval from the board. (*See* RX0401.) There is no evidence in the record that the board ever gave that approval.

On the other hand, Microporous was the leading maker of deep-cycle battery separators. Deep-cycle batteries contain antimony, and their performance is degraded by antimony "transfer" between the positive and negative plates. (Doc. 377 at 13.) Natural rubber separators are the best for preventing antimony transfer. (*Id.* at 14; Tr. 365 (Gilchrist).) Because polyethylene is inert and does not retard antimony transfer, PE separators do not work well in deep-cycle batteries. (*Id.*) Microporous's pure natural rubber Flex-Sil product is recognized by customers as superior in quality and is considered the industry standard for deep-cycle battery separators. (*See* Doc. 377 at 15; Tr. 535 (Gilchrist); Tr. 271, 277 (Godber); Tr. 4683-85 (Whear); Tr. 1964-65 (Wallace); Tr. 3787, 3818 (McDonald); PX0433 at 001; RX1338; RX1643.).)

Daramic HD, which is made of latex-coated polyethylene, rather than natural rubber, is not an effective substitute for Flex-Sil. Daramic HD did not achieve significant sales in comparison to Flex-Sil, even though Flex-Sil was priced substantially higher. (*See* Tr. 535-36 (Gilchrist); Tr. 271, 277 (Godber); Tr. 1966-72 (Wallace).) Daramic HD was used exclusively in low-end batteries, was not qualified for use in original deep-cycle equipment by several of the major customers, and was never considered by Microporous to be a threat to its deep-cycle separator business. (*See* Tr. 3820-22 (McDonald); Tr. 554 (Gilchrist); Tr. 271 (Godber); RX0780; RX1093 at 2; RX0835; RX1334 at 2; RX1329 at 2.)

It was the superiority of Flex-Sil and Microporous's expertise with rubber technology that motivated the transaction. Polypore acquired Microporous to broaden Daramic's product offering into market niches it had been unable to penetrate effectively. (*See* Tr. 652, 1057, 1059-61 (Hauswald); Tr. 1735 (Roe); RX1630; RX1097 at 3, *in camera*; PX0433.)

In contrast to deep-cycle battery separators, the separators used in SLI batteries and those used in motive power applications are both typically made of pure polyethylene, with the primary difference being that motive power separators are generally larger and thicker. (*See* PX0033 at 14, *in camera* (FTC's expert report); Doc. 342 at 38-39, Findings 193-196.) Pure PE separators for both SLI and motive power applications are made on production lines that are essentially

identical except for different rollers (called "calendar rolls"), which can be switched out in a matter of a few hours. (Tr. 1016-20 (Hauswald); Tr. 3792-95 (McDonald).)

As a leading supplier of pure polyethylene SLI separators, and as a former supplier of motive power separators to North American customers, Entek is well positioned to re-enter the market for motive power battery separators, and would have the ability and incentive to do so in response to non-competitive pricing. (*See* Doc. 342 at 163, 165, Findings 1029 & 1040; Tr. 2311, 2446-48, *in camera* (Burkert); Tr. 2514, *in camera* (Gagge) Tr. 4459-60, 4495-96, & 4522-23, *in camera* (Weerts); RX0201; RX0945 at 116-18, *in camera* (Polypore's expert report).) In addition, small firms can enter the market on a *de novo* basis to produce PE-based motive power battery separators at a scale similar to Microporous's production of CellForce without confronting significant technological barriers to entry. (*See* Tr. 932-33, *in camera* (Hauswald); Tr. 4332-34 (Thuet).) New motive separators can be tested and qualified in a matter of months. (*See* RX1162 at 002; RX1141, *in camera*; RX0007; RX0243 at 007; RX1137, *in camera*; RX1144, *in camera*; RX1145, *in camera*; RX1155 at 002, *in camera*.)

At the time of trial in this case, the Piney Flats CellForce production lines were operating at less than 40% of capacity. (Tr. 3647 (Trevathan).) Prior to the

acquisition, much of Microporous's production of CellForce at Piney Flats was being exported to EnerSys in Europe for motive power batteries (Tr. 3774 (Trevathan))—production that Microporous intended to shift to its new Feistritz plant in Austria (Tr. 3762-63 (Trevathan)). The shifting of this CellForce production to Austria would result in significant additional capacity becoming available at Piney Flats, and there was no evidence in the record that Microporous was able to use that additional capacity prior to the acquisition. (*See* Tr. 3623, 3721, 3774 (Trevathan); Tr. 503, *in camera* (Gilchrist).)

Even if a North American customer could be identified for which the additional Piney Flats capacity was needed, the FTC did not consider whether divestiture of the "line in boxes" for a PE-based production line, along with the Piney Flats plant, to an existing major separator manufacturer, such as an Asian or European manufacturer, would be a fully adequate remedy to address such a need. (*See* Doc. 377 at 38-39 (discussing Piney Flats production capacity limitations but not considering option of divestiture of combination of Piney Flats plant and "line in boxes" to existing international manufacturer); *cf.* Doc. 342 at 73-74, Findings 430-431; *id.* at 124-25, Findings 773-777 (describing the asserted capabilities of the new PE-based production line (the "line in boxes") that Microporous was considering adding to its Piney Flats plant and finding that this new production line would give the Piney Flats facility sufficient capacity for Microporous to enter the

North American SLI market and/or supply CellForce separators to existing and new customers).)

C. Standard of Review

The Court is to review the Commission's legal conclusions and decide all issues of law relating to the Final Order and Opinion on a *de novo* basis. 15 U.S.C. § 45(c). *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005), *cert. denied*, 548 U.S. 919, 126 S. Ct. 2929 (2006). Similarly, the correct application of the governing legal standards to the facts in the case is for this Court to resolve *de novo*. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016 (1986).

The Commission's findings of fact are reviewed under a substantial evidence standard. *See* 15 U.S.C. § 45(c). Under that standard, this Court examines the record taken as a whole to determine whether the Commission's findings are supported by substantial evidence. *See Schering-Plough v. FTC*, 402 F.3d at 1063 ("[W]e must consider *all* of the evidence when drawing our conclusions about the reasonableness of [the] agency's findings of fact.") (emphasis in original). In reviewing a finding of fact by the FTC, the Court will examine whether the Commission adequately considered record evidence tending to undercut the finding. *See id.* ("[T]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.") (quoting

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464 (1951)); *id.* at 1070 ("Substantial evidence requires a review of the *entire* record at trial," including any "evidence that contradicts the Commission's conclusion."). *See also Tenneco, Inc. v. FTC*, 689 F.2d 346, 358 (2d Cir. 1982) (when judging substantiality of evidence relied upon by FTC, "we must consider all other record evidence that 'fairly detracts from its weight'") (quoting *Universal Camera*, *supra*).

Furthermore, this Court's decision in *Schering-Plough* demonstrates that inconsistencies in the Commission's reasoning or contradictions in its logic may betray a lack of the substantial evidence necessary to support the Commission's findings. *See Schering-Plough*, 402 F.3d at 1070 (rejecting an FTC finding as "not supported by law or logic").

SUMMARY OF ARGUMENT

The Commission's Final Order and Opinion should be vacated because of a series of fundamental legal errors. Even if the Commission's conclusions on liability were correct in all respects, the remedy ordered by the Commission should be vacated to the extent it requires petitioner to divest the production facility in Austria, since the rationale for this remedy is in direct conflict with the Commission's competitive analysis.

First, in analyzing the largest and most important market found to be at issue (the "SLI" battery separator market), the Commission applied the wrong

legal standard by treating Microporous as a current competitor, an error that enabled the Commission to evade the demanding strictures of the potential competition doctrine. The Commission doubled the error by relying improperly on a presumption of liability that was dispositive in this case. Sensing the problems created by these critical defects, the Commission tried to cure the problem, as an afterthought on appeal, by adding a footnote in its final opinion reciting a quick-and-dirty "potential competition" analysis. But the Commission committed further legal error in applying the potential competition doctrine, and the easy assertions contained in that footnote are not supported by substantial evidence in the record.

These legal and factual errors in the analysis of the important SLI market justify the Court in reversing and vacating the Commission's Final Order and Opinion in its entirety. At a minimum, they require a remand for a new trial, since it is far from clear that the Commission would conclude that the competitive effects it found in the remaining much smaller markets would by themselves support the relief it ordered.

Second, the Commission also committed serious errors in its approach to the other two markets found to be at issue here—the alleged markets involving battery separators for "deep-cycle" and "motive power" applications. With respect to deep-cycle separators, the Commission erred in defining the relevant product market and in analyzing competitive effects because its finding that Microporous's

Flex-Sil product and Daramic's HD product were close or significant competitive substitutes lacked the support of substantial evidence in the record. And the Commission erred in analyzing competitive effects for motive power separators because it lacked support to conclude that new entry was unlikely to occur in this market. In particular, Entek, a leading competitor in the manufacture and sale of SLI separators, had the obvious potential to be a significant new entrant into the production of motive separators in response to non-competitive pricing.

Finally, even if the Commission's conclusions on the merits were upheld, the Commission still committed a fundamental legal error in ordering the divestiture of the Feistritz, Austria, plant, and this portion of the Final Order should be vacated. The competitive harms found by the Commission were all limited to producers and customers located in North America, and the Commission specifically concluded that no overseas production facilities even had the potential to serve the relevant markets at issue. The decision to order divestiture of the Austrian facility conflicted so flagrantly and unreasonably with the agency's conclusions about the harms to be redressed that this punitive decision exceeded the bounds of the Commission's remedial authority and cannot be sustained.

ARGUMENT

I. THE COMMISSION ERRED IN ANALYZING COMPETITIVE EFFECTS CONCERNING SLI BATTERY SEPARATORS

The Commission's approach to analyzing competitive effects in the all-important North American market for SLI battery separators was deeply flawed, both legally and factually.

The Commission's first and most fundamental legal error was to analyze the acquisition as a horizontal merger, improperly treating Microporous as a current competitor in the North American SLI battery separator market, rather than only a potential competitor whose speculative prospects for entry had no definite effects on competition for SLI separators. The Commission compounded this error by improperly relying on the presumption of liability provided under *United States v. Philadelphia Nat'l Bank*, which is only available for mergers of *current* competitors that significantly increase concentration in an already highly concentrated market. *See* 374 U.S. 321, 363, 83 S. Ct. 1715, 1741 (1963).

The Commission also erred in attempting to rehabilitate its case, post-trial, by inserting an alternative potential competition analysis in a footnote in its opinion. The agency's application of this potential competition theory was legally defective, and the factual assertions on which it was based lacked the support of substantial evidence in the record.

These several errors were integral to the Commission's entire ruling because the SLI market, which encompasses separators used in car batteries, was far and away the largest and most significant market at issue in this case. The Commission's errors in analyzing competition in this market therefore justify a complete reversal of the Final Order and Opinion. At a minimum, these errors require a remand to the Commission for a new hearing on competitive effects.

A. The Commission Applied the Wrong Legal Standard by Treating Microporous as a Current Competitor

In considering the market for SLI battery separators, the FTC should have analyzed the transaction under the *potential competition doctrine* only, not as a traditional horizontal merger between two current competitors in the market. Microporous was not making or selling any SLI separators when it was acquired by Polypore in 2008 or in the years before that. The ALJ specifically found that there were only two participants in the North American market for SLI separators both before and after the transaction (Daramic and Entek), and that Microporous had a zero share of that market in the years leading up to its acquisition by Polypore. (*See* Doc. 342 at 75, Finding 439 (showing no market share for Microporous in SLI separator sales in 2006 and 2007).) While some managers within Microporous had considered making or selling SLI battery separators, there was no company plan to do so, and the Microporous board had ordered management to get board approval before doing so—approval the record evidences

was never obtained. Microporous was not a current competitor in the North American SLI battery separator market. Instead, at most, Microporous was a potential entrant into that market.

Because of the high degree of speculation required to predict how competition might be affected by the elimination of a potential competitor, as opposed to the loss of a current market participant, the Supreme Court has imposed a heavy burden of proof on potential competition cases under section 7. The Court has only recognized such claims where the government proves three essential elements: (1) the relevant market is "substantially concentrated," (2) the potential entrant has the "characteristics, capabilities, and economic incentive" to render it a perceived potential *de novo* entrant, and (3) the potential entrant's premerger presence on the fringe of the relevant market "in fact tempered oligopolistic behavior on the part of existing participants in that market." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 624-25, 94 S. Ct. 2856, 2871 (1974).

No presumption or other evidentiary shortcuts can establish the required elements of a potential competition claim. Instead, there must be direct evidence that the premerger presence of the potential entrant on the edge of the market has had a direct and unique procompetitive influence on the behavior of the firms in the market. *See Tenneco, Inc. v. FTC*, 689 F.2d 346, 355 (2d Cir. 1982) ("The Commission's conclusion that the perception of Tenneco as a potential entrant

actually tempered the conduct of oligopolists in the market must also be supported by substantial evidence. It is not."); *United States v. Siemens Corp.*, 621 F.2d 499, 509 (2d Cir. 1980) ("[T]he absence of any present procompetitive influence of [the potential entrant's] presence on the fringe is fatal to the Government's claim under the 'perceived' potential competition doctrine."). *See also* 5 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1126h, at 92 (3d ed. 2009) ("Areeda & Hovenkamp") ("The threat of entry might influence present market occupants to behave more competitively than they otherwise would, but the circumstances in which that would occur are limited and perhaps exceptional. *Actually proving such an effect is extremely difficult.*") (emphasis added).[5]

Here, the FTC chose a very different path. It wrongfully evaded the strictures of *Marine Bancorporation* by treating Microporous as "a current participant and actual competitor in the North American SLI separator market," despite the undisputed fact that Microporous had no SLI separator sales. (Doc. 377

[5] One FTC Commissioner recently acknowledged that the strict proof requirements imposed by the Supreme Court in *Marine Bancorporation* are an "impediment[] to challenging a transaction involving a potential competitor" (*i.e.*, a firm that has "no current sales" in the relevant market). Remarks of J. Thomas Rosch, Commissioner, FTC, before the ABA Section of Antitrust Law's 59th Spring Meeting, Washington, D.C., "The Past and Future of Direct Effects Evidence," at 17 (Mar. 30, 2011), *available at* http://www.ftc.gov/speeches/rosch/110330aba-directeffects.pdf. The remarks by Commissioner Rosch suggest a recognition that no potential competition case is sustainable without proof that the pre-merger perception of potential entry by the fringe firm had an actual tempering effect on the conduct of current competitors in an oligopolistic market.

at 22.) The erroneous decision to treat Microporous as a current participant in the SLI market was critical to this case—indeed, outcome determinative—because it was the foundation for the FTC's misreliance on the *presumption* of anticompetitive effects applicable under section 7 of the Clayton Act for certain mergers between current competitors. (*Id.* at 27 (concluding that the evidence was sufficient "to create a presumption that the merger was . . . unlawful in the SLI market").) *See infra* section I.B.

The reasons given by the Commission for treating Microporous as a current participant in the SLI market, however, are all factors relevant instead to whether Microporous was a *potential* competitor, not a present competitor. The Commission found that Microporous had engaged in discussions over a period of years with two of the leading North American SLI battery manufacturers, JCI and Exide, about the possibility of supplying PE separators or rubberized PE-based separators (its CellForce line) to these customers. (*See* Doc. 377 at 20-22.) The Commission also stressed that Microporous had invested in equipment for a new production line (to be located either in its Feistritz, Austria, plant or at its plant in Piney Flats, Tennessee) that could be used to make CellForce or other PE-based separators, and that at various times Polypore perceived that Microporous had the potential to be a future supplier to customers that manufacture automotive batteries. (*See id.*; Doc. 342 at 73-74, Findings 430-431; *id.* at 124-25, Findings 773-777

(describing the asserted capabilities of the new PE-based production line (the "line in boxes") that Microporous was considering adding to its Piney Flats plant and finding that this new production line would give the Piney Flats facility sufficient capacity for Microporous to enter the North American SLI market and/or supply CellForce separators to existing and new customers).) None of these asserted facts, even if true, establish that Microporous was already in the SLI market at the time of the acquisition, or even that Microporous had the ability rapidly to supply SLI separators to significant customers in the immediate future.

Relying on the ALJ's legal conclusion, the Commission twisted the record when it asserted that Microporous was "actively competing for SLI business." (Doc. 377 at 20 (citing Doc. 342 at 258-59, where the ALJ erroneously concluded that Microporous "was bidding for SLI business").) The ALJ's conclusion, in turn, rested on findings that Microporous had engaged in on-again/off-again discussions with JCI, was negotiating with Exide, and had had contacts with another battery manufacturer, East Penn Battery, about the possibility of developing a supply relationship, all before it had a commercially viable product. (*See* Doc. 342 at 104-16, Findings 638-651, 684-722.) Even if the findings cited by the ALJ were all accepted as true, the efforts described in these findings could only have led to possible *future* SLI sales; none of these findings reflects that Microporous was

"actively competing" in the SLI market or that it was presently "bidding for SLI business."

Rather, the undisputed facts in the record confirm that Microporous had no contract with any SLI customer (or even a near-final contract), had made no firm bids to supply SLI separators to any customer, and had no orders for SLI separators. Microporous lacked experience and reputation in the production of pure PE separators, such as those typically required for SLI batteries, and had not adopted a plan to enter that business.

Although Microporous qualified at one point as a potential supplier to JCI, the development efforts with JCI had collapsed the year before the transaction, and the R&D discussions with JCI were dead. "Ultimately, however, the JCI and Microporous negotiations did not lead to a contract between the two parties." (*Id.* at 254 (citing Finding 691); *see id.* at 125, Finding 781 ("In early 2007, Microporous' discussions with JCI broke down.").)

Similarly, Microporous's discussions with Exide over a possible supply relationship had also stalled, and no contract had been signed. "Exide did not return its redline of the draft supply contract to Microporous, and no agreement was finalized prior to the acquisition." (*Id.* at 255 (citing Finding 715).) Moreover, the RFP from Exide, to which Microporous was responding, covered all types of batteries manufactured by Exide, including "automotive, motive, stationary and

golf cart batteries" (*Id.* at 112, Finding 694), and it was unclear which types of separators Exide might have ultimately considered purchasing from Microporous. (*See also id.* at 18, Finding 54 ("Exide's business is segmented into 'Industrial' and 'Transportation' units. The transportation unit is the majority of its business, and includes SLI batteries for cars, trucks, motorcycles, recreational vehicles, boats and other applications. The transportation division also includes batteries for deep-cycle applications, such as golf carts."); *id.* at 112, Finding 696 (finding that Exide intended to use the 2007 RFP process to move from a single source of supply to a "multi-sourcing strategy" for its various separator requirements).)

And while Microporous had discussed the possibility of supplying PE-based separators to East Penn Battery for some unspecified applications, "Microporous did not have the machinery or the tooling to supply the volumes that East Penn Battery requested," and "Microporous did not commit to East Penn Battery that it could supply East Penn Battery with the sizes and volumes of PE separators discussed in 2007." (*Id.* at 256 (citing Findings 720 and 721).) Again, the record is unclear whether any separators that East Penn might have considered purchasing from Microporous would be for standard SLI car batteries. (*See id.* at 20, Finding 66: "East Penn's Battery business is segmented into 'Wire and Cable,' 'Automotive,' and 'Industrial' divisions. East Penn Battery includes in its automotive division both SLI batteries and deep-cycle batteries.") Even assuming

that Microporous had brief discussions with East Penn Battery regarding separators for SLI applications, those discussions did not proceed beyond preliminary stages. (*See* Tr. 3623 (Trevathan); Tr. 503, *in camera* (Gilchrist).)

Indeed, Microporous's own board of directors expressly *disfavored* the development of a pure PE separator business for Microporous. In November 2007, Microporous's board *directed* Microporous's CEO *not* to commit the company to any such business and *not* to enter into any significant contracts for PE production without the specific approval of the board. (*See* RX0401.) The Microporous board *never* gave its approval for any such entry by Microporous into the SLI market.

These record facts establish that it was clear legal error for the Commission to treat the acquisition as a horizontal merger of current competitors in the SLI market. At a minimum, the record demonstrates that the Commission lacked substantial evidence to find that Microporous was a current competitor for SLI separator sales, and therefore it was legally improper to analyze the transaction as a merger of current competitors in this market.[6]

[6] The FTC's Merger Guidelines take the position that current market participants include "[f]irms not currently earning revenues in the relevant market, but that have committed [available production capacity] to entering the market in the near future," as well as "[f]irms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a [significant price increase], without incurring significant sunk costs," such as firms that already produce the same product in an adjacent geographic market or that could rapidly convert existing production facilities to manufacture the relevant product. U.S. Dep't of Justice & FTC,

B. The Commission Erred in Applying a Presumption of Liability

Through the use of what it characterized as a "strong presumption," the FTC tilted the tables in this case by shifting the burden to Polypore to prove a negative—that the loss of Microporous from the fringe of the SLI market would not lead to a substantial lessening of competition. (Doc. 377 at 31 (concluding that Polypore "failed to rebut the strong presumption of likely [anticompetitive] effects in a merger to duopoly in the SLI market").) In doing so, the Commission wrongly relied on the *Philadelphia National Bank* presumption that applies only to horizontal mergers that significantly increase concentration in an already highly concentrated market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. at 363, 83 S. Ct. at 1741 (a merger that "produces a firm controlling an undue

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Horizontal Merger Guidelines § 5.1 (2010). Again, because of the degree of inherent speculation involved in such inquiries, however, the established benchmark in gauging whether a firm on the fringe of a market may be deemed such a "near future" or "rapid" entrant is whether the evidence shows that the firm would enter the relevant market *within one year*. *See* 5 Areeda & Hovenkamp ¶ 1123b, at 61. *Cf. United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 84 S. Ct. 1044 (1964) (treating as a current competitor in the market to supply interstate natural gas to California the only other interstate natural gas pipeline operating in adjacent States where the adjacent pipeline had already demonstrated a willingness and capability of immediately serving customers in California and had already achieved a degree of entry by forcing price reductions in the relevant market). As discussed, the evidence in the record here clearly shows that Microporous did *not* meet that standard for imminent entry into the SLI market. (*See, e.g.*, Doc. 342 at 75, Finding 441 (Microporous planning document tentatively predicted first sales of SLI separators three years in the future and more than two years following acquisition).)

percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," is presumed likely to lessen competition substantially, absent a showing by defendant that the merger is "not likely to have such anticompetitive effects"); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (describing burden-shifting framework under section 7); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (same).

The FTC's reliance on the *Philadelphia National Bank* presumption of anticompetitive effects required not only that the relevant market (here, the North American market for SLI separators) was found to be highly concentrated, *but also* that the combination of the merging firms by itself significantly *increased* concentration in the relevant market. *See* 374 U.S. at 363, 83 S. Ct. at 1741 (presumption not available unless the government can show that the merger "results in a significant increase in the concentration of firms in th[e] market"); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004) (same).

Polypore's acquisition of Microporous, however, had no effect on concentration in the SLI separator market because Microporous had zero market share, making the *Philadelphia National Bank* presumption inapplicable. In order to claim advantage of the critical presumption of anticompetitive effects, the FTC's economic expert *imputed* to Microporous a projected market share of 6% in the North American market for SLI sales for purposes of market concentration analysis,

even though the ALJ found that Microporous had no share. (PX0033 at 18-19, 41, *in camera* (FTC's expert report).) That projection by the FTC's expert was based on a speculative estimate made in the middle of 2007 of potential future sales for calendar year 2010 that was used by Microporous for preliminary planning purposes. (*See* Doc. 342 at 75, Finding 441 ("A Microporous document from 2007 predicted future market shares for 2010 in a North American SLI battery separator market for Entek, Daramic, and Microporous. Microporous projected [for itself] a 6% share by 2010 [and a zero share before 2010], based upon projected sales to Exide.") (citing PX0080 at 60).)

The 6% estimate depended on assumptions that Microporous might (a) qualify in the future as an SLI supplier to Exide or another significant customer, (b) enter into a final contract with the customer for a significant firm order to supply SLI separators, and (c) build one or more functioning PE production lines able to produce a quality PE product suitable for automotive batteries. Consistent with the fact that not one of these preconditions had been satisfied at the time, and no firm business decisions had been taken to enter the SLI separator business, much less satisfy any of those conditions, the 2007 document relied upon by the FTC's expert only projected that Microporous might garner sales in the SLI market *three* years out into the future (in 2010) and predicted zero SLI sales before then.

The Commission itself did not adopt the expert's approach of imputing a market share to Microporous. (*See* Doc. 377 at 27.) Nevertheless, the Commission still applied the presumption of liability *as if* the merger *had* created a significant increase in concentration in the SLI market. (*Id.*) The facts revealed in the record, however, negate any legal basis for the FTC's treatment of Microporous as a current competitor in the North American SLI market, and for that reason it was legal error for the FTC to assume the benefit of the presumption of anticompetitive effects under section 7.

C. The Commission's Alternative Conclusion Based on Potential Competition Theory Was Legally Deficient and Lacked Substantial Evidentiary Support

The FTC obviously recognized the weakness of its position that Microporous was a current competitor in the SLI market, because the Commission felt it necessary to tag onto its opinion a footnote stating an alternative conclusion based on potential competition analysis. (*See* Doc. 377 at 27 n.41.) This alternative conclusion was added for the first time on appeal; the ALJ's Initial Decision treated Microporous only as a current participant in the SLI market and relied on the presumption of anticompetitive effects. (*See* Doc. 342 at 259 ("Microporous was an actual competitor in the SLI market.").)

In support of this post-trial alternative legal theory, the Commission recited two purported facts: (1) that "Microporous was the only firm in a position to enter

the concentrated North American SLI market and was already bidding for business," and (2) that "Daramic perceived Microporous as a competitive threat and reacted by offering more competitive terms to those customers it believed it could lose to Microporous." (*Id.*)

The first purported fact, even if it were true, is insufficient by itself to support a potential competition case. It represents a misguided effort by the Commission to apply the so-called "actual potential competitor" theory.

In years past, federal antitrust enforcers have taken the position that they could bring a potential competition case not only under the "perceived potential competitor" doctrine approved by the Supreme Court in *Marine Bancorporation* (which requires proof of current effects in the relevant market), but also under the far more speculative "actual potential competitor" theory, which, despite the confusing use of the word "actual," rests entirely on a prediction that the merger may only eliminate the *future potential* "for long-term deconcentration of an oligopolistic market," *Marine Bancorporation*, 418 U.S. at 625, 94 S. Ct. at 2872. *See* U.S. Dep't of Justice, Non-Horizontal Merger Guidelines § 4.112, 49 Fed. Reg. 26,823 (1984), *available at* http://www.justice.gov/atr/public/guidelines/2614.pdf.

The Supreme Court, however, expressly refused to approve the "actual potential competitor" theory in *Marine Bancorporation*, and only one court of appeals has ever condemned a combination of firms based solely on this

speculative theory. *See Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S. Ct. 1768 (1982) (cited by the FTC in Doc. 377 at 27 n.41). Other circuits and commentators have voiced deep skepticism about the legal sufficiency of the actual potential competition theory, and its status as a legal doctrine under section 7 is highly doubtful. *See Tenneco*, 689 F.2d at 355; *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977) (criticizing "the wholly speculative nature of the 'eventual entry' test" and holding that "such uncabined speculation cannot be the basis of a finding that Section 7 has been violated"); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 296-98 (4th Cir. 1977) (similar). *See also* 5 Areeda & Hovenkamp ¶ 1124, at 62:

> [Secton 7] coverage is clearest when a merger terminates a present competitive force by eliminating the most likely potential entrant whose perceived status has substantially restrained the anticompetitive behavior of a market's inhabitants. . . . A more troublesome case is the elimination through merger of an outside firm that cannot be described as a present competitive force and whose only offense, if any, is that it has chosen to merge with an inside firm rather than to create new competition. Where the outside firm is relevant only because it might otherwise enter in the future and thereby increase competition at that time, the merger does not reduce competition; it only eliminates a future opportunity to increase it.

Guided by the Supreme Court's opinion in *Marine Bancorporation*, this Court should reject the "actual potential competitor" theory of liability, which is divorced from any evidence that the threat of entry by the acquired firm had produced real procompetitive benefits in the market prior to the acquisition.

Even if the "actual potential competition" theory could legally state a claim under section 7, the Commission's own precedents demonstrate that this theory would not have any application in this case, because it cannot be shown that Microporous had a concrete plan to enter the SLI market. *See In re B.A.T. Industries, Ltd.*, 104 F.T.C. 852, 922 (1984) (for this theory to apply, the actual potential entrant must have settled on a concrete entry plan and must have taken "actual steps toward entry"). Microporous's board specifically reserved judgment on whether to pursue the SLI market and required management to get express board approval before doing so (*see* RX0401), and there is no evidence that such approval was ever sought, much less granted. As explained in part I.A. above, the assertion that Microporous was "already bidding for [SLI] business" is inconsistent with the record and unsupported by substantial evidence; Microporous never bid for SLI business and did not have an approved plan to do so.[7]

In addition, according to its own formulation of the theory, the Commission would have had to establish that there was a substantial likelihood that such entry

[7] Indeed, if Microporous was actually "bidding for" SLI business based on its preliminary and conditional contacts with customers about the possibility of developing a PE or PE-based separator product, then Asian PE separator manufacturers have most assuredly also been bidding for potential SLI business in North America by virtue of their similar preliminary discussions with major North American SLI separator customers—yet, in obvious tension with its contrary treatment of Microporous, the Commission blithely dismissed that suggestion. (*See* Doc. 377 at 34-35.)

would ultimately produce a deconcentration of the market or other significant procompetitive effects. *In re B.A.T.*, 104 F.T.C. at 924. But there is simply no substantial evidence to support such a finding here. Consistent with the fact that it had no prior experience or reputation in the production of pure PE separators, Microporous's own tentative projection (relied on by the FTC's economic expert in calculating the supposed change in market concentration) was that Microporous would generate no SLI sales until three years in the future, and even then, its preliminary estimate was that after three years it might gain only a 6% share of SLI separator sales—hardly a significant deconcentration of the market. (*See* PX0080 at 60; PX0033 at 18-19, 41, *in camera* (FTC's expert report) (relying on Microporous projection of 6% share three years in future for calculation of concentration ratios).)

The Commission's second assertion in its footnote, purporting to base its decision on the "perceived potential competition" doctrine, was also error because there was insubstantial evidence in the record to support it. In asserting that "Daramic perceived Microporous as a competitive threat [in the North American SLI market] and reacted by reducing prices," the Commission cited ALJ Findings 820-821, 824-825, 849, and 852. (Doc. 377 at 20.) However, a close review of these and related findings, and of the record evidence on which they rest, reveals that the Commission's assertion that Microporous's potential for entry had actually

disciplined competition in the SLI market was erroneously based almost entirely on evidence about competition in the sale of motive or deep-cycle separators.

The ALJ Findings cited by the Commission describe a so-called "MP Plan," developed by Daramic to respond on a global basis to Microporous's efforts to expand its sales. (*See* Doc. 342 at 131, Finding 820.) The ALJ found that in 2007 Daramic determined to negotiate new long-term supply contracts with particular customers who might be tempted to shift some supply to Microporous. (*Id.*) The ALJ implied that Daramic believed the potential shift in sales could include a significant volume of conventional SLI separators (*id.*), but the evidence actually undercuts that implication and is only ambiguous at best for the FTC.

In **Finding 821**, cited by the Commission, the ALJ identified just three customers that Daramic focused on under the MP Plan and for which Daramic projected a potential loss of sales to Microporous—Crown Battery, Douglas Battery, and East Penn Battery—and identified the categories of separators purchased by these customers for which Daramic believed it risked a loss of sales: For both Crown Battery and Douglas Battery, the projected losses encompassed only "motive product," *not any SLI separator sales*, and for East Penn Battery, the projected losses included, again, "motive power separators," as well as something termed "automotive product." (*Id.* at 132, Finding 821 (citing PX0258 and Tr. 1288-90 (Roe)).) Thus, two of the three examples provided by the ALJ and relied

upon by the Commission *did not even involve a perceived potential loss of SLI sales*. Moreover, the record reveals that the evidence with respect to the third customer, East Penn Battery, is also lacking in support for the FTC's finding of perceived potential SLI competition.

Crown Battery. Findings 824 and 825, cited by the Commission, relate to Daramic's negotiation of a new supply contract with Crown Battery. As noted, the ALJ found that Daramic's concern about the potential loss of Crown sales involved only *motive power* separators, not SLI, so the new Crown contract was logically irrelevant to the Commission's latter-day potential competition theory. Nevertheless, even if there were a suggestion that Crown might consider Microporous a potential supplier of "SLI" separators, **Finding 824** clearly states that while 50% of Crown Battery's product line was identified as "SLI batteries," Crown "includes in its SLI division the batteries it makes for deep-cycle batteries for sweeper/scrubbers, golf carts and marine vehicles." (*Id.* at 132, Finding 824.) In other words, at Crown, "SLI" included "deep-cycle" separators for golf carts and floor scrubbers, which are *not* included in the FTC's definition of "SLI separators." Unlike the pure PE SLI separators manufactured by Daramic and Entek, deep-cycle was historically Microporous's strongest category because of Microporous's position as the world leader in the manufacture of pure rubber separators with its Flex-Sil product. *See supra* pp. 9-10.

Furthermore, ALJ **Finding 827**, *not* cited by the Commission, explained that there were several important and longstanding relationship factors between Crown and Daramic, entirely unrelated to any potential comparison with Microporous, that led Crown Battery to renew its contract with Daramic. (*See* Doc. 342 at 133, Finding 827.) And ALJ **Finding 829**, *also conspicuously absent from any citation by the Commission*, puts the final lie to the FTC's suggestion of perceived potential SLI competition from Microporous relating to Crown Battery:

> Although Crown Battery had purchased Microporous products for its golf cart batteries [*i.e.*, deep-cycle], and had considered CellForce when it first came on the market, Crown Battery stopped considering CellForce for industrial applications [*i.e.*, motive power] many years before the 2007 contract with Daramic and did not consider the price of CellForce when negotiating the 2007 contract with Daramic. Crown Battery had no test results for CellForce and would not switch to a supplier without test results from them.

(*Id.* at 133, Finding 829 (citing Tr. 4106-08 (Balcerzak)).) This Finding expressly shows that as far as Crown Battery was concerned, Microporous was a competitive factor only for deep-cycle separators, its historical area of strength—not for motive power separators (the application for which Microporous developed the CellForce product line), let alone for pure PE SLI separators, which are *not even mentioned* by Crown Battery.

East Penn Battery. According to the ALJ, the only customer for which Daramic projected potential losses of "automotive" separator sales under the MP Plan was East Penn Battery. (*Id.* at 132, Finding 821.) However, ALJ Findings

831-841 relating to Daramic's new contract with East Penn (none of which was cited by the Commission) once again undercut any suggestion of potential competition effects involving SLI separator sales.

First, just as with Crown Battery, **Finding 831** makes it clear that East Penn's "automotive division" included not only SLI batteries made for cars, boats, and recreational vehicles, *but also deep-cycle batteries*. (*Id.* at 133, Finding 831 ("Included in [East Penn's] automotive division are its deep-cycle batteries.").) Thus, the record does *not* support the conclusion that the potential loss of East Penn "automotive" separator sales projected in Daramic's MP Plan even involved the type of separators the FTC includes in the relevant SLI product market.

Second, the remaining Findings concerning the East Penn contract renewal shred any lingering hint of a factual basis for the Commission's potential competition theory in the SLI market:

> **Finding 834**: At the time of the January 2008 contract renewal, East Penn was purchasing only "small quantities of rubber-based PE separators [*i.e.*, CellForce] from Microporous for motive power batteries [*not* SLI], in an amount meeting less than 10% of [East Penn's] needs." (*Id.* at 134.)
>
> **Finding 835**: "East Penn Battery has never purchased any other type of separator from Microporous for commercial use in any other battery application." (*Id.*)
>
> **Finding 837**: East Penn's renewal of its supply contract with Daramic was based on the strong longstanding relationship between the companies and Daramic's excellent record of quality as a supplier to East Penn, rather than any comparison with Microporous. (*See id.*)

> **Finding 838**: "East Penn Battery has never had a long-term supply contract or a memorandum of understanding with Microporous for the purchase of separators." (*Id.*)
>
> **Finding 839**: In 2007, East Penn discussed the possibility of considering Microporous as a supplier of PE-based separators, "but Microporous did not have the machinery or tooling to supply the volumes that East Penn Battery requested." (*Id.*)
>
> **Finding 840**: "Microporous never committed to East Penn Battery that it could supply East Penn Battery with the sizes and volumes of PE separators discussed in 2007. Microporous has never been qualified by East Penn Battery as an alternative supplier of PE separators." (*Id.* at 134-35.)

Douglas Battery. The ALJ's Findings regarding Daramic's "MP Plan," which formed the evidentiary foundation for the Commission's perceived potential competition theory, also relied upon the fact that Daramic agreed to favorable terms in a new contract with Douglas Battery. (*See id.* at 135, Findings 842-848.) But, again, these Findings offer no conceivable support for the Commission's assertion of competitive effects in the SLI market because they clearly show that Microporous's limited potential to supply Douglas Battery *had absolutely nothing to do with SLI separators*: (1) Douglas made motive power and deep-cycle batteries; it did not manufacturer any SLI batteries (**Finding 842**); (2) "Douglas Battery has not discussed the supply of separators with Microporous since 2004." (**Finding 846**); (3) "Douglas Battery had tested a golf cart separator manufactured by Microporous [*i.e.*, deep-cycle], and found it too brittle." (**Finding 847**); "At the

time of entering into the 2008 supply contract with Daramic, Douglas Battery was not engaged in any discussions with Microporous." (**Finding 848**).

Daramic's negotiations with JCI. Finally, although not cited by the Commission in support of its potential competition theory, it should be noted that the ALJ cited evidence that Daramic had engaged in hard-bargaining tactics in negotiating a new long-term contract with JCI in 2003-2004 as principal support for concluding that Microporous's potential entry into the SLI market had a competitive impact on Daramic. (*See id.* at 108-11, Findings 664-683 (describing evidence of Daramic's hard-bargaining demands that allegedly forced JCI to accept a new contract on less favorable terms than JCI would have liked); *id.* at 256-57.) There is no doubt as a legal matter, however, that this evidence of hard-bargaining tactics cannot support a perceived potential competition case, because it does not show that Microporous's purported presence on the fringe of the SLI market led to any *reduction in prices* or any other "*tempering*" of oligopolistic behavior in the North American SLI market. *See Marine Bancorporation*, 418 U.S. at 625, 94 S. Ct. at 2871; *Tenneco*, 689 F.2d at 355. If anything, it shows just the opposite. If Polypore perceived a potential competitive threat from Microporous, it should have relaxed rather than toughened its position with customers.[8]

[8] Similarly, evidence cited by the FTC for its finding that Entek perceived Microporous as a potential entrant did not show any actual price reductions for SLI

In sum, careful review of the record evidence makes it abundantly clear that the Commission's assertions about potential competition in the SLI market are lacking in the necessary substantial support and should be rejected by this Court.[9]

D. The Commission's Errors Justify Complete Reversal

The consequences of the several legal errors committed by the Commission in analyzing the SLI separator market cannot be minimized, and no part of the Final Order and Opinion should be upheld in the face of these errors.

As the Commission itself recognized, "SLI is by far the largest market segment [at issue in this case], accounting for almost three-quarters of flooded lead-acid battery separator sales in 2005." (Doc. 377 at 3 n.7 (citing ALJ Finding 261).) The magnitude and singular importance of the SLI analysis in the context of

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separators or other "tempering" of competition in the North American SLI market. (*See* Doc. 342 at 74, Finding 436; Tr. 4517, *in camera* (Weerts).)

[9] The FTC put significant weight on purported evidence of post-merger price increases by Polypore. (*See* Doc. 377 at 25 (referring to alleged price increases for deep-cycle separators), 30-31.) But with one exception, the ALJ Findings do not indicate that any purported price increases applied to SLI separators. (*See* Doc. 342 at 145-47, Findings 897-916; *see also* Doc. 377 at 30-31.) These findings do not establish that Microporous's asserted presence as a potential entrant on the fringe of the market had tempered SLI pricing pre-merger. In fact, the evidence shows that Daramic's sales, profits, and market share, including in the sale of SLI separators, actually declined after the acquisition, largely as a result of vigorous competition from Entek in the sale of SLI separators and increases in the cost of raw materials and other inputs. (*See* Doc. 342 at 118, Finding 736 ("When JCI's contract with Daramic expired on December 31, 2008, JCI transitioned that business to Entek."); Tr. 4924-29, *in camera* (Riney); Tr. 1535 (Toth); Tr. 4176-77 (Seibert); RX0998, *in camera*; RX1119, *in camera*.)

the full case before the Court lead to the definite conclusion that the Commission's Final Order and Opinion should be reversed in its entirety because of the Commission's fundamental legal mistakes.

At a minimum, given that the SLI product market was by far the largest at issue, these errors justify a remand to the Commission for a new administrative hearing to reassess properly the overall competitive effects of the challenged transaction.

II. THE COMMISSION ERRED IN ANALYZING PRODUCT MARKET AND COMPETITIVE EFFECTS REGARDING SEPARATORS FOR DEEP-CYCLE AND MOTIVE POWER APPLICATIONS

A. The Commission Lacked Substantial Evidence to Find that Polyethylene-Based Separators Were Close Competitive Substitutes for Rubber Separators in Deep-Cycle Batteries

As a basis for its conclusions relating to competitive effects in the purported market for deep-cycle battery separators (separators used in batteries for golf carts and floor scrubbers, for example), the Commission found that Daramic's latex-coated PE-based separator product ("Daramic HD") was a close competitive substitute for Microporous's pure rubber separators (Flex-Sil) and should be considered part of the same product market. (*See* Doc. 377 at 14.) The weight of the record evidence, however, does not support these findings.

Proving a properly defined relevant product market is an essential component of a section 7 claim, and two products may be considered part of the

same relevant market if the evidence establishes that customers view them as substitutes and will switch from one to the other in response to a small but significant price increase. *See United States v. Engelhard Corp.*, 126 F.3d 1302, 1305-08 (11th Cir. 1997). However, where the evidence shows that customers perceive significant quality differences between the products, especially where there is a wide disparity in prices, this Court has held it appropriate to treat the products as being in separate relevant markets, even though they serve the same basic use. *See United States Anchor Mfg., Inc. v. Rule Indus.*, 7 F.3d 986, 995-99 (11th Cir. 1993) (holding that although higher priced anchors were functionally interchangeable with less expensive anchors, they constitute a separate relevant market for antitrust purposes because of customer perceptions that they are of significantly higher quality), *cert. denied,* 512 U.S. 1221, 114 S. Ct. 2710 (1994).

Here, the record shows that pure rubber separators like Flex-Sil have superior qualities for retarding antimony transfer in deep-cycle batteries and that customers willingly pay a premium for those superior qualities. (Doc. 377 at 14; Tr. 365 (Gilchrist).) Microporous had a strong position in the sale of rubber separators for deep-cycle batteries precisely because its Flex-Sil product offers uniquely superior antimony suppression, which significantly improves battery performance and battery life. For those reasons, Flex-Sil is recognized by customers as a higher quality product and the acknowledged industry standard for

deep-cycle battery separators. (*See* Doc. 377 at 15; Tr. 535 (Gilchrist); Tr. 271, 277 (Godber); Tr. 4683-85 (Whear); Tr. 1964-65 (Wallace); Tr. 3787, 3818 (McDonald); PX0433 at 001 ("Flex-Sil is no doubt the separator of choice in today's market for golf cart battery application."); RX1338; RX1643.).) In fact, Flex-Sil is the only separator actually advertised by battery makers as a selling point for their deep-cycle batteries. (*See* Tr. 277 (Godber); Tr. 1963-65 (Wallace); RX1643.) Both Microporous's PE-based CellForce product and Daramic's HD have only been used in limited deep-cycle applications. (*See* Tr. 535-36 (Gilchrist); Tr. 271, 277 (Godber).) And CellForce represented only a tiny fraction of Microporous's deep-cycle separator sales. (RX1120, *in camera*.)

At the same time, the real-world market evidence showed that Daramic's HD product did not compete effectively with Microporous's Flex-Sil. Daramic HD was a niche product, at best, for deep-cycle applications and was not a direct or close competitor to Microporous's rubber deep-cycle separators. Daramic failed to achieve a significant portion of sales of deep-cycle battery separators versus Flex-Sil, even though Flex-Sil was priced substantially higher than Daramic HD. (*See* Tr. 535-36 (Gilchrist); Tr. 271, 277 (Godber); Tr. 1967-72 (Wallace).) HD was used exclusively in low-end batteries and was not viewed in the industry as an effective substitute for Flex-Sil. (*See* Tr. 3822 (McDonald); Tr. 554 (Gilchrist)). Perhaps most significantly, Microporous did not consider HD to be a threat to its

deep-cycle business. (Tr. 3820 (McDonald); *see* Tr. 554 (Gilchrist); RX0780 ("I do not believe that Daramic HD is a threat to our business."); Tr. 271 (Godber); RX1093 at 2 ("Nawaz [Qureshi, VP of technology and engineering at U.S. Battery,] said the batteries [with Daramic HD separators] had failed and that we didn't have anything to worry about as far as Daramic was concerned."); RX0835; RX1334 at 2; RX1329 at 2).) This evidence, which includes ordinary course business records, as opposed to self-serving testimony, was largely ignored by the Commission and certainly not given adequate weight in its conclusion that Flex-Sil and Daramic HD should be considered competitive substitutes.

Also largely ignored by the Commission was (1) the fact that HD was not qualified for use in original equipment by several of the major deep-cycle battery manufacturers, including Trojan, U.S. Battery, or Exide, (Tr. 3822 (McDonald); Tr. 1762 (Roe); Tr. 270-71, 273-74 (Godber); Tr. 3091 (Gillespie); RX1094)), (2) the fact that U.S. Battery uses Flex-Sil exclusively in its premium deep-cycle battery line (Tr. 1966-67 (Wallace)), and (3) the fact that Flex-Sil continued to constitute more than 90% of U.S. Battery's deep-cycle separator purchases notwithstanding the fact that Flex-Sil separators were priced twice as high as Daramic HD. (Tr. 1961-62, 1972 (Wallace); Tr. 2064-65 (Qureshi).) Indeed, Flex-Sil accounted for almost all of Microporous's sales to Trojan in 2007 and the lion's share of its total sales. (RX01120, *in camera*; Tr. 3853-55, *in camera* (McDonald).) Although the

ALJ found that Trojan threatened to switch to HD in order to obtain price reductions on Flex-Sil (Doc. 342 at 87-90, Findings 529, 535-536, 538-539, 541), the ALJ nevertheless found that Trojan decided that Flex-Sil would continue to constitute at least 75% of its separator purchases, with HD and CellForce amounting to no more than 25% (*id.* at 90, Finding 546).

It was the superior qualities of Microporous's rubber technology and rubber separator products that motivated Polypore's acquisition of Microporous. The acquisition of these unique rubber products and technological expertise enable Polypore to serve industrial market niches that it was not successful in serving previously. (*See* Tr. 652, 1057, 1059-61 (Hauswald); Tr. 1735 (Roe); RX1630; RX1097 at 3, *in camera*; PX0433 ("The addition of Flex-Sil and AceSil would broaden our portfolio of products into two niche markets we do not supply today.").)

The Commission inadequately considered this evidence in defining the relevant product market for deep-cycle separators, and the Commission's findings on which this market definition was based were not supported by substantial evidence. (*See* Doc. 377 at 14-15 (merely asserting the legal truism that "[s]ubstitution for the purpose of defining relevant markets does not require complete switching between products" and observing that in certain other cases, products have been assigned to the same market despite price differences "when

the products, in fact, constrained each other's price levels") (citing cases).) The assertion of these legal conclusions fails to grapple in any meaningful way with the evidence offered by Polypore that in the real world the availability of Daramic HD did not constrain the pricing of Flex-Sil for the most significant customers and that the two products should therefore not be lumped together in the same product market. *See United States Anchor*, 7 F.3d at 995-99.

Alternatively, the Commission's failure to give adequate consideration to the record evidence discussed above indicates that the Commission lacked substantial evidence to support its finding that petitioner's Daramic HD separators were close competitive substitutes for Microporous's Flex-Sil separator. *See id.*

The remaining niche competition between Daramic HD and Microporous's CellForce product for use in deep-cycle batteries was insubstantial relative to the total volume of commerce addressed by the FTC's review of the challenged transaction, and it should not be considered sufficient by itself to support the Commission's decision to condemn the merger. Indeed, CellForce accounted for only around 3% of Microporous's deep-cycle battery separator sales in 2007. (RX1120, *in camera*.)

At a minimum, the case should be remanded to the Commission for further consideration in light of the lack of substantial evidence showing close competition between Flex-Sil and Daramic HD for use in deep-cycle batteries and in light of

the relatively small volume of commerce implicated by the remaining niche competition for deep-cycle separators between HD and CellForce.

B. The Commission's Conclusions About Competition for Motive Battery Separators Failed to Give Adequate Weight to the Prospect of Competitive Entry

The Commission's conclusions concerning competitive effects in the sale of battery separators for motive power applications (such as forklifts and mining equipment) depend fundamentally on the Commission's finding that there were no prospects for likely entry into this market, including by Entek, the leading competitor for PE SLI separators. (*See* Doc. 377 at 23-25, 35.) The weight of the evidence in the record, however, clearly supports a contrary finding.

The prospect for entry by additional competitors will negate a *prima facie* case under section 7 of the Clayton Act. Court decisions have firmly established that the government or other plaintiffs cannot prevail in a section 7 merger challenge unless there are substantial barriers preventing future entry by other prospective competitors into the relevant market in response to potential non-competitive pricing. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.) ("In the absence of significant barriers [to entry], a company probably cannot maintain supracompetitive prices for any length of time."). *See also id.* at 987-88 (rejecting government's contention that defendant's proof must show that entry will be "quick and effective"). Here, the Commission

failed adequately to credit record evidence about the potential for entry into the market for motive separators—in particular, entry by Entek.

The record shows there is a strong likelihood that other pure polyethylene separator makers, like Entek, would enter the motive market and provide countervailing competition for Polypore in the event of a significant price increase for motive power separators. Motive power batteries typically use PE separators that are very similar in material and manufacture to the pure PE separators used in SLI batteries. The only significant difference between PE separators used in SLI batteries and those used in motive power batteries is that motive power separators are generally larger and thicker. (*See* PX0033 at 14, *in camera* (FTC's expert report) ("The separators used in motive batteries . . . differ from the separators used in car batteries in that they are substantially larger and thicker."); Doc. 342 at 38-39, Findings 193-196.) Both SLI and motive power PE separators are made on production lines that are essentially identical except for different rollers (called "calendar rolls"), which can be switched out in a matter of a few hours. (Tr. 1016-20 (Hauswald); Tr. 3792-95 (McDonald).) And the evidence shows that small PE separator manufacturers of the same relative size as Microporous in terms of its output capacity for CellForce spring up around the world from time to time, indicating that there are not significant technological barriers to entry in the sale of motive separators. (*See* Tr. 932-33, *in camera* (Hauswald); Tr. 4332-34 (Thuet).)

It is therefore unsurprising that Entek, one of the leading makers of pure PE SLI separators today, previously competed in the manufacture and sale of motive separators in the 1990s and could easily and efficiently commence again to market motive power separators in competition with Daramic. (*See* Doc. 342 at 163, 165, Findings 1029 & 1040; Tr. 2311, 2446-48, *in camera* (Burkert); Tr. 2514, *in camera* (Gagge) Tr. 4522-23, *in camera* (Weerts).) Unlike Microporous, Entek has a strong track record and industry reputation in the production of pure PE separators. Indeed, during a strike at Daramic's plants in 2006, Entek actively expressed a willingness to supply EnerSys with PE motive power separators. (*See* RX0201.) Entek has substantial ability and capacity to enter into the sale of motive separators in response to any attempted anticompetitive price increase. (*See* Tr. 4459-60 & 4495-96, *in camera* (Weerts); RX0945 at 116-18, *in camera* (Polypore's expert report).) Such entry could occur relatively quickly, since evidence indicates that new motive separators can be tested and qualified in a matter of months. (*See* RX1162 at 002 ("6-12 months period for qualification/acceptance of new product" by motive battery maker EnerSys); RX1141, *in camera*; RX0007; RX0243 at 007; RX1137, *in camera*; RX1144, *in camera*; RX1145, *in camera*; RX1155 at 002, *in camera*.)

The Commission's conclusion that Entek would be unlikely to enter the market for motive separators rested largely on its finding that Entek had expressed

little interest in entering. (*See* Doc. 377 at 35.) As a legal matter, however, the prospects for entry should be analyzed on the basis of objective economic realities, not the assertions of interested parties, particularly those that can be expected to oppose the merger. *See* 2B Areeda & Hovenkamp ¶ 422a, at 91, 94 ("Likelihood of entry is best measured by an objective test" with attention focused on those firms "that appear to be particularly likely entry candidates"); 5 Areeda & Hovenkamp ¶ 1126, at 79 ("'subjective' testimonial evidence" about potential for entry "is inherently unreliable because it is likely to be self-serving"). And the entry analysis must focus on how other firms are likely to respond to significant, long-term price increases, and the opportunities for profit that would be made available by supracompetitive pricing, not just on how they may react in light of current or pre-existing price levels. *See Baker Hughes*, 908 F.2d at 987-88.

In concluding that there were significant barriers to entry in the market for motive separators, the Commission also focused on the capital investment needed to build a new production facility for polyethylene separators, the time needed to acquire expertise in the manufacture of PE separators, the need for scale economies to lower production costs, and the need for entrants to gain a positive reputation among prospective customers in North America. (*See* Doc. 377 at 33.) All of these attributes, however, are already enjoyed by Entek, which currently operates large-scale PE separator production, is well known to motive separator customers

in North America, and has previously manufactured PE separators for motive applications.

For these reasons, the Commission's conclusions about competitive effects relating to motive separators should be reversed or remanded because of the Commission's failure to take adequate account of the full range of evidence in the record concerning the potential for competitive entry.

III. THE COMMISSION ERRED IN ORDERING DIVESTITURE OF THE PRODUCTION FACILITY IN FEISTRITZ, AUSTRIA

Even if the Commission were correct in concluding that the challenged transaction violated section 7 of the Clayton Act by significantly diminishing competition in North American markets for SLI, deep-cycle, and motive battery separators, the Court should still vacate the portion of the Commission's Final Order and Opinion requiring petitioner to divest the production plant located in Feistritz, Austria. (*See* Doc. 368 (Final Order) at 5, 7, 12.) To the extent it mandated divestiture of the Austrian plant, the remedy ordered below exceeded the Commission's authority and went well beyond what was reasonably required to address the competitive issues found by the Commission.

While the Commission enjoys broad authority to craft a remedy that will adequately address the adverse competitive effects it finds with a transaction, that authority is not limitless. The exercise of this authority must relate logically to the harms identified by the Commission and the specific markets found to be at issue.

See Seeburg Corp. v. FTC, 425 F.2d 124, 129-30 (6th Cir.) ("While the FTC has wide latitude in remedying such violations, its order must be reasonably related to the violation found.") (citing *FTC v. Rubberoid Co.*, 343 U.S. 470, 473, 72 S. Ct. 800, 803 (1952)), *cert. denied*, 400 U.S. 866, 91 S. Ct. 104 (1970). *See also Beatrice Foods Co. v. FTC*, 540 F.2d 303, 314 (7th Cir. 1976) (modifying portions of order not reasonably related to violations found); *Abex Corp. v. FTC*, 420 F.2d 928, 933 (6th Cir.) (striking portions of remedial order as overbroad and unrelated to violations found), *cert. denied*, 400 U.S. 865, 91 S. Ct. 98 (1970). Here, the Commission acted beyond its legal authority in ordering divestiture of the Austrian plant.

As a central part of its analysis in this case, the Commission took pains to explain at length why market participants in all three of the relevant markets it found to be at issue are confined only to battery separator manufacturers located in North America. (*See* Doc. 377 at 18-19.) In particular, the Commission concluded that "North American battery manufacturers do not consider foreign supply a reasonable competitive alternative to local supply due primarily to cost and quality," and that "[w]ith one exception, there is no evidence that any North American battery manufacturer has imported flooded lead-acid battery separators from outside North America." (*Id.* at 19.)

The Commission specifically found that battery separator production facilities located in Europe and Asia or elsewhere outside North America did not compete in the relevant markets and had no significant likelihood of entering into the North American markets to provide competition. (*See id.* at 33-34 (concluding that Asian separator manufacturers are unable to compete in North America because of the costs of transporting product from Asia and because of capacity constraints at Asian production facilities).) (*See also* Doc. 342 at 166-77, Findings 1051-1126 (detailing bases for ALJ Findings that European and Asian manufacturers do not participate in the North American markets and are not positioned to enter those markets in the near future, even in response to significant price increases).)

In direct contradiction to these specific findings, the Commission nevertheless ruled that divestiture of the Austrian plant "is necessary to restore lost competition to the relevant North American markets." (Doc. 377 at 41.) The remedial order requiring petitioner to divest the Feistritz production facility conflicts so flagrantly with the Commission's analysis of the relevant geographic markets and its finding that separator manufacturers could not effectively compete for sales to North American customers from plants located overseas that this remedy must be vacated. It is logically incompatible with the reasoning underlying the FTC's case and bears no reasonable relation to the competitive effects the

Commission found in North American separator markets. *See Schering-Plough*, 402 F.3d at 1070 (rejecting an FTC finding as "not supported by law or logic").

The justifications and evidence cited by the Commission do not support a conclusion that divestiture of the Austrian plant is reasonably required to ensure an effective divestiture remedy for the harms found by the FTC. The Commission asserted that divestiture of the Feistritz facility will allow the acquirer to maintain sufficient capacity at the Piney Flats plant to compete effectively for business in North America. (Doc. 377 at 38.) According to the Commission's own analysis, however, Microporous was an effective and important competitor for North American separator customers up until its acquisition by Polypore from its single plant in Piney Flats, Tennessee. Thus, divestiture of the Piney Flats plant alone should enable equally effective competition. Furthermore, the weight of the evidence in the record clearly shows that there is excess production capacity available at Piney Flats. At the time of trial, Microporous's CellForce production lines at Piney Flats were operating under 40% of capacity (Tr. 3647 (Trevathan)), leaving any acquirer of the Piney Flats facility ample room to expand and increase competition in North America.

Moreover, the additional divestiture of the "line in boxes" for a new PE-based production line at Piney Flats further enhances the package of North American production assets available to a purchaser and thus the potential that the

buyer will be an effective competitive factor in North America. In concluding that Microporous should be treated as a current competitive factor in the North American market for SLI separators, the ALJ put great weight on Microporous's plans to add this new PE-based production line (the very same "line in boxes"). (*See* Doc. 342 at 73-74, Findings 430-431; *id.* at 124-25, Findings 773-777 (describing the asserted capabilities of the new PE-based production line (the "line in boxes") and finding that this new production line would give the Piney Flats facility sufficient capacity for Microporous to enter the North American SLI market and/or supply CellForce separators to existing and new customers).) It is wholly inconsistent and illogical for the Commission now to ignore the new capacity provided by this "line in boxes" when judging whether a divestiture of the Piney Flats facility would be a sufficient and effective remedy. The inclusion of the "line in boxes" as part of a divestiture of the Piney Flats plant would also enable any acquirer to continue to fulfill the EnerSys contract from Piney Flats, as Microporous was doing at the time of the acquisition, while leaving ample capacity to be deployed in pursuing other competitive opportunities in North America. (*Cf.* Doc. 377 at 38 (expressing concern about an acquirer's ability to fulfill EnerSys's supply needs in Europe).)[10]

[10] The Commission expressed the belief that the "line in boxes" would take too long to become operational at Piney Flats to address the capacity issues identified by the Commission, contradicting reliance on the line in boxes as

Lastly, in expressing its concern that customers prefer global suppliers with multiple plants in multiple countries (*id.* at 39-40), the Commission failed entirely to explain why a sale of Microporous's U.S. production facilities to an existing separator manufacturer with experience and expertise in the relevant product markets, such as one of the major Asian PE separator manufacturers like BFR or a European industrial separator manufacturer like Amer-Sil, would not be a fully adequate remedy for the competitive effects found in North America. Such an option would fully address the concerns stated by the Commission as the basis for ordering divestiture of the Feistritz facility, because it would immediately give such a major global manufacturer a significant local production presence in the U.S. for serving North American customers, in addition to the acquirer's existing overseas facilities already positioned to supply the local needs of battery manufacturers situated in those other markets. (*See id.* at 39 ("Two of Microporous' largest global customers expressed their preference to work with a supplier that can provide local supply for their global operations.").)

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support for considering Microporous an actual participant in the SLI market despite its lack of sales and lack of any committed plan to enter that market. (*See* Doc. 377 at 39.) However, the time that has now passed since the Final Order and Opinion renders this concern unfounded. In addition, if the acquirer of the Piney Flats facility were an existing separator manufacturer with PE-separator production experience and expertise, such as one of the major Asian firms, there is no reason to believe that such an acquirer could not move quickly to make efficient and productive use of the "line in boxes" at Piney Flats.

Given the stark and dramatic disconnect between the North America-only geographic market definitions and the competitive effects analyses propounded by the Commission in this case and the remedial order mandating divestiture of the Austrian plant, it can only be concluded that the imposition of this remedy on petitioner is an improper exercise of power by the FTC and, indeed, nothing short of punitive in nature. If this divestiture order is allowed to stand, the "reasonable relationship" standard for judicial review of FTC remedies would be rendered meaningless. *See Beatrice Foods Co. v. FTC*, 540 F.2d at 314; *Seeburg Corp. v. FTC*, 425 F.2d at 129-30; *Abex Corp. v. FTC*, 420 F.2d at 933.

Petitioner respectfully urges the Court not to allow this arbitrary and illogical remedy to stand.

CONCLUSION

For all of the foregoing reasons, the Final Order and Opinion of the Federal Trade Commission should be vacated and reversed in its entirety. In the alternative, the Final Order and Opinion should be vacated and remanded to the Commission for a new hearing in light of the flaws discussed herein. At a minimum, the Court should vacate the Final Order and Opinion to the extent it requires petitioner to divest the production plant located in Feistritz, Austria.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,749 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Paul T. Denis
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CERTIFICATE OF SERVICE

I hereby certify this 26th day of April, 2011, I caused an original and 6 copies of the foregoing to be sent via Next Day service to the Clerk of the Court and 1 copy to be sent via Next Day service to the following:

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