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**

# REPLY BRIEF FOR PETITIONER

PAUL T. DENIS
STEVEN G. BRADBURY
GORAV JINDAL
SEAN P. MCCONNELL
DECHERT LLP
1775 I STREET, N.W.
WASHINGTON, D.C. 20006
(202) 261-3300

*Counsel for Petitioner Polypore International, Inc.*

**ORAL ARGUMENT REQUESTED**

# TABLE OF CONTENTS

# TABLE OF CITATIONS

## Cases

**Other Authorities**

## PRELIMINARY STATEMENT

In its response brief ("FTC Br."), the Federal Trade Commission ("FTC" or "Commission") is asking this Court to grant it an extraordinary degree of discretion. It answers every argument of petitioner Polypore International, Inc. ("petitioner" or "Polypore") with a plea for deference.

In defending its ruling on liability under section 7 of the Clayton Act, the FTC downplays legal and factual arguments and instead urges the Court to accept on faith:

—That the Commission's error in finding an actionable effect in the alleged market for "starter, lighting, and ignition," or "SLI," battery separators (where the acquired company, Microporous, was not even a current competitor) was irrelevant because the Commission would have reached the same ruling even if its findings were limited only to alleged competitive effects in narrowly defined markets for deep-cycle and motive power battery separators, despite the fact that the alleged SLI market was far and away the largest product market at issue in this case;

—That the Commission's conclusions about competitive effects in the alleged market for SLI battery separators would have been the same, even if the Commission had not wrongly relied on the *Philadelphia National Bank* presumption of anticompetitive effects, which properly applies only to mergers between current competitors, not to cases of mere potential competition;

—That the Commission properly applied the doctrine of "perceived potential competition" in an afterthought footnote analyzing potential competition for SLI separators, even though the record evidence the Commission claims supports that doctrine is insubstantial and ambiguous at best;

—That the Commission properly applied the so-called "actual potential competitor" doctrine in the same footnote, even though that highly speculative doctrine does not state a claim under section 7 and even though the Commission ignored (and continues to ignore now before this Court) its own controlling precedent in *In re B.A.T. Industries, Ltd.*, 104 F.T.C. 852 (1984), which clearly establishes why this doctrine could not be applied to the present case even if the doctrine did state a claim;

—That the Commission properly defined a relevant product market for deep-cycle battery separators, even though plenty of record evidence shows that Polypore's Daramic HD product and Microporous's Flex-Sil separator were not close competitive substitutes; and

—That the Commission correctly predicted that Entek, Polypore's primary competitor in the production of polyethylene-based battery separators, would not likely re-enter the alleged market for PE separators for motive power applications, even though Entek previously supplied such separators and even though the Commission based this conclusion almost entirely on Entek's self-serving

statements and failed to consider, as the law requires, the objective likelihood of Entek's entry if prices for motive separators were to increase substantially over the long term.

Finally, in defending its obviously overbroad remedial order requiring divestiture of the production plant in Feistritz, Austria, notwithstanding that all of the alleged competitive harms it found were expressly confined to North America, the FTC asks this Court to accept on faith:

—That divestiture of the Feistritz plant is necessary to enable the buyer to compete effectively in supplying battery separators to customers in North America, even though Microporous competed effectively in North America through the entirety of its existence without the Feistritz plant, even though the Feistritz plant was not even in operation at the time of the acquisition and was built to supply only customers in Europe, and even though Microporous's plant in Piney Flats, Tennessee, had and continues to have plenty of excess capacity to supply North American customers; and

—That the Commission might later decide, in the exercise of unreviewable discretion, to exclude the Feistritz plant from the divestiture remedy if a suitable buyer were ultimately identified who already possessed international facilities, even though the current divestiture order does not mention this possibility and is unyielding on its face in stipulating that the Feistritz facility must be sold.

In light of the many errors infecting the Commission's Final Order and Opinion, this Court should reject the FTC's legally unsupported pleas for deference and should reverse the agency's decision in its entirety. In the alternative, the Court should vacate the Final Order and Opinion and remand to the Commission for further proceedings. At a minimum, even if the Court were to uphold each of the Commission's conclusions on liability, the Court should vacate the remedial order to the extent it overreaches by requiring Polypore to divest the Feistritz facility.

## ARGUMENT

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

The FTC insists that the Court should uphold the ruling below in deference to the Commission's findings of alleged competitive effects in deep-cycle and motive power separators without regard to the analysis of competition for SLI battery separators. *See* FTC Br. 41 n.7 (urging the Court to uphold the Commission's decision based on its "independent conclusions" about loss of competition in deep-cycle and motive markets and arguing that "nothing in Polypore's arguments regarding the SLI market has any bearing on those findings.").

Given the much larger size and importance of the alleged SLI market, however, the Court should not accept the Commission's assurance that the liability

analysis would have been the same without consideration of SLI competition. (*See* Doc. 377 at 3 n.7 (acknowledging that the alleged market for SLI separators (of which Microporous had a zero share) accounted for three-quarters of all the sales at issue).)[1] The legal and factual errors made by the Commission in analyzing SLI effects demand that the Final Order and Opinion be reversed in its entirety or, in the alternative, that the case be remanded to the Commission for a new hearing on overall liability in light of the proper framework for evaluating competition for SLI separator sales.[2]

### A. It Was Error for the Commission to Treat Microporous as a Current Competitor in the Alleged SLI Market and to Assume the Benefit of the Presumption of Anticompetitive Effects

As one member of the Commission recently affirmed, where the acquired company has "no current sales" in the relevant market and no clear prospect of

[1] By reference to the document numbers given 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," and the public version of the ALJ's Initial Decision is cited as "Doc. 342." The "in camera" or confidential versions of the ALJ's Initial Decision (Doc. 341) and the Commission's Opinion (Doc. 368) may be found in the separate volume of extracts from the administrative record. Pages of trial testimony are cited as "Tr. __ (Name of witness)," FTC exhibits as "PX __," and Polypore exhibits as "RX __." Petitioner's opening brief is cited as "Br."

[2] The FTC predictably parades before the Court a small number of Daramic documents that allegedly acknowledge the possible competitive implications of the acquisition, *see* FTC Br. 15-19, but not one of those documents addresses or predicts any immediate effect on competition in the sale of SLI battery separators, the biggest and most important product market claimed by the FTC.

making sales in the immediate future (as was indisputably true for Microporous with respect to SLI battery separators), the Commission must, as a legal matter, analyze the transaction under the rigorous standards of the "potential competition" doctrine recognized in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 624-25, 94 S. Ct. 2856, 2871 (1974), and may not (as the Commission purported to do here) analyze the case as a merger of two *current* competitors.[3]

The FTC relies on *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 84 S. Ct. 1044 (1964), and *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981), in defending its decision to treat Microporous as a current participant in the alleged SLI separator market, FTC Br. 41-42, but those precedents have no application to this case. In *El Paso Natural Gas*, the acquired company, Pacific Northwest Pipeline Corp., was already a large interstate supplier of the relevant product, natural gas, at the time of the acquisition; it operated in several States immediately surrounding California, the relevant geographic market; and it had negotiated contracts to serve customers in California, had an approved plan to do so, and had entered into contracts with the acquiring company, El Paso, governing

[3] *See* 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. A "current" competitor can include a firm with the present capacity rapidly to sell the relevant product into the relevant geographic market in the immediate future—*i.e.*, within one year. *See* Br. 25-26 n.6.

their respective rights to serve customers in and around California. *See* 376 U.S. at 653-59, 84 S. Ct. at 1045-48. The Court concluded that Pacific Northwest was a current supplier that gave buyers in California a second choice at the time of the acquisition. *See id.* at 661, 84 S. Ct. at 1049-50. Similarly, in *Grumman Corp. v. LTV Corp.*, both the target firm and the would-be acquirer had long competed against each other in the production of the relevant products, fighter aircraft and aircraft components, and thus were indisputably both current participants in the market; the only question was the likelihood of future competition over new Defense Department contracts. *See* 665 F.2d at 11-15.

The same cannot be said of Microporous here. Microporous was not already producing the relevant product, SLI battery separators, at the time of the acquisition, and it had zero sales of SLI separators in the years before that. (*See* Doc. 342 at 75, Finding 439.) Microporous, moreover, had no contracts to sell SLI separators, had made no firm bids to supply such separators, and had no approved plan to do so. Indeed, Microporous's board of directors had specifically instructed its management *not* to enter the pure-PE separator business (including SLI separators) without further approval from the board, which was never given. (*See* RX0401 at 001 (11/14/07 memorandum from the "MPLP Board" to CEO Mike Gilchrist); *id.* at 002 ("[T]he Board does not endorse a pure PE growth strategy competing head-to-head with larger competitors (i.e., Daramic, Entek). . . .

[A]ny . . . exceptions must be approved by Board on case-by-case basis."); Tr. 438, *in camera* (Gilchrist) (testimony of former Microporous CEO that "the scope of the whole document [RX0401] was basically trying to delineate where the board wanted us to concentrate," and in relevant part it "says we can't have or they didn't endorse a pure PE strategy").)[4]

The FTC mischaracterizes the record when it claims that Microporous was a current competitor for SLI separator sales. *See* FTC Br. 45-48. The FTC points to Microporous's preliminary exploration of possible supply arrangements with two SLI battery makers, Johnson Controls, Inc. ("JCI") and Exide, but JCI had abandoned Microporous as a potential SLI separator supplier a year before the acquisition, and Microporous's discussions with Exide had stalled and Exide had allowed its preliminary MOU with Microporous to expire without renewal. (*See* Doc. 342 at 125, Finding 781 ("In early 2007, Microporous' discussions with JCI broke down."); *id.* at 255 (citing Finding 715) ("Exide did not return its redline of the draft supply contract to Microporous, and no agreement was finalized prior to

[4] The FTC erroneously asserts that this memorandum "was not a Board document at all," FTC Br. 47 n.10, even though it is plainly styled a memorandum "From" the "MPLP Board." (RX0401 at 001.) The FTC's assertion is based on the fact that the memorandum was not adopted or voted on by the board as a resolution. (*See* Tr. 434, *in camera*, (Gilchrist), *cited in* FTC Br. 47 n.10.) There is no legal requirement that a board's future intentions can only be established through board resolutions. Regardless, this memorandum represents a clear and forceful communication from the company's board of directors to its CEO addressing "Strategic Mandates" for Microporous. (RX0401 at 001.)

the acquisition."); *see* Tr. 502-03, *in camera* (Gilchrist) (confirming that Microporous had no contracts with or orders from any customers for the sale of SLI or PE-based separators, including for the Feistritz plant or the "line in boxes" for installation at the Piney Flats plant, prior to the acquisition).)

Contrary to the FTC's assertion, Daramic's head of sales, Tucker Roe, did *not* testify that "Microporous was bidding on a portion of JCI's SLI business," FTC Br. 46; instead, he simply testified that "That is what Johnson Controls told me" in 2003-2004, and that JCI had led him to believe, incorrectly, that Microporous at that time was qualified as a supplier of SLI separators to JCI. (*See* Tr. at 1237, 1240, 1249-50 (Roe).) The fact that JCI misled Polypore about the readiness of Microporous to supply SLI separators and that Polypore had at one time misapprehended Microporous's potential to bid for SLI separator sales is insufficient to convert Microporous into a current competitor. To the contrary, the fact that JCI felt compelled to mislead Polypore about the readiness of Microporous is powerful evidence that Microporous was not a current competitor.

As a matter of law, the Commission could only treat Microporous as a current competitor for SLI separator sales on a showing that it was *in fact* already a participant in the alleged market; it is not enough that one or more individuals at some point may have *incorrectly believed* (based on false information provided by a customer for its own strategic benefit) that Microporous was qualified to supply

PE separators to JCI and was bidding on contracts.[5] The evidence shows to the contrary—that Microporous never made a firm bid and did not even qualify its separator with JCI until years later, in 2007, at which point JCI had already abandoned Microporous as a potential supplier.[6]

The FTC is also wrong to say that Microporous and Exide "were in serious discussions for an SLI supply contract" "from 2007 up until the time of the acquisition." FTC Br. 46. In fact, the evidence in the record indicates quite clearly that in 2007-2008, Microporous did not believe it would ever actually supply SLI separators to Exide. (*See* Tr. 3839-47 (McDonald); Tr. 3760 (Trevathan); RX0283 at 001 (11/10/07 Microporous email characterizing as a "strong bet[]" the "assumption" that "we will not expand for Exide and East Penn in the U.S."); RX0285 (2/15/08 Microporous email discussing Exide's continuing promises to

[5] It is also not sufficient that several years before the acquisition, in 2004, Microporous had produced a small amount of sample SLI separators for purposes of testing with JCI and had sold some of those sample separators to another battery maker, Voltmaster, after it was determined that the samples had failed to meet JCI's qualification standards. *See* FTC Br. 46 (citing Tr. 3795-96 (McDonald); PX0131 at 067). There were no discussions following that one-time sale about any further sales to Voltmaster or other customers because Microporous had no intention of producing SLI separators at that time. (Tr. 3796-98 (McDonald).)

[6] The testimony provided by a JCI witness suggesting that JCI abandoned Microporous because of the prospect of a potential change in ownership of the company is not plausible. *See* FTC Br. 12 n.3 (citing Tr. 2697-701 (Hall)). In the real world, any supply contract executed between JCI and Microporous would have been honored by Polypore or another purchaser. The truth is that JCI dropped Microporous because it was unproven as a potential supplier of SLI separators.

consider extending the MOU with Microporous and commenting, "That and a $1.50 will buy you a cup of coffee.").)

And with respect to a third customer identified by the FTC—East Penn Battery, *see* FTC Br. 47—the trial testimony was unequivocal that Microporous never had a contract or even an MOU with East Penn to supply PE separators for any application, including SLI batteries; never bid or committed to supply such separators to East Penn; and never demonstrated to East Penn's satisfaction that it had the capacity to fulfill East Penn's SLI separator needs. (*See* Tr. 3989-91 (Leister).) The ALJ so found. (Doc. 342 at 134-35, Findings 834-840; *id.* at 256 (citing Findings 720-721).) *See* Br. 24, 37-38.

Finally, the FTC's defense of the Commission's application of the *Philadelphia National Bank* presumption of anticompetitive effects fails. *See* FTC Br. 43-45. It is well established that the presumption applies only to the acquisition of a *current competitor* where the acquisition will produce a significant increase in concentration in the market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S. Ct. 1715, 1741 (1963); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004). The presumption has no applicability where, as here, the acquired company has zero presence in the alleged relevant market (for SLI battery separators). The

inherently speculative nature of competitive effects analysis in potential competition cases most assuredly precludes any reasonable reliance on a legal presumption of such effects. (Indeed, significantly, the Supreme Court did not apply the presumption in the *El Paso Natural Gas* case, on which the FTC places so much reliance, even though that case was decided just one year after *Philadelphia National Bank*.)

The FTC urges the Court to ignore the improper use of the presumption because the Commission identified other factors supporting its conclusion about SLI effects. FTC Br. 44-45. But the Court should decline this invitation to look the other way and to assume that the Commission would have reached the same result without the presumption of liability. It cannot reasonably be pretended that the Commission's analysis did not critically depend on what it itself described as "a strong presumption," which it concluded petitioner failed to rebut. (Doc. 377 at 32.) All signs indicate that the Commission's use of the presumption was dispositive. Once it is determined that it was legal error to rely on the presumption in analyzing SLI effects, the proper result is to reverse the Final Order and Opinion or, at the least, to remand the case for a fresh consideration untainted by this improper tilting of the table.

### B. The FTC's Alternative Analysis Based on Potential Competition Theory Was Legally and Factually Flawed

In the alternative, the FTC tries to justify the Commission's conclusions about competitive effects in the alleged SLI market on the basis of a "potential competition" analysis, FTC Br. 48-53, but this fallback rationale also comes up short.

First, the record evidence does not support the FTC's reliance on the "perceived potential competitor" theory endorsed in *Marine Bancorporation*. *See* Br. 33-39. The ALJ's Findings that Daramic reduced its prices to Crown Battery and Douglas Battery as part of its "MP Plan" (heavily relied on by the Commission in supporting its "perceived competitor" analysis) are entirely irrelevant to this issue, since the Crown and Douglas purchases involved only motive power separators, not the SLI separators that are the subject of the potential competition analysis. *See* Br. 33-36, 38-39. The FTC now implicitly concedes as much but argues that "the Commission never suggested that Daramic's price concessions to Crown Battery and Douglas . . . related to SLI separators," FTC Br. 51 n.13. That is not true, however; the Commission plainly so suggested. (*See* Doc. 377 at 20 (explaining the Commission's conclusion that Microporous was a participant "in the North American SLI Market" and citing ALJ Findings 820-821, 824-825, and 842-848 relating to pricing for Crown and Douglas in support of the Commission's

view "that Daramic perceived Microporous as a competitive threat" in this market "and reacted by reducing prices"). *See* Br. 33-35, 38-39.

Putting aside Crown and Douglas leaves only the suggestion that Daramic gave East Penn Battery favorable pricing as the sole remaining item of evidence claimed by the FTC in support of its perceived potential competitor theory. *See* FTC Br. 50-51. But the record on this point is ambiguous at most and certainly insubstantial as a link to Microporous's potential as a competitive factor in SLI separator sales. The ALJ specifically found that the terms of Daramic's renewed supply contract with East Penn were based on the strong longstanding relationship between the companies *and not on any comparison with Microporous*. (Doc. 342 at 134, Finding 837.) As Daramic well knew, Microporous never had anything more than a minor supply relationship with East Penn, limited to industrial motive power separators. (*See id.*, Findings 834-835 and 838.)

While one of Daramic's "MP Plan" documents identified East Penn as a possible future customer for Microporous's "automotive" separators (*see id.* at 132, Finding 821; PX0258 at 002 ("East Penn-auto"), *cited in* FTC Br. 14, 47), this evidence provides no clear link to potential SLI sales because the record shows that East Penn included in its "automotive division" not only SLI batteries for cars and other vehicles, but also *deep-cycle batteries* (such as for golf carts and floor scrubbers), which all participants in the industry knew to be Microporous's core

strength. (Doc. 342 at 133, Finding 831.) *See* Br. 37. (Daramic, as a major supplier to East Penn, would certainly be aware of how East Penn organized its production divisions, and thus a reference to "East Penn-auto" in a Daramic document could well include possible sales of separators for deep-cycle batteries.) The FTC responds to this point by citing testimony indicating that East Penn had discussions with Microporous about the possible supply of SLI separators, FTC Br. 47, 51 (citing Tr. 4016-17 (Leister)), but the very same East Penn witness provided clear and uncontroverted testimony that East Penn never told Daramic it had talked with Microporous about the possibility of supplying PE separators for SLI applications and never discussed Microporous as a possible alternative supplier in negotiating contract renewal and pricing with Daramic. (Tr. 4002-03, *in camera* (Leister).)[7]

[7] Although the FTC claims that Daramic's Tucker Roe testified he understood Microporous had made offers to East Penn and viewed Microporous as a competitive threat for SLI separators, FTC Br. 51 (citing Tr. 1289-90 (Roe)), 46 (citing Tr. 1307-08 (Roe)), this testimony is not substantial support for the Commission's theory. In explaining Daramic's MP Plan, PX0258, Mr. Roe testified that "we understood Microporous had visited customers," including East Penn, and "we assumed they made quotations," but he specifically stated that Daramic "did not know" "what type of quotation they may have made to them." (Tr. 1290 (Roe).) Mr. Roe's testimony about Microporous's potential as an SLI supplier related most specifically to past negotiations with JCI, a North American customer for which the FTC does not claim Daramic reduced prices or otherwise offered more favorable contract terms. (*See* Tr. 1300-01, 1307-08 (Roe).)

Second, the FTC's invocation of the "actual potential competitor" theory is equally flawed. The FTC suggests that the Supreme Court recognized the validity of this speculative theory in *Marine Bancorporation*, FTC Br. 51-52 & n.14, but that is not the case, *see* Br. 30-31. The rare statements by other courts of appeals seeming to approve this theory, including dicta from the Fifth Circuit's pre-Circuit split opinion in *Mercantile Texas Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 1255 (5th Cir. 1981), cited in FTC Br. 51-52, are not holdings binding on this Court. *See* 638 F.2d at 1265 ("In the absence of necessary findings by the Board, however, we will not decide whether the doctrine adequately describes a violation of the Clayton Act standard.").

The most glaring defect in the Commission's "actual potential competitor" reasoning (and its defense of that reasoning before this Court) is its failure to adhere to (indeed, even to mention) its own controlling precedent in *In re B.A.T. Industries, Ltd.*, 104 F.T.C. 852 (1984). This omission is telling: The FTC's own analytical framework in *B.A.T. Industries* requires evidence that the potential entrant had a concrete, approved plan for competing in the relevant market in the near term and already took "actual steps toward entry." *Id.* at 922. As discussed above, the record here simply will not support any such findings. (*See, e.g.*, RX0401 ("Strategic Mandates" memorandum from the board of directors).)

## II. THE COMMISSION ERRED IN ANALYZING LIABILITY ISSUES WITH REGARD TO DEEP-CYCLE AND MOTIVE POWER BATTERY SEPARATORS

### A. The Commission's Finding that Daramic HD Was a Close Competitive Substitute for Flex-Sil Is Contrary to the Weight of the Evidence

The FTC is highly selective in citing evidence in defense of its product market definition for deep-cycle separators. *See* FTC Br. 7-9, 31-36. Once again, it disregards clear facts in the record showing that customers did not view Daramic HD as a functionally and economically interchangeable substitute for Flex-Sil. *See United States v. Engelhard Corp.*, 126 F.3d 1302, 1305-08 (11th Cir. 1997); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995-99 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S. Ct. 2710 (1994).

While the FTC cites evidence that Daramic originally hoped the HD product could compete effectively with Flex-Sil, as reflected in early promotion materials, *see* FTC Br. 32-33, the FTC conveniently overlooks the testimony of Daramic's Tucker Roe that "[a]s we went forward" with testing, "[w]e learned afterwards that the HD product did not match up to the—to a Flex-Sil-type product." (Tr. 1760 (Roe).) With respect to customer preferences, Mr. Roe testified that Daramic supplied only "a small amount of volume of HD" to U.S. Battery "for their low-cost, low-warranty deep-cycle battery," and "the HD product that we supply to Exide is for replacement golf cart batteries," as "[o]ur HD product line has not

been approved for any [original equipment] manufacturer." (Tr. 1762 (Roe).) Mr. Roe concluded that Daramic was not a successful competitor to Microporous in deep-cycle separator sales. (Tr. 1277 (Roe).)

Thus, Trojan Battery's CEO Rick Godber testified that Trojan has never purchased any Daramic HD separators; that Trojan has no contract to purchase HD; that Trojan believes HD does not perform as well as Flex-Sil; and that he believes Flex-Sil performs 15-20% better than CellForce and that CellForce performs 10-15% better than HD. (Tr. 270-71 (Godber); *see also* RX0772, *in camera* (confirming that Trojan believed that both Flex-Sil and CellForce were superior to HD in life expectancy).) Mr. Godber also testified that Flex-Sil accounts for up to 95% of Trojan's separator purchases. (Tr. 275 (Godber).)

Indeed, Microporous's own former director of sales, Steve McDonald, testified that he was not aware of any instance where U.S. Battery switched from using Flex-Sil to HD in a golf cart battery. (Tr. 3956-57 (McDonald).) He confirmed that Daramic's HD product was only used in low-end golf cart batteries, and such batteries accounted for a "very, very, very low percentage" of Microporous's deep-cycle separator sales. (Tr. 3958 (McDonald).) More than 90% of U.S. Battery's separator purchases were Flex-Sil, even though there were no volume restrictions in the supply of HD available to U.S. Battery *and even though the price of Flex-Sil was twice the price of HD*. (Tr. 1961-62, 1972, 1981

(Wallace).) For these reasons, Microporous never viewed HD as a competitive threat to Flex-Sil's uniquely strong position in deep-cycle sales. (Tr. 3820 (McDonald); *see* Tr. 554 (Gilchrist); RX0780 ("I do not believe that Daramic HD is a threat to our business.").)

The FTC cites evidence suggesting that Exide "now uses" both Flex-Sil and HD in one of its batteries. FTC Br. 8. What the FTC fails to point out is that Exide only used HD in its lower performance aftermarket battery, where battery life can be shorter and performance standards are laxer, and never in its batteries for original equipment golf cart manufacturers, which require longer warranty batteries with longer life cycles and higher performance demands. (*See* Tr. 3090-92 (Gillespie); see also RX0780 (indicating that Exide did not believe HD was competitive with Flex-Sil in performance).) Moreover, while there was testimony at the trial in May 2009 that Exide used HD in place of Flex-Sil in a certain aftermarket battery, it is inappropriate and incorrect for the FTC to claim that it is still the case "now."

When pure rubber separators like Flex-Sil are properly treated as being in a separate product market, the only remaining competition at issue between Daramic HD and Microporous's CellForce product for deep-cycle applications is quite insubstantial (and certainly not sufficient to support the Commission's conclusions

about competitive effects). CellForce accounted for only 3% of Microporous's (already fairly modest) deep-cycle separator sales. (*See* RX1120, *in camera*.)

### B. The Commission Failed to Analyze Sufficiently the Likelihood that Entek Would Enter the Motive Separator Market in Response to a Long-Term Significant Price Increase

Contrary to the FTC's protests, in rejecting the likelihood of competitive entry in the alleged market for motive power separators, the Commission relied almost entirely on Entek's own self-serving assertions that it had no present intent of re-entering the motive separator business. (*See* Doc. 377 at 35.)

The FTC says that Entek would face cost disadvantages in producing motive separators that would make it difficult for Entek to match Daramic's current pricing, *see* FTC Br. 39, but there is scant record evidence to support that claim. Furthermore, the Commission's entry analysis was legally flawed because it made no effort to consider, as it was required to do, the objective question whether Entek would be a competitive entrant in response to a long-term significant price increase for motive battery separators. *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 989 n.9 (D.C. Cir. 1990) (Thomas, J.) ("In evaluating entry barriers . . . a court should focus on whether significant entry barriers would exist *after* the merged firm . . . begin[s] to charge supracompetitive prices," because at that point, "the barriers that existed during competitive conditions might well prove

insignificant.") (emphasis in original) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15, 107 S. Ct. 484, 494 n.15 (1986)).

Even accepting the Commission's views about Entek's supposed production costs relative to current market prices, the Commission said nothing about Entek's prospects for entry in response to supracompetitive pricing (*see* Doc. 377 at 35), and this omission is fatal to the Commission's conclusions about competitive effects with respect to motive separators.

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

The FTC argues that it was within the Commission's "broad discretion" to order divestiture of the Feistritz, Austria, plant because the Commission concluded that such divestiture was supposedly necessary to enable a buyer to compete effectively in supplying battery separators to customers in North America. *See* FTC Br. 54-56. But it is very difficult to see how that is so when (1) by the Commission's own admission, Microporous competed effectively in North America throughout its entire existence without the Feistritz plant, (2) the Feistritz plant was not even in operation at the time of the acquisition and was constructed only to serve customers located in Europe, not North America; and (3) Microporous's North American production facility in Piney Flats, Tennessee, has a large amount of excess capacity that would enable any buyer to compete for substantial orders in North America (capacity that could be significantly

supplemented with the "line in boxes" acquired by Microporous but not yet installed before the acquisition). *See* Br. 54-55.

In defending its harsh and uncompromising remedial order, the FTC argues that the Court should simply trust that the agency might do the right thing at the end of the day—that it might exercise what it appears to regard as virtually unlimited administrative discretion to allow Polypore to retain the Feistritz facility if a buyer becomes available that already operates sufficient overseas separator plants and could effectively compete for North American customers using the Piney Flats plant and the so-called "line in boxes." *See* FTC Br. 59-60 (arguing that this option is more appropriately left to the discretion of the Commission acting under its own rules (*i.e.*, without judicial oversight) at the time Polypore submits a particular proposed sale). The divestiture order by its terms does not hint at this possibility, but the fact that the FTC now acknowledges that it may be a permissible option only underscores that the remedy ordered by the Commission was not and is not necessary to secure effective relief and therefore is overbroad. The Court should ensure that this option is followed and reject the current divestiture order to the extent it mandates the sale of Feistritz.

The FTC relies on the Fifth Circuit's opinion in *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008), which upheld an order requiring divestiture of all the assets of the acquired firm, including assets for the production of water

tanks, even though the relevant product market at issue was the market for cryogenic gas storage tanks. FTC Br. 57. The court in *Chicago Bridge* accepted the FTC's argument that although the water tank assets were unrelated to the production of cryogenic tanks, their divestiture was necessary to enable the spun-off entity to compete on an "equal footing," since the water division would provide a consistent revenue stream to supplement the sporadic sales of the cryogenic tank division. 534 F.3d at 441.

Significantly, however, the divestiture order at issue in *Chicago Bridge* "carefully devolve[d] discretion to [the acquirer, Chicago Bridge & Iron] and a third-party monitor [*i.e.*, not the Commission] to determine how assets must be divided to effectuate the order and its general remedial purpose," and, the court pointed out, the Commission's opinion approving the order specifically "*included a provision that allows the exclusion of the water assets if the acquirer and monitor trustee both find them unnecessary*." *Id.* at 441-42 (emphasis added) (internal quotation marks omitted). "Accordingly," the court stated, "as we read the Commission's order," Chicago Bridge was "required to divest to the new separate entity no more nor less of the [acquired firm's] assets as [were] necessary for the new entity to compete . . . in the relevant markets," and only by "[c]onstruing the Commission's order as having this meaning and intent" did the

court "conclude that the Commission did not abuse its discretion" in fashioning this extraordinary divestiture remedy. *Id.* at 442.

In the present case, neither the Commission's Opinion nor its Final Order included any provision, like the one the court found so significant in *Chicago Bridge*, that would allow Polypore to withhold the Feistritz plant from the divestiture where that plant is not needed to enable a suitable buyer, such as an existing international firm, to compete effectively for battery separator sales in North America using the domestic production assets of Microporous. Indeed, the chances in this case that sale of the Austrian facility will be unnecessary to achieve effective competition in North America are much greater than the likelihood that a prospective buyer in *Chicago Bridge* would not need the consistent revenue stream of the water division, since Microporous competed successfully without the Feistritz plant, the Piney Flats facility would provide any buyer significant excess production capacity in North America, and this Piney Flats capacity would be further supplemented by the addition of the extra "line in boxes." *See* Br. 54-56. Yet, here, the Commission has bluntly mandated divestiture of an Austrian facility wholly unrelated to the competitive issues found by the Commission without any safety-valve provision like that found in *Chicago Bridge* and without any

reasonable basis to conclude that sale of the facility is necessary to preserve competition in North America.[8]

As the FTC acknowledges, a divestiture remedy ordered by the Commission must be reasonably related to the competitive harms found by the agency in the relevant markets. *See Beatrice Foods Co. v. FTC*, 540 F.2d 303, 314 (7th Cir. 1976); *Seeburg Corp. v. FTC*, 425 F.2d 124, 129-30 (6th Cir.), *cert. denied*, 400 U.S. 866, 91 S. Ct. 104 (1970); *Abex Corp. v. FTC*, 420 F.2d 928, 933 (6th Cir.), *cert. denied*, 400 U.S. 865, 91 S. Ct. 98 (1970). In this case, those harms involved only the sale to customers located in North America of battery separators

[8] Polypore has not waived its right to raise this argument. The FTC relies on cases applying the doctrine of "administrative issue exhaustion." *See Mahon v. USDA*, 485 F.3d 1247, 1254-57 (11th Cir. 2007) (appellants precluded by "issue exhaustion" from raising for the first time on appeal the "issue" of whether their citrus crops fell within the agency's definition of "ornamental nursery"), *cited in* FTC Br. 58. That doctrine does not apply here, because the "issue" of whether divestiture of the Feistritz plant was necessary to redress the competitive harms found by the Commission was strenuously raised and hotly contested before the agency. In its appeal to the Commission, Polypore thoroughly challenged the ALJ's conclusion that no buyer of Microporous's Piney Flats plant and "line in boxes" would be able to compete as effectively as Microporous if it did not also receive the production capacity and international supply capabilities provided by the Feistritz facility. *See* Respondent's Appeal Brief (Public), Doc. 349, at 51-57. Moreover, Polypore specifically argued as follows: "The [ALJ] ultimately found that the divestiture of foreign assets is governed by the standard articulated by the Commission in *Chicago Bridge*: 'foreign assets [need be divested] *only to the extent they are necessary for an acquirer to compete in the Relevant Markets*.' . . . Preoccupied with their focus on 'complete divestiture,' Complaint Counsel cite *Chicago Bridge but fail to disclose that total divestiture was not required there*, as noted by the [ALJ]." *Id.* at 51 & n.28 (emphases added).

manufactured at plants located in North America. If the requirement to divest Feistritz is reasonably related to the harms alleged and found by the Commission in this case, then there truly are no effective bounds to the Commission's remedial powers, and the reasonable-relation standard is utterly devoid of content.

## CONCLUSION

For the foregoing reasons and for the reasons given in petitioner's opening brief, the Final Order and Opinion of the Commission should be reversed in its entirety. In the alternative, the Final Order and Opinion should be vacated and remanded for a new hearing. At a minimum, the remedial order requiring petitioner to divest the production facility located in Feistritz, Austria, should be vacated.

Dated: July 19, 2011

Respectfully submitted,

s/ Paul T. Denis

Paul T. Denis
Steven G. Bradbury
Gorav Jindal
Sean P. McConnell
DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006
(202) 261-3300

*Counsel for Petitioner*
*Polypore International, Inc.*

## 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 6,365 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Paul T. Denis
Paul T. Denis

**CERTIFICATE OF SERVICE**

I hereby certify this 19th day of July, 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:

Michele Arington, Esq.
John F. Daly, Esq.
Donald S. Clark
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-576
Washington, DC 20580-0002

Catharine M. Moscatelli, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

s/ Sean P. McConnell
Sean P. McConnell
DECHERT LLP
1775 I Street, N.W.
Washington, D.C. 20006