

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9327

PUBLIC

RESPONDENT'S RESPONSES TO COMPLAINT COUNSEL'S POST-TRIAL
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
REOPENED HEARING

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

DOCKET NO. 9327

**IN THE MATTER OF
POLYPORE, INTERNATIONAL, INC.**

**COMPLAINT COUNSEL'S POST-TRIAL
PROPOSED FINDINGS OF FACT
ON REOPENED HEARING**

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I. Complaint Counsel has Proven that Respondent's Proffers Are Not True

A. Proffer #1 is not true

- Respondent's allegation in the first proffer that "after the close of the record" Exide decided to { _____ } is not accurate because Exide has been { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1249. Exide decided to { _____ } (Gillespie, Tr. 5826-5827, *in camera*). { _____ } (Gillespie, Tr. 2966, *in camera*; *see also* Bregman, Tr. 2899-2901, *in camera*; CCFOF605). Mr. Seibert, who has only been in position at Daramic since late 2008, admitted that { _____ } (Seibert, Tr. 5730, *in camera*; PX5076 (Seibert, Dep. at 48), *in camera*).

Response to Finding No. 1249:

Complaint Counsel's Finding No. 1249 is incomplete and misleading. First, to the extent Complaint Counsel cites Gillespie's testimony to support its proposed finding, such support should be disregarded. Gillespie has proven not to be credible and his testimony should be given no weight. Moreover, it is telling that Complaint Counsel offers no documentation to attempt to support this finding. In addition, {

} (Gillespie, Tr. 2965, *in camera*). {

}.”

(Gillespie, Tr. 2965, *in camera*).

Moreover, {

}. (RFOF

1501, *in camera*). {

}. (RFOF 1602, *in camera*; Gillespie, Tr. 5851, *in camera*).

Instead, {

}. (RFOF

1540-43, *in camera*). Not surprisingly, {

}. (Gillespie, Tr. 5870, *in camera*; RX01693 at 002 (“{

}.”), *in*

camera). Instead, as Gillespie himself even testified, {

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

1250. Exide’s decision to {

}

(Gillespie, Tr. 5826-5827, *in camera*). {

} (Gillespie, Tr. 5826, 2977, 3049, *in camera*).

Response to Finding No. 1250:

Complaint Counsel’s Finding No. 1250 is inaccurate, incomplete and misleading. First, Complaint Counsel cites only Gillespie’s testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion.

Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

First and foremost, Complaint Counsel arrives at Finding No. 1250 by manipulating Gillespie's hearing testimony. During the re-opened hearing, Complaint Counsel {

} (Gillespie, Tr. 5826, *in camera*)(emphasis added). {

} (Gillespie, Tr. 5826-27, *in camera*). This testimony {

} This is further evidenced when looking at Gillespie's actual testimony in May. Only one of the pages of initial hearing testimony that Complaint Counsel cites is relevant to their proposed finding, and there {

} (Gillespie, Tr. 3049, *in camera*). Complaint Counsel ignores {

} (Gillespie, Tr. 3021, *in camera*). At the time of the initial hearing {

} It was only on cross-examination at the November 12, 2009 hearing that Gillespie, for the first time, admitted (albeit reluctantly) that {
}. (Gillespie, Tr. 5838-39, *in camera*).

This finding further ignores that fact that after the record was closed on June 22, 2009,

{

}). (RFOF 1529, *in camera*; RX01676, *in camera*; Seibert, Tr. 5674, *in camera*; Gillespie, Tr. 5845, *in camera*). {

}. (RFOF 1529, *in camera*; Seibert, Tr. 5673-74, 5676-77, *in camera*; Gillespie, Tr. 5845-46, *in camera*; RX01676, *in camera*). {

}. (RFOF 1540, *in camera*; Seibert, Tr. 5677-78, *in camera*). {

}, (RFOF 1209, 1212, *in camera*), {

}. (RFOF 1641, *in camera*). None of this information was disclosed by Gillespie when he testified in May 2009, as Exide chose to withhold its strategy from this Court.

1251. While Exide has been {

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

Response to Finding No. 1251:

Complaint Counsel's Finding No. 1251 is incomplete and misleading, and draws a false conclusion. For its response to this finding, Respondent incorporates by reference its responses

to Finding Nos. 1249 and 1250. First, it is telling that Complaint Counsel relies solely on the testimony of Gillespie to support its finding. Gillespie's testimony is not credible and should be given no weight. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. In addition, this finding completely ignores the undisputed evidence that {

}. (RFOF 1552, *in camera*;

RX01687 at 002, *in camera*). {

}. (RFOF 1552, *in camera*).

- Respondent's allegation in the first proffer that "Exide decided to move { _____ } of its PE separator purchases for { _____ } to another supplier" is not accurate because Exide has { _____ } business to another supplier

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1252. Exide has { _____ } (Gillespie, Tr. 5826, *in camera*).

Response to Finding No. 1252:

Complaint Counsel's Finding No. 1252 is incomplete, incorrect and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight. Moreover, it is

telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Significantly, Complaint Counsel's proposed finding ignores the clear evidence that { }. (RFOF 1539-1542, *in camera*). {

}. (RFOF 1541, *in camera*). As a result, { }. (RFOF 1539-1542, *in camera*). {

}. (RFOF 1549, *in camera*; RX01704, *in camera*; Gillespie, Tr. 5838, *in camera*). {

}. (RFOF 1549, *in camera*; Gillespie, Tr. 5838, *in camera*). { }. (RFOF 1549, *in camera*; Toth, Tr. 5750-51, *in camera*; RX01704, *in camera*). {

}. (RFOF 1549, *in camera*; Gillespie, Tr. 5838-39, *in camera*). Accordingly, { }. (RFOF 1549, *in camera*). {

Moreover, this finding ignores testimony by Seibert which provides: {

} (PX5076 (Seibert, Dep. at 49), *in camera*). In addition,

{

} (Seibert, Tr. 5723 (“{

}.”), *in camera*; 5691 (“{

}.”), *in camera*). {

} (RFOF 1553, *in camera*).

1253. When asked if Exide had ever informed him that it intended to {

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

{

} PX5076

(Seibert, Dep. at 48-49), *in camera*). What Mr. Seibert does know is that {

}.

(PX5076 (Seibert, Dep. at 74), *in camera*).

Response to Finding No. 1253:

Complaint Counsel’s Finding No. 1253 is incomplete and misleading, and it should be disregarded in its entirety. Complaint Counsel ignores Seibert’s uncontradicted testimony that, “{ }.” (Seibert, Tr. 5723, *in camera*). This finding also completely ignores further testimony by Seibert which provides: {

} (PX5076 (Seibert, Dep. at 49), *in camera*).

{

}. (RFOF 1501, 1602, *in camera*; Gillespie, Tr. 5851, *in camera*). Instead, {

}. (RFOF 1540-43, *in camera*). Not

surprisingly, {

}. {

(Gillespie, Tr. 5870, *in camera*; RX01693 at 002 (“{

}).”), *in camera*). Instead, as

Gillespie himself even testified, {

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

}. (RFOF 1594, *in camera*). As a further response to

this finding, Respondent incorporates by reference its response to Finding No. 1252.

1254. Mr. Gillespie testified that while Exide intends on purchasing {

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

{

} (Gillespie, Tr. 5868, *in camera*). Additionally, Exide would not {

} (Gillespie, Tr. 5826-5828, *in camera*).

Response to Finding No. 1254:

Complaint Counsel’s Finding No. 1254 is incomplete and misleading. For its response to this finding, Respondent incorporates by reference its responses to Finding Nos. 1252 and 1253. First, it is telling that Complaint Counsel relies solely on Gillespie’s testimony to support this

proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight, and this finding should be disregarded in its entirety. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Nor did Complaint Counsel depose, subpoena, or call to testify at the November 12, 2009 hearing a single witness from Entek – instead choosing to rely entirely on the rehearsed and not credible testimony of Gillespie. As a result, Complaint Counsel has failed to support this proposed finding with any credible evidence.

Significantly, this finding completely ignores Seibert's testimony which provides:

{

} (PX5076 (Seibert, Dep. at 49), *in camera*).

Moreover, {

} (RX01668 at 002, *in camera*;

Seibert, Tr. 5659-60, *in camera*; Gillespie, Tr. 5839, *in camera*). Further, the evidence in the record stands in stark contrast to Complaint Counsel's proposed finding – {

} (See Respondent's Response to Findings Nos. 1249-53).

1255. Because today Exide has {

} (Gillespie, Tr. 5823, 5833, *in camera*;

CCFOF1254).

Response to Finding No. 1255:

Complaint Counsel's Finding No. 1255 is incomplete and misleading. First, it is telling that Complaint Counsel relies solely on Gillespie's testimony to support this proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight, and this finding should be disregarded in its entirety. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Further, Respondent incorporates its responses to Proposed Finding Nos. 1249-54. In addition, Respondent directs the Court to the evidence in the record showing that {

},

(RFOF 1209, 1212, *in camera*), {

}. (RFOF 1641, *in camera*).

Additionally, {

}. (RFOF 1642, *in camera*).

- Respondent's allegation in the first proffer that "Exide decided to move {
} its PE separator purchases for { _____ } to another supplier" is not

accurate because Exide has {
_____}.
_____}.

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1256. Exide {
products. (Gillespie, Tr. 5829, *in camera*). } for such

Response to Finding No. 1256:

Complaint Counsel's Finding No. 1256 is incomplete and misleading, and draws a false conclusion. First, it is telling that Complaint Counsel relies solely on the testimony of Gillespie to support its finding. Gillespie's testimony is not credible and should be given no weight. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. Second, this finding completely ignores the undisputed evidence that {

_____}. (RFOF 1552, *in camera*; RX01687 at 002, *in camera*). Based on this evidence, it is clear that {

_____}. (RFOF 1552, *in camera*).

1257. Exide has informed Daramic that it intends to {
_____}. (Gillespie, Tr. 5810, *in camera*, 5864-5865, *in camera*). In fact, Mr. Gillespie testified that

Exide expects to {
5825-5826, *in camera*). } (Gillespie, Tr.

Response to Finding No. 1257:

Complaint Counsel's Finding No. 1257 is incomplete and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, this finding ignores several key pieces of evidence which shows that {

},

(RFOF 1209, 1212, *in camera*), {

}. (RFOF 1641, *in camera*). In fact,

{

} (PX5076 (Seibert, Dep. at 49), *in camera*).

{

}. (RFOF

1552, *in camera*; RX01687 at 002, *in camera*). It is clear from this evidence that {

} (RFOF 1552, *in camera*). Extensive evidence was put forth during the first hearing regarding {

} (RFOF 201, 589; RX00303, *in camera*, RX00304; RX00305; RX00306; RX00307; RX00147, *in camera*; RFOFCOL 926-76).

- Respondent's allegation in the first proffer that Exide's purchase orders of {
_____} of PE separators "amounts to approximately {
_____} worth of PE
separators" is not accurate because Exide's {
_____}
_____}.

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1258. Exide has not placed any {¹
_____}. (Gillespie, Tr. 5798, *in camera*). Mr. Seibert admitted that {
_____} (Seibert, Tr. 5701, *in*
camera). With respect to his conversations with Mr. Gillespie prior to Mr. Seibert's
testimony in June, Mr. Seibert admits that {
_____} (PX5076 (Seibert, Dep. at
12), *in camera*).

Response to Finding No. 1258

Complaint Counsel's Finding No. 1258 is false and misleading. {

} While {

}, Complaint Counsel distorts Mr. Seibert's

¹ {

} Complaint Counsel's Findings of Fact use the term incremental orders in all instances for the sake of consistency.

statement to imply that {

}. In fact, {

}. (Gillespie, Tr. 5836-37, *in camera*; RX01723 at 002, *in camera*). {

}. (Gillespie, Tr. 5843; RX01726). {

}, long after Mr. Seibert's June trial testimony and the referenced conversation with Gillespie. (PX5076 (Seibert, Dep. at 12), *in camera*).

1259. Neither is Exide in any way {
}. (Gillespie, Tr. 5800, 5832, *in camera*).

Response to Finding No 1259:

Complaint Counsel's Finding No. 1259 is inaccurate, unreliable and should therefore be disregarded by this Court. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, the evidence shows that {

}. (Gillespie, Tr. 5836-37, 5843, *in camera*; RX01723 at 002, *in camera*; RX01726). {

}.
}

- Respondent's allegation in the first proffer that Exide's purchase orders of { } of PE separators "amounts to approximately { } worth of PE separators" is not accurate even as to Exide's { } separator needs because it is not based on a { } needs

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1260. { } (Gillespie, Tr. 5862, *in camera*). It is unrealistic to use Exide's {

camera). { } (Gillespie, Tr. 5862, *in camera*).
} (Gillespie, Tr. 5862, *in camera*).

Response to Finding No. 1260:

Complaint Counsel's Finding No. 1260 is incorrect, inaccurate, unreliable and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, Gillespie, not Respondent, determined that { } (RFOF 1540, *in camera*).

When confronted about {

Response to Finding No. 1261:

Complaint Counsel's Finding No. 1261 is incomplete, inaccurate and misleading to the extent the Complaint Counsel suggests that {

} First, Complaint

Counsel ignores that {

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

{

}, (Seibert, Tr. 5674, *in camera*),

{

} (Seibert, Tr. 5683, *in*

camera). In fact, {

} (RX01699, *in camera*; Seibert, Tr. 5672-74, *in camera*).

Second, {

} (Seibert, Tr. 5682, *in camera*). In particular, {

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

{

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

camera). {

}.

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

} (RX01724, *in camera*;

Seibert, Tr. 5683, *in camera*). For example, {

} (RX01724, *in camera*). Similarly, {

} (RX01724, *in camera*).

Accordingly, {

} (Seibert, Tr. 5682, *in camera*). Respondent

feared that {

} (Seibert,

Tr. 5682, *in camera*). {

}.”

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

{

}

1262. Exide’s {

} (Gillespie, Tr. 5792, 5860,

in camera). Thus, Exide informed Daramic {

} (RX01715, *in*

camera ({

))). Mr. Seibert admitted that {

} (Seibert, Tr. 5697, *in camera*).

Response to Finding No. 1262:

Complaint Counsel’s Finding No. 1262 is inaccurate and misleading. For its response to this finding, Respondent incorporates its response to Finding No. 1261. In addition, this finding ignores the reality that {

} (Seibert, Tr. 5681-82, *in camera*). Based on the evidence, this Court should find that {
}

1263. Exide's {
} (PX5076 (Seibert, Dep. at 6, 9), *in camera*).

Response to Finding No. 1263:

Complaint Counsel's Finding No. 1263 is misleading to the extent that {
}. For its response to
this finding, Respondent incorporates its response to Finding Nos. 1261-62.

1264. Mr. Seibert wrote a letter to Mr. Gillespie on June 2, 2009, two days before he testified in the previous hearing, acknowledging that Daramic {
} (PX5076 (Seibert, Dep. at 10, *in camera*)).² Mr. Seibert confirmed that {
} (PX5076 (Seibert, Dep. at 10-11), *in camera*).

Response to Finding No. 1264:

Complaint Counsel's Finding No. 1264 is inaccurate, misleading and should be disregarded to the extent that Complaint Counsel attempts to use deposition testimony to submit the content of a document not in evidence. Under Rule 1003 of the Federal Rules of Evidence "[t]o prove up the content of a writing ... the original is required, except as otherwise provided in

² Mr. Seibert attempted to evade this question at trial, insisting that he "would have to see a communication." (Seibert, Tr. 5699, *in camera*). Complaint Counsel was forced to impeach him with his deposition testimony. (Seibert, Tr. 5699-5701, *in camera*).

these rules or Acts of Congress.” While Complaint Counsel possessed the June 2nd letter at Mr. Seibert’s deposition, they introduced no exhibits despite ample opportunity to do so. Mr. Seibert’s deposition testimony is not the best evidence of the content of the June 2nd letter, and this Court should disregard this finding. Further, when Complaint Counsel asked Mr. Seibert about this June 2nd letter at trial, Mr. Seibert stated that he “would have to see a communication.” (Seibert, Tr. 5699, *in camera*). Complaint Counsel refused to show Mr. Seibert the requested communication.

To the extent that this finding is admissible, Respondent incorporates its responses to Finding Nos. 1261-1263. Respondent states that {

} . It is uncontroverted that {

} . (RFOF 1529, *in camera*). In fact, {

} .” (RX01717, *in camera*;

Gillespie, Tr. 5848-49, *in camera*; Seibert, Tr. 5683-84, *in camera*). Only days later, {

} . (RFOF 1529, *in camera*).

{

} . (RX01717, *in camera*; Gillespie, Tr. 5848-49, *in camera*;

Seibert, Tr. 5683-84, *in camera*). Also, {

} . Accordingly, {

}.

1265. Exide began {

}. (Gillespie, Tr. 5795, 5845-5846, *in camera*).

Response to Finding No. 1265:

Complaint Counsel's Finding No. 1265 is incorrect and misleading to the extent that {

}. For its

response to this finding, Respondent incorporates its response to Finding Nos. 1261-63.

Respondent further states that {

}. (RFOF 1529, 1531, *in camera*; RX01724, *in camera*).

Additionally, {

}. (RFOF 1529, *in camera*). {

}. In addition, {

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

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

{

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

example, {

}.
}

(RX01724, *in camera*). Similarly, {

} (RX01724, *in camera*). {

}.
}

1266. Exide placed {

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

}.
}

Response to Finding No. 1266:

Complaint Counsel's Finding No. 1266 is inaccurate and misleading to the extent that {

} For its

response to this finding, Respondent incorporates its response to Finding Nos. 1261-63 and 1265.

Respondent further states that {

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

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

Moreover, {

} (RX01717, *in camera*; Gillespie, Tr. 5848-49,

in camera; Seibert, Tr. 5683-84, *in camera*). {

}.
}

- Respondent's allegation in the first proffer that Exide's { _____ } are a result of a decision to move { _____ } of its business to another supplier is not accurate because Exide { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1267. The only reason that Exide {

for the { _____ } (Gillespie, Tr. 5795-5796, *in camera*). In fact, but
 _____ } (Gillespie, Tr. 5813, 5832, *in camera*).

Response to Finding No. 1267:

Complaint Counsel's Finding No. 1267 is unreliable, incorrect, inaccurate and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Further, {

_____ } Gillespie testified that {
 _____ } (Gillespie, Tr. 5807, *in camera*). Gillespie further testified that {

_____ } (Gillespie, Tr. 5807, *in camera*). Gillespie's testimony here, and elsewhere, is not credible. According to Exide's second quarter results, Exide's sales of transportation and

industrial batteries are down 29% and 26%, respectively. (Gillespie, Tr. 5843-44; RX01726).
Moreover, Exide's free cash has declined 129% from last year, which Gillespie does not dispute.
(Gillespie, Tr. 5844). {

}. (Gillespie, Tr. 5862, *in camera*).

Based on the foregoing, including specifically {

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

}. (JX-9, *in camera*;

in camera). {

}. (RFOF 1549, 1552,

}. {

Additionally, Complaint Counsel mischaracterizes {

}. {

} (RX00976, *in camera*, PX0728, *in camera*). {

} (RX00976, *in camera*). {

} (PX0728, *in camera*).

1268. Moreover, Mr. Gillespie informed Mr. Seibert and Mr. Roe that {
}. (Gillespie, Tr.
5796, *in camera*). Indeed, Daramic admitted that it {

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

Response to Finding No. 1268:

Complaint Counsel's Finding No. 1268 is unreliable, incorrect, misleading and inaccurate. For its response to this finding, Respondent incorporates its response to Finding No.

1267. Respondent further states that {

}. (RX01679, *in camera*). {

}.” (RX01720 at 005, *in camera*). {

}. (RX01685, *in*

camera).

1269. {

}. (Gillespie, Tr. 5789-5790, 5859, *in camera*; see also RX01720 at 19-20, *in camera* ({

}. (Gillespie, Tr.

5791, *in camera*). {

} (Gillespie, Tr. 5793, *in camera*).

Response to Finding No. 1269:

Complaint Counsel’s Finding No. 1269 is incorrect and misleading. For its response to this finding, Respondent incorporates its responses to Finding Nos. 1267-68. Respondent further states that {

}.” (RX01720 at 005, *in camera*).

{

} (RFOF 1534, *in camera*). {
} (RX01723, *in camera*;
Gillespie, Tr. 5837, *in camera*). {
}

1270. Exide's concern about a potential {
5831, *in camera*). } (Gillespie, Tr. 5793,

Response to Finding No. 1270:

Complaint Counsel's Finding No. 1270 is incorrect and misleading. For its response to this finding, Respondent incorporates its responses to Finding Nos. 1267-69. Further, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Complaint Counsel also mischaracterizes {

} (RX00976, *in camera*, PX0728, *in camera*). {

} (RX00976, *in camera*). {

} (PX0728, *in camera*). {

}.
}

1271. {

} (Gillespie, Tr. 5798, 5837, *in camera*; RX01720 at 019, *in camera*). Mr. Seibert agreed that all of Exide's {

}. (Seibert, Tr. 5699, *in camera*). Despite this, Daramic is {

}. (Gillespie, 5803-5805, *in camera*).

Response to Finding No. 1271:

Complaint Counsel's Finding No. 1271 is misleading. For its further response to this finding Respondent incorporates its response to Findings Nos. 1267-70. Also, to the extent that Complaint Counsel cites to Gillespie's testimony to support its proposed finding, Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support Gillespie's testimony even though it had ample opportunity to do so. Complaint Counsel fails to support Gillespie's testimony with any credible evidence.

{

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

camera). {

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

}.” (RX01681, *in camera*).

Additionally, {

}. For example, {

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

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

1272. Mr. Gillespie testified that Exide is not {
}. (Gillespie, Tr. 5832, *in camera*). Mr. Gillespie testified that if
Exide was {

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

Response to Finding No. 1272:

Complaint Counsel's Finding No. 1272 is inaccurate and contradicted by the weight of the evidence on the record. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

The facts, however, speak much louder and more truthfully than Mr. Gillespie's words:

{

}. (RFOF 1538, *in camera*). {

}. (RFOF 1539, *in camera*).

{

}. (RFOF 1549, 1552, *in camera*). {

}.

{
}. (Gillespie, Tr. 5836-37, *in camera*; RX01723 at 002, *in camera*). {

}. (Gillespie, Tr. 5843; RX01726).

Moreover, {

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

{

}.
}

- Respondent's allegation in the first proffer that Exide's { } are "inconsistent with past order patterns" is not accurate because Exide { }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1273. 2009 was not the first year that Exide { }.
(Gillespie, Tr. 5806, 5833, *in camera*). In 2008, Exide { }.
(Gillespie, Tr. 5806, *in camera*). The reasoning for Exide's { }.
(Gillespie, Tr. 5806, 5833, *in camera*). Just as Exide { }

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

Response to Finding No. 1273:

Complaint Counsel's Finding No. 1273 is incorrect and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

{

}. (Seibert, Tr. 5734-35, *in camera*). The Court finds that {

}.

Additionally, Complaint Counsel mischaracterizes {

}. {

} (RX00976, *in camera*, PX0728, *in camera*). {

} (RX00976, *in camera*). {

} (PX0728, *in camera*).

1274. Mr. Seibert admitted that Exide's {

} (Seibert, Tr. 5734, *in camera*).

Response to Finding No. 1274:

Complaint Counsel's Finding No. 1274 is incorrect, misleading and unreliable. Mr. Seibert never admitted that {

} as claimed by Complaint Counsel. Instead, Mr. Seibert testified to quite the opposite. Mr. Seibert testified that {

} (Seibert, Tr. 5734, *in camera*).

In fact, {

} (RX01698, *in camera*; Seibert, Tr. 5672, *in camera*). {

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

} (Seibert, Tr. 5674, *in camera*).

Accordingly, {

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

}.” (RX01720 at

005, *in camera*).

1275. As the findings above show, Exide’s decision to { } was adopted long before the close of the record on June 22, 2009. (CCFOF 1249 - 1251). {

} (CCFOF 1252 - 1255). Exide will also {

}. (CCFOF 1256 - 1257).

Response to Finding No. 1275:

Complaint Counsel’s Finding No. 1275, which unnecessarily and inappropriately summarizes and rehashes Complaint Counsel’s previous proposed findings, is inaccurate and misleading, and draws false conclusions for the reasons set forth in Respondent’s responses to Finding Nos. 1249-57, which Respondent incorporates herein. Such a “summary” finding should be disregarded in its entirety.

1276. Exide has not placed orders for { } worth of PE separators from Daramic because { } (CCFOF 1258 - 1259). Nor has it placed orders for { } separators from Daramic because Daramic’s {

}. (CCFOF 1260).

Moreover, Exide’s placement of {

} before the close of the record on June 22, 2009. (CCFOF 1261 - 1266).

Response to Finding No. 1276:

Complaint Counsel's Finding No. 1276 is incorrect, misleading and repetitive, and such a "summary" finding is inappropriate and should be disregarded in its entirety. For its response to this finding, Respondent incorporates its responses to Finding Nos. 1258-1266. Further, Respondent states that it consistently represented that {

}. In fact, Mr. Rikard, counsel for Respondent, during the opening statements explicitly stated {

}

Complaint Counsel relies on mere semantics to confuse the issues before this Court and evade the truth of the matter – {

}. (RFOF 1538, *in camera*).

{

}. (Gillespie, Tr. 5836-37, 5843, *in camera*; RX01726; RX01723 at 002, *in camera*). {

}.

1277. Exide's decision to place {

}. (CCFOF 1267 - 1272). Exide told Daramic {

(CCFOF 1268). {

}.

} (CCFOF 1273-1274).

Response to Finding No. 1277:

Complaint Counsel's Finding No. 1277 is incorrect, unreliable, misleading, and repetitive. For its response to this finding, Respondent incorporates its responses to Finding Nos.

1267-1272, 1268, and 1273-1274. Complaint Counsel's "summary" finding is not appropriate and should be disregarded in its entirety.

B. Proffer #2 is not true

- Respondent's allegation in the second proffer that "Exide does not intend to and will not purchase any additional separators from Daramic in either { _____ }" is not accurate because Exide intends on purchasing separators from Daramic in { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1278. Exide has informed Daramic that it intends to { _____ } (Gillespie, Tr. 5810, *in camera*). In fact, Mr. Gillespie testified that Exide expects to { _____ } (Gillespie, Tr. 5825-5826, *in camera*).

Response to Finding No. 1278:

Complaint Counsel's Finding No. 1278 is incomplete, repetitive, and misleading. For its response to this finding, Respondent incorporates by reference its responses to Finding Nos. 1257 and 1275 which fully responded to the same inaccuracies of Complaint Counsel.

1279. Exide has consistently informed Daramic that it { _____ } (Gillespie, Tr. 5864-5865, *in camera*). Between July and October 2009, Mr. Gillespie { _____ } (Gillespie, Tr. 5864, *in camera*; RX01669 at 002, *in camera* { _____ }); RX01687 at 002, *in camera*). Moreover, on September 30, 2009, Exide's CEO, Mr. Gordon Ulsh, informed Mr. Toth that { _____ } (RX01704 at 001, *in camera*).

Response to Finding No. 1279:

Complaint Counsel Finding No. 1279 is inaccurate and misleading. In Finding No. 1279, Complaint Counsel relies heavily on the testimony of Gillespie. Gillespie has proven not to be credible and his testimony is given no weight. Further, as has often been the case, Complaint Counsel's rendition of Gillespie's testimony is manipulated. Gillespie stated that {

(Gillespie, Tr. 5864, *in camera*) (emphasis added). {

}

Furthermore, {

}.” (Gillespie, Tr. 2965, *in camera*). {

} (Gillespie, Tr. 3011, *in camera*; PX1028, *in camera*). {

}. (Hauswald, Tr. 1117, *in camera*; Roe, Tr. 1719-20, *in camera*).

{

} First, Daramic is aware that {

} (Seibert, Tr. 5661, *in camera*; Gillespie, Tr. 3022-23, 3122-27, *in camera*; Weerts, Tr. 4486, 4521-23, *in camera*; RX00303 at 002, *in camera*; RX00303, *in camera*; RX00304; RX00305; RX00306; RX00307).

{

} (PX5076 at 17; RX01668, *in camera*). Now, {

}.
}

Second, the idea that {

} (Seibert, Tr.

5646-48, *in camera*; RX01721, *in camera*). {

} (RX01721 at 002, *in camera*; Seibert, Tr. 5648, 5651, *in*

camera). Following this, {

} (Seibert, Tr. 5650, *in camera*).

{

} (RX01665 at 002-

003, *in camera*). In response, Daramic {

} (RX01713 at 003, *in camera*; Seibert,

Tr. 5657, *in camera*).

{

} (Seibert, Tr. 5652, *in camera*). {

} (RX01668, *in camera*; RX01669, *in camera*, Seibert, Tr. 5659-

60, *in camera*; Gillespie, Tr. 5839, *in camera*). {

} (Seibert, Tr. 5662-

63, 5666, *in camera*; Toth, Tr. 5749-50, *in camera*; RX01714 at 002, *in camera*; RX01718 at 002, *in camera*). This included {

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

{

} (Toth, Tr. 5749-

50, 5756, 5758-59, *in camera*) (emphasis added). {

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

in camera). {

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

5760-61, *in camera*; PX5075 at 007, *in camera*). {

}

(Seibert, Tr. 5690-91, *in camera*). {

} (Toth, Tr. 5762-

63, *in camera*; RX01693, *in camera*; RX01712, *in camera*; Seibert, Tr. 5691, *in camera*;

Gillespie, Tr. 5854-55, *in camera*). {

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

{

} (RX01704, *in camera*; Gillespie, Tr. 5838, *in camera*; Toth, Tr. 5749-51, 5756, 5758-59, *in camera*; PX5076 at 17; RX01668, *in camera*). {

}.}

1280. {

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

Response to Finding No. 1280:

Complaint Counsel Finding No. 1280 is false and misleading. Again, Complaint Counsel attempts to show { } when no such thing exists. {

.} (RX01687, *in camera*). {

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

}, Gillespie has proven not to be credible and his testimony is given no weight.

{

} (Seibert, Tr. 5687, *in camera*; RX01687, *in camera*). {

} (RX01678 at 003, *in*

camera). {

.} (PX5076 at 29, *in camera*). This is, by no means, an even trade.

{

} (Toth, Tr. 5756-59,5761-

62, *in camera*, RX01678, *in camera*). {

} (RX01687, *in camera*; RX01714, *in camera*; Toth, Tr. 5761-62, *in camera*).

{

} (RX01687, *in camera*).

- Respondent’s allegation in the second proffer that “Exide does not intend to and will not purchase any additional separators from Daramic in either { _____ }” is not accurate because Exide offered { _____ }

_____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel’s statement is incorrect for the reasons stated below.

1281. In October 2009, after Daramic {

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

} (Gillespie, Tr. 5815-5816, *in camera*). According to Mr. Gillespie, Daramic’s immediate response was that it {

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

Response to Finding No. 1281:

Complaint Counsel Finding No. 1281 is inaccurate and misleading. First, Complaint Counsel cites only Gillespie’s testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, {

(RX01687, *in camera*). {

} (RX01678 at 003, *in camera*). {

} (Seibert, Tr. 5690-91, *in camera*; Toth, Tr. 5762-63, *in camera*; RX01693, *in camera*; RX01712, *in camera*; Gillespie, Tr. 5854-55, *in camera*; see also Response to Finding No. 1280).

{

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

(RX01693, *in camera*)(emphasis added).

}

{

} (RX01693, *in camera*; *see also*

RX001685 (“{

}.”), *in camera*). {

} (Seibert, Tr. 5645, *in*

camera). {

} (Seibert, Tr. 5652, 5720, *in camera*;

RFOF1576, 1584, *in camera*).

1282. Mr. Seibert later wrote to Mr. Gillespie on October 20, 2009, that {

} (RX01693 at 002, *in camera*). Mr. Seibert confirmed that
Mr. Gillespie had {

} (Seibert, Tr. 5712, *in camera*). Mr.
Seibert’s letter to Mr. Gillespie {

} (Gillespie, Tr. 5870-5871, *in camera*; RX01693 at
002, *in camera*).

Response to Finding No. 1282:

Complaint Counsel Finding No. 1282 is inaccurate, incomplete and misleading. In response to this Finding, Respondent incorporates its response to Finding No. 1281. Additionally, Complaint Counsel heavily relies on only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight.

{

} (Toth, Tr. 5737-40, *in camera*, 5747-48, *in camera*; Seibert, Tr. 5645, *in camera*). {

} (Toth, Tr. 5737-40, *in camera*, 5747-48, *in camera*; Seibert, Tr. 5645, *in camera*). {

} (Seibert, Tr. 5660, *in camera*; RX01119, *in camera*; Hauswald, Tr. 1118; Gillespie, Tr. 3126, *in camera*; RX01120, *in camera*).

{

} (Seibert, Tr. 5711, *in camera*). {

} (RFOF 1519, *in camera*). {

} (Seibert, Tr. 5652, 5720, *in camera*, RFOF 1576, 1584, *in camera*). {

} (Gillespie, Tr. 3017, *in camera*).

{

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

}

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

}. (RX01693 at 002, *in camera*). {

}

- Respondent's allegation in the second proffer that Exide will have { _____ } of separators is not accurate because Daramic { _____ } to Exide

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1283. Exide will not have {
"} (Gillespie, Tr. 5860, *in camera*). Daramic has
not agreed to {
}. (Gillespie, Tr. 5799, 5860, *in camera*). Daramic
has not even {
} (Seibert, Tr. 5707, *in camera*). To date, Exide has {

} (Seibert Tr. 5707-
5708, *in camera*; PX5076 (Seibert, Dep. at 51), *in camera*; Gillespie, Tr. 5799, *in camera*).

Response to Finding No. 1283:

Complaint Counsel's Finding No. 1283 is incorrect, misleading and repetitive. For its further response to this finding Respondent incorporates its response to Findings Nos. 1267-1271. Respondent also states that {

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

1284. The total amount of {

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

Response to Finding No. 1284:

Complaint Counsel's Finding No. 1284 is incorrect and misleading. For its further response to this finding Respondent incorporates its response to Finding Nos. 1267-1271 and 1283. Respondent also states that {

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

Moreover, Gillespie, not Respondent, determined that {

}. (RFOF 1540, *in camera*).

When confronted about {

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

1285. Mr. Seibert testified that it would be {

} (Seibert, Tr. 5714-5715, *in camera*; RX01685 at 001, *in camera*). Mr. Seibert confirmed at his deposition that it would be {
}. (PX5076 (Seibert, Dep. at 38), *in camera*).

Response to Finding No. 1285:

Complaint Counsel's Finding No. 1285 is misleading and irrelevant. Complaint Counsel focuses on semantics debating whether {

}. (RFOF 1547, *in camera*). {

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

1286. Mr. Seibert did not know whether or not Daramic would {
}. (Seibert, Tr. 5720, 5722, *in camera*). When asked at his deposition whether {
} (PX5076 (Seibert, Dep. at 53), *in camera*).

Response to Finding No. 1286:

Complaint Counsel's Finding No. 1286 is misleading and clearly misstates Mr. Seibert's testimony. Daramic has made {

}. (Seibert, Tr. 5681, 5722, *in camera*). The sole reason Mr. Seibert does not know {

} (Seibert, Tr. 5720, *in camera*). When asked these same questions at his deposition,

Mr. Seibert testified {

} (PX5076 (Seibert, Dep. at 94), *in camera*).

Moreover, Complaint Counsel completely misconstrues Mr. Seibert's deposition testimony implying that {

} . In fact, Mr. Seibert's complete testimony states that {

} (PX5076

(Seibert, Dep. at 53), *in camera*). This statement is consistent with {

} . (See Respondent's

Response to Finding Nos. 1267-1271 and 1283-1284).

1287. On October 20, 2009, Daramic reiterated that it {

} (RX01693 at 001-002, *in camera*).

Response to Finding No. 1287:

Complaint Counsel's Finding No. 1287 is incorrect. {

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

}.” (RX01720 at 005, *in camera*). {

}. (Seibert, Tr. 5674, *in camera*). {

}. (RFOF

1545-46, *in camera*).

1288. {

} (Seibert, Tr. 5672-5673, 5707, *in camera*).

Response to Finding No. 1288:

Complaint Counsel’s Finding No. 1288 is misleading. Complaint Counsel ignores that

{

}. (RFOF 1529, *in*

camera). {

}. (FOF 1541, *in camera*). {

}.

(RFOF 1529, 1541, *in camera*; Seibert, Tr. 5672-73, *in camera*). In addition, {

}

(RFOF 1541-1542, *in camera*).

1289. As the findings above show, Exide has told Daramic it intends to {

}

(CCFOF 1254 – 1257, 1278-1280). Exide also {

1282). {

} (CCFOF 1281 - 1282).

}. (CCFOF 1281 -

Response to Finding No. 1289:

Complaint Counsel’s Finding No. 1289, which unnecessarily and inappropriately summarizes and rehashes Complaint Counsel’s previous proposed findings, is inaccurate and misleading, and draws false conclusions for the reasons set forth in Respondent’s responses to Finding Nos. 1254-57, 1278-1282, which Respondent incorporates herein. Such a “summary” finding should be disregarded in its entirety. Further, Complaint Counsel’s proposed findings, summarized in its Finding No. 1289, are contradicted by the clear evidence in the record. {

} (RX01687 at 002, *in camera*; Seibert, Tr. 5686, *in camera*;

Gillespie, Tr. 5852-53, *in camera*). {

} (Seibert,

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

} (RX01678 at 003, *in camera*). {

} Contrary to Complaint Counsel's

assertion, {

}

{

} (RX01704, *in camera*; Gillespie, Tr. 5838, *in camera*; Toth, Tr.

5749-51, 5756, 5758-59, *in camera*; PX5076 at 17; RX01668, *in camera*). Tellingly, however, {

}. (RFOF

1540-43, 1553, 1601-02). {

}

Complaint Counsel's assertion regarding {

} is without basis in fact and demonstrates

Exide's gamesmanship. The reality surrounding {

} (Gillespie, Tr. 5870, *in camera*). In response to {

}

(RX01693, *in camera*).

Despite Daramic's {

} (RX01693, *in*

camera; see also RX001685 (“{

}.”), *in camera*). {

}

(Seibert, Tr. 5645, *in camera*). In fact, {

.} (Seibert, Tr. 5690-91, *in camera*).

1290. Exide will not receive {

}. (CCFOF 1283 - 1287). Daramic has agreed to {

}. (CCFOF 1283, 1286-1288). The {

}. (CCFOF 1284). {

} (CCFOF 1288).

Response to Finding No. 1290:

Complaint Counsel's Finding No. 1290 is misleading, incorrect, repetitive, and unreliable. Such a "summary" finding is inappropriate and should be disregarded in its entirety. For its further response to this finding, Respondent incorporates its responses to Finding Nos. 1283-1288.

C. Proffer #3 is not true

- Respondent's allegation in the third proffer that Exide has decided not to purchase PE separators from Daramic in { _____ } is not accurate because Exide { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1291. { _____ } (See
CCFOF 1252 – 1257).

Response to Finding No. 1291:

Complaint Counsel's Finding No. 1291, which unnecessarily and inappropriately summarizes and rehashes Complaint Counsel's previous proposed findings, is inaccurate and misleading, and draws false conclusions for the reasons set forth in Respondent's responses to Finding Nos. 1252-57, which Respondent incorporates herein. Such a "summary" finding should be disregarded in its entirety.

- Respondent's allegation in the third proffer that Daramic's decision to { _____ } is based on Exide's "apparent decision not to purchase PE separators from Daramic in { _____ }" is not accurate because Daramic has been { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1292. Polypore, through its corporate finance personnel and its Daramic business unit, has been {
}. (PX5075 (Toth, Dep. at 8-9), *in camera*;
Toth, Tr. 5775-5777, *in camera*). Mr. Toth, Polypore's CEO recalled discussing that
with Complaint Counsel a year and a half earlier. (PX5075 (Toth, Dep. at 9), *in*
camera; Toth, Tr. 5775-5777, *in camera*).

Response to Finding No. 1292:

Complaint Counsel's finding number 1292 is inaccurate, misleading, and contrary to the
credible testimony of Bob Toth, Polypore's President and Chief Executive Officer. While Toth
admits {

}, (Toth, Tr. 5776, *in camera*; PX5075 (Toth, Dep. at 8-9), *in*
camera), Toth's uncontradicted testimony makes it clear that {

}. (Toth, Tr. 5776, 5737-38, *in*
camera; RFOF 1555, *in camera*). At that time, {

}. (Toth, Tr. 5776, *in camera*; RFOF 1555, 1611, *in*
camera). {

}. (RFOF 1555, 1611, *in camera*; Seibert, Tr. 5692-94, *in camera*).

Complaint Counsel has proffered no contrary evidence and Toth's testimony at the hearing on
November 12, 2009 went uncontradicted by Complaint Counsel. (RFOF 1554).

1293. Daramic is {
}. (Seibert, Tr. 5692-5693, *in camera*). {

} (Seibert, Tr. 5693, *in camera*).

Response to Finding No. 1293:

Complaint Counsel’s finding number 1293 is incomplete and misleading. Complaint Counsel fails to mention that {

} (RFOF 1613, 1616, *in camera*). The evidence shows that {

}

(RFOF 1608, 1597-1605, 1549-1550, 1622, 1627, *in camera*; Seibert, Tr. 5723 (“{

}.”), *in camera*). {

} (RFOF 1610, *in camera*).

1294. Polypore was always {
options {
Tr. 5693, *in camera*). } (RX01692 at 001-002, *in camera*). In analyzing its
} (Seibert,

Response to Finding No. 1294:

Complaint Counsel’s finding number 1294 is inaccurate and misleading, and takes testimony out of its proper context to serve the specific needs of Complaint Counsel. As previously stated, {

} (See Respondent’s Response to Finding No. 1292). {

} (RFOF 1616, *in*

camera). {

},

(RFOF 1558, *in camera*), Complaint Counsel speculates that {

}. (RX01692 at 001-002, *in camera*). Complaint Counsel

overlooks the fact that {

}. (RFOF

1558, *in camera*; see also RX01692 at 002 ({

}), *in*

camera; Seibert Tr. 5693 ({

}), *in camera*). More significantly,

Complaint Counsel's speculation ignores the fact that {

}. (RX01692 at 005, *in camera*; Toth, Tr. 5765-66, *in camera*). The evidence is clear that

{

}, (RFOF 1617, *in*

camera) – {

}. (RFOF 1601-03, *in camera*). Complaint Counsel's proposed finding is mere

speculation.

1295. The assessment of {

} (Toth, Tr. 5777, *in camera*). Daramic has two large North American

separator plants – Corydon and Owensboro – {

} (Toth, Tr. 5737,

in camera). {

} (Toth, Tr. 5737, *in camera*).

Response to Finding No. 1295:

Complaint Counsel's finding number 1295 is incomplete and misleading. Complaint Counsel fails to mention that {

}. (RFOF 1613, 1616, *in camera*). As Toth explained at the November 12, 2009 hearing, "{
}.” (Toth, Tr. 5737, *in camera*).

1296. With regard to the former Microporous facility located in Piney Flats, TN, Daramic's third North American separator facility, that plant is operating {
}. (Toth, Tr. 5777-5778, *in camera*). Mr. Toth had {
}. (Toth, Tr. 5777, *in camera*).

Response to Finding No. 1296:

Complaint Counsel's finding number 1296 is incomplete and misleading. {
}. (Seibert, Tr. 5693, *in camera*; PX5075 (Toth, Dep. at 40), *in camera*).

1297. Neither Mr. Toth nor Mr. Seibert ever testified that the reason {
(
}. (See generally, Toth, Tr. 5737-5782, *in camera*; Seibert Tr. 5643-5735, *in camera*). {
} (Toth, Tr. 5748, *in*

camera; see also Polypore Opening Statement, Tr. 5610 {

}

Response to Finding No. 1297:

Complaint Counsel's finding number 1297 is false and takes testimony out of its proper context to serve the specific needs of Complaint Counsel. {

}. (RFOF 1556, *in*

camera). The evidence is clear that {

}. (RFOF

1558, *in camera*). In fact, the evidence shows that {

}. (RFOF 1613, *in camera*). For this reason, {

}. (Toth Tr, 5737-39,

5741, *in camera*; RFOF 1557-58, 1560, 1567, 1569-70, 1576-84, *in camera*). For example,

{

}. (Toth, Tr. 5739, *in camera; see also* RFOF 1610, *in camera*). Further,

{

} (Toth, Tr. 5743-44, 5747-49, *in camera*; see generally RFOF

1554-1595). {

5718-19, *in camera*).

} (Seibert, Tr.

Finally, {

} (RFOF 1610, *in*

camera). Thus, the evidence and uncontradicted testimony of both Toth and Seibert make clear that {

} (RFOF 1616, *in camera*).

1298. {

} (Toth, Tr. 5747-5748, *in camera*). {

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

} (Toth, Tr. 5748-5749, *in camera*).

Response to Finding No. 1298:

Complaint Counsel's finding number 1298 is inaccurate. Moreover, Complaint Counsel has improperly added language in support of its incorrect interpretation of Toth's testimony in order to serve the specific needs of Complaint Counsel. Toth's complete testimony is as follows:

“{

}.” (Toth, Tr. 5748, *in camera*). Toth's testimony is

consistent with the evidence in the record showing that {

} (See Respondent's

Response to Finding No. 1297). Quite simply, the record is clear that {

} (RFOF

1606-1610, *in camera*).

1299. Mr. Seibert testified that Daramic {

} (Seibert, Tr. 5694, *in camera*). {

} (Seibert, Tr. 5645, *in camera*). {

}³ (Seibert, Tr. 5694, *in camera*). This is, as Mr. Seibert confirmed on the stand, because Daramic needed to {
(Seibert, Tr. 5718-5719, *in camera*).⁴ }

Response to Finding No. 1299:

Complaint Counsel's finding number 1299 is inaccurate, misleading and speculative. Complaint Counsel again mischaracterizes testimony and takes testimony out of context in order

³ That Mr. Seibert singles out Daramic's {

}

⁴ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5717-5719, *in camera*).

to create a “fact”. In this instance, Complaint Counsel ignores Seibert’s testimony that {

} (Seibert, Tr. 5718-19, *in camera*). Far from being impeached as Complaint Counsel suggests, the record fully supports Seibert’s testimony. {

} (RFOF 1611, *in camera*). {

} (RFOF 1612, *in camera*).

{

} (RFOF 1613, *in camera*). {

} (RX01692 at 005, *in*

camera; RFOF 1562, *in camera*; Toth Tr. 5765-66, *in camera*). The evidence is clear that {

}, (RFOF 1617, *in*

camera) – {

} (RFOF 1601-03, *in camera*). In fact, {

} (RFOF 1517-19, 1525, 1557-59, 1563-67, 1569-71, 1582-83, *in camera*). {

}. (RFOF 1512-1515, 1522-23, 1528, 1539-40, 1585-88, 1594-95, 1597-99, 1601-1602, 1621-22, *in camera*). Thus contrary to Complaint Counsel's incorrect assertion, {

}. (RFOF 1610, 1589, 1616-17, *in camera*).

Finally, Complaint Counsel's hollow attempt to suggest that {

}. (*See, e.g.*, RFOF 151-159, 178-180, 939-940, 1066, 1093, 1098, *in camera*). Contrary to Complaint Counsel's contention, {

}. (Toth, Tr. 5765-66, *in camera*; RFOF 151-159, 178-180, 939-940, 1066, 1093, 1098, *in camera*). Instead, {

} (Toth, Tr. 5765-66, *in camera*). {

} (Toth, Tr. 5765-66, *in camera*).

1300. Regardless of Exide's {
(Seibert, Tr. 5718-5719, *in camera*). When asked what the {

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

Response to Finding No. 1300:

Complaint Counsel's finding number 1300 is inaccurate, misleading, speculative, and mischaracterizes the trial and deposition testimony of Harry Seibert. {
} and Complaint Counsel improperly cites his testimony for this inaccurate premise. (*See* Seibert, Tr. 5718-5719, *in camera*). Seibert has consistently testified, both at the November 12, 2009 hearing and during his October 27, 2009 deposition, {

} (Seibert, Tr. 5718-5719, *in camera*; PX5076 (Seibert Dep. at 81, 84-85), *in camera*). Instead, {

} (Seibert, Tr. 5716-17, *in camera*; PX5076 (Seibert Dep. at 81, 84-85), *in camera*; *see also* RFOF 1610, *in camera*; Respondent's Response to Finding No. 1299).

1301. When asked at his deposition whether Daramic might decide not to {

}

(PX5076 (Seibert, Dep. at 81), *in camera*).

Response to Finding No. 1301:

Complaint Counsel's finding number 1301 is inaccurate, misleading, speculative, and mischaracterizes the deposition testimony of Harry Seibert. As Complaint Counsel's proposed finding illustrates, Mr. Seibert testified that at the time of his deposition, {

}. ”

(PX5076 (Seibert, Dep. at 81), *in camera*). {

}. (RFOF 1610, *in camera*; see

also Respondent's Response to Finding Nos. 1299-1300).

1302. Mr. Toth confirmed that even if {

}. (PX5075 (Toth, Dep. at 58-59), *in camera*).

Response to Finding No. 1302:

Complaint Counsel's finding number 1302 is inaccurate, misleading, and calls for speculation. As Toth himself pointed out, {

}.
}

(PX5075 (Toth, Dep. at 58-59), *in camera*; Toth, Tr. 5778-79, *in camera*). Setting aside Complaint Counsel's irrelevant speculation, the record is clear that {

}. (RFOF 1596-1605,

in camera).

1303. Moreover, Daramic refused to even consider {

}. (RX01693 at 002, *in camera*; Seibert, Tr. 5712, *in camera*).

Response to Finding No. 1303:

Complaint Counsel's finding number 1303 is inaccurate and misleading. The evidence in the record is clear that {

}. (Gillespie, Tr. 5870, *in camera*; RX01693 at 002 (“{

}.”), *in camera*;

RX01685 (“{

}.”), *in camera*). In fact, {

}.” (Seibert, Tr.

5645, *in camera*).

1304. Polypore's internal documents reiterate that {

}. (RX01692 at 001-002, *in camera*).

Response to Finding No. 1304:

Complaint Counsel's finding number 1304 is false and misleading. Moreover, Complaint Counsel's proposed finding is not supported by the evidence cited. {

}. (RX01692 at 001-002, *in camera*; RFOF 1558, *in camera*).

{

}. (RFOF 1558 ({

}), *in camera*; RX01692 at 002 ({

}), *in camera*; Seibert, Tr. 5693 ({

})", *in camera*). Complaint Counsel's proposed finding is mere speculation.

1305. Polypore anticipated a {
there is {
002, *in camera*). Yet, under all scenarios, {
}. (RX01692 at 002, *in camera*). Polypore believes that
}. (RX01692 at
}. (RX01692 at 002, *in camera*).

Response to Finding No. 1305:

Complaint Counsel's finding number 1305 is misleading and speculative. In its response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding Nos. 1294 and 1304. First, this finding completely ignores the testimony of Seibert which provides: "{

}" (PX5076 (Seibert, Dep. at 49), *in*

camera). Furthermore, there is ample evidence in the record showing that {

95, *in camera*). { } (RFOF 1594-

} (RFOF 1597-98, *in camera*). {

} (RFOF 1599, *in camera*). Finally, {

} (RFOF 1600-01, *in camera*). Thus regardless of Complaint Counsel's speculation, the facts are clear that {

} (RFOF 1603, 1610, *in camera*).

1306. In fact, even under the {

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

Response to Finding No. 1306:

Complaint Counsel's finding number 1306 is misleading and speculative. In its response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding Nos. 1294 and 1304-05. Moreover, Complaint Counsel's own witness makes clear that {

} (Gillespie, Tr. 5826-27, 5839, *in camera*). Complaint Counsel's proposed finding is mere speculation and should be disregarded.

1307. As the findings above make clear, Exide's PE separator purchasing decision for {
(CCFOF 1292 – 1295, 1297 - 1306). { } (CCFOF 1292). The reasons Polypore decided to {
} (Toth, Tr. 5737; 5747-5748, *in camera*).

Response to Finding No. 1307:

Complaint Counsel's finding number 1307 is inaccurate, misleading, speculative, and takes testimony out of its proper context to serve the specific needs of Complaint Counsel. In its response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding Nos. 1292-1295 and 1297-1306. The record is replete with evidence demonstrating that {

} (RFOF 1613, 1616, 1610 *in camera*). Moreover, Toth's uncontradicted testimony makes it clear that {

} (Toth, Tr. 5776, 5737-38, *in camera*; RFOF 1555, *in camera*). Complaint Counsel's Proposed Findings 1292 – 1295 and 1297 – 1306 are without evidentiary support and are pure conjecture.

1308. {
 1306, 1309-1311). {
 - 1305). {
 1306).

} (CCFOF 1253 – 1255, 1305 –
 } (CCFOF 1304
 } (CCFOF 1304 -

Response to Finding No. 1308:

Complaint Counsel’s Finding No. 1308 is incomplete and misleading, and as a repetitive, irrelevant “summary” finding it should be disregarded in its entirety. In its response to Complaint Counsel’s finding, Respondent incorporates by reference its response to Finding Nos. 1292-1295 and 1297-1306. Complaint Counsel’s finding ignores the fact that {

{
 }. (RFOF 1602-04, *in camera*). In stark opposition to Complaint Counsel’s claim

{
 }. (RFOF
 1599, *in camera*). In addition, {

}. (RFOF 1604, *in camera*). Thus, {

}. (RFOF 1602, *in camera*; Gillespie, Tr. 5851, *in camera*). {

}. (RFOF 1613, 1616, 1610 *in camera*).

D. Proffer #4 is not true

- Respondent’s allegation in the fourth proffer that it “appears unlikely” that Daramic will “retain any small amount of business from Exide in { }, or thereafter” is not accurate because Daramic anticipates supplying Exide in { } with or without a contract

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel’s statement is incorrect for the reasons stated below.

1309. Polypore expects that Exide will continue purchasing PE separators from Daramic in 2010, after the NASA expired. {

} Rather, Mr.

Toth, reported to Polypore’s investors, to whom he has a duty to be truthful, that Daramic anticipates maintaining a supply position with Exide with or without a contract. (Toth, Tr. 5769, *in camera*; Seibert, Tr. 5724). When confronted with the statement, Mr. Toth testified that it “sounds like something I would have said.” (Toth, Tr. 5769, *in camera*).

Response to Finding No. 1309:

Complaint Counsel’s Finding No. 1309 is inaccurate and misleading. {

} (RFOF 1603,

in camera). {

}.

(RFOF 1604, *in camera*). Although Complaint Counsel again attempts to mischaracterize Toth’s testimony, Toth’s uncontradicted testimony makes clear that {

} (Toth, Tr. 5768-69, *in*

camera; RFOF 1567, 1571-75, *in camera*). {

} (Seibert, Tr. 5724, *in camera*). {

} (RFOF 1596-1605, *in camera*).

1310. {

} (Seibert, Tr. 5729-5730, *in camera*). {

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

camera).

} (RX01692 at 002, *in*

Response to Finding No. 1310:

Complaint Counsel's Finding No. 1310 is incomplete, misleading, speculative and it should be disregarded in its entirety. In its response to Complaint Counsel's finding, Respondent incorporates by reference its response to Finding Nos. 1304-1308. As previously indicated,

{

} (PX5076 (Seibert, Dep. at 49), *in camera*). Additionally,

{

} The evidence in the record makes clear that {

} (RFOF 1603, 1610, *in camera*; Seibert,

Tr. 5723 (“{

}.”), *in*

camera).

1311. Moreover, Exide has informed Daramic that they intend on {
}. (Gillespie, Tr. 5810,
in camera; see also PX5076 (Seibert, Dep. at 74), *in camera*).

Response to Finding No. 1311:

Complaint Counsel's Finding No. 1311 is incomplete, repetitive and misleading. For its response to this finding, Respondent incorporates by reference its responses to Finding Nos. 1257 and 1275.

- Respondent's allegation in the fourth proffer that for Daramic to "retain any small amount of business from Exide in { }, or thereafter" it "will only be able to obtain such sales through a { }" is not accurate because Daramic has never offered Exide { }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1312. {

generally, CCFOF 1069-1078). } (See

Response to Finding No. 1312:

Complaint Counsel finding 1312 is incorrect, incomplete and misleading. Again, Complaint Counsel ignores the clear evidence that has been presented at trial, and opts to disregard the facts that are in contrast to their version of events. {

}. {

{

} (Gillespie, Tr. 3011, *in camera*;

PX1028, *in camera*). {

}.” (Gillespie, Tr. 2965, *in camera*). At the time, {

} (Gillespie, Tr. 3017, *in camera*). Furthermore, {

}. (Roe, Tr. 1718, *in camera*; Hauswald, Tr. 1170-71, *in camera*).

Additionally, {

}. (See

Respondent's Response to Finding No. 1069). {

. (Roe, Tr. 1718-19, *in camera*).

{

} (RX01713, *in camera*;

RX01714, *in camera*). It has been made unequivocally clear {

} (Toth, 5742-43, *in*

camera; RX0172 at 001, *in camera*). Most importantly, {

} (RX01668 at 002, *in camera*; Seibert, Tr. 5734, *in camera*).

1313. Mr. Seibert was unable to testify as to {

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

not testify as to {

} (PX5076 (Seibert, Dep. at 101), *in camera*). Mr.

Seibert confirmed at trial that he did not know what {

} (Seibert, Tr. 5726, *in camera*).⁵ Mr. Seibert was
unable to even confirm that Daramic would {
}. (Seibert, Tr. 5725, *in camera*). Mr. Seibert
could not testify about anything less than {
} (Seibert, Tr. 5725, *in camera*).

Response to Finding No. 1313:

Complaint Counsel Finding No. 1313 mischaracterizes the record. In this response
Respondent incorporates its response to Finding No. 1327. Seibert's testimony referenced by
Complaint Counsel in Finding No. 1313 {

} (Seibert, Tr. 5725 – 26, *in camera*). {

} (Seibert, Tr. 5726, *in camera*;
PX5076 (Seibert, Dep. at 101), *in camera*). {

} (Seibert, Tr. 5726, *in camera*;
PX5076 (Seibert, Dep. at 101), *in camera*).

Furthermore, it is unrefuted that Daramic {

} (RFOF 1521, *in camera*). {

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

⁵ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony, which he finally adopted. (Seibert, Tr. 5725-5726, *in camera*).

5734, *in camera*). {

} (RFOF 1523; Seibert,

Tr. 5733-34, *in camera*).

1314. Mr. Seibert testified that Daramic had not even resolved whether it would {

} (PX5076 (Seibert, Dep. at 101), *in camera*).

Response to Finding No. 1314:

Complaint Counsel Finding No. 1314 mischaracterizes the record as Respondent has illustrated in its response to Finding No. 1313.

1315. Daramic has not considered what

} (Seibert, Tr. 5723, *in*

camera). If Exide does not {

} (PX5076 (Seibert, Dep. at 96),

in camera). Mr. Seibert testified that the possibility that Exide would {

} (PX5076 (Seibert, Dep. at 96), *in camera*). While Mr.

Seibert testified that {

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

Response to Finding No. 1315:

Complaint Counsel Finding No. 1315 is misleading and mischaracterizes the record. *See* Response to Finding No. 1313, incorporated herein. {

} (Seibert, Tr. 5722-23, *in camera*).

{

} (Seibert, Tr. 5723, *in camera*). {

} (Seibert, Tr. 5723, *in camera*). {

} (Gillespie, Tr. 5814 – 15, *in camera*). Gillespie has proven not to be credible and his testimony is given no weight.

{

}.” (Seibert, Tr. 5645, *in camera*).

- Respondent’s allegation in the fourth proffer that for Daramic to “retain any small amount of business from Exide in { _____ }, or thereafter” it “will only be able to obtain such sales through a { _____ }” is not accurate because Daramic _____

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel’s statement is incorrect for the reasons stated below.

1316. {

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

{

}; see also
RX01666 at 002, *in camera*; RX01667 at 002, *in camera*; RX1668 at 02, *in camera*;
RX01683 at 001, *in camera*; RX01718 at 002, *in camera*; RX01714 at 002, *in camera*).

Response to Finding No. 1316:

Complaint Counsel Finding No. 1316 is incorrect, inaccurate and incomplete. {

} (See Respondent’s Response to Finding

No. 1279). {

(RFOF 1505-1510, *in camera*). {

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

{

} (RFOF

1513, *in camera*). {

} (RX01713 at 002, *in camera*).

{

} (RX01667 at 002, *in camera*; Seibert, Tr.

5670, *in camera*). {

} (RFOF 1523, *in*

camera; Seibert, Tr. 5733-34, *in camera*). {

} (RX01668 at 002, *in camera*; Seibert, Tr. 5659-60, *in*

camera; Gillespie, Tr. 5839, *in camera*).

Moreover, {

} (Toth, Tr. 5750-51, *in camera*). {

} (RFOF 1586-92, *in*

camera). {

} (RX01714, *in camera*; Toth,

Tr. 5761-62, *in camera*).{

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

camera). {

}. (RFOF 1565-66,

in camera). {

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

} (RFOF 1528, in

camera).

1317. As recently as October 1, 2009, Daramic understood that {

} (Toth, Tr.

5749-5750, in camera). Despite that understanding, Daramic, {

}. (Toth, Tr. 5750-5751, in camera; Seibert, Tr. 5663-5664, in camera; see also RX01714 at 001-003, in camera ({

))).

Response to Finding No. 1317:

Complaint Counsel Finding No. 1317 is incomplete, inaccurate, misleading and misrepresents the evidence. (See Respondent's Response to Finding No. 1316). Again, Complaint Counsel ignores the facts that are in contrast to their position and, instead, paints an inaccurate and incomplete picture. {

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

}. (Toth, Tr. 5749-50,

in camera). {

} (Toth, Tr. 5750-51, *in camera*). Toth's testimony remains unrefuted on this fact.

{

} (RFOF 1591, *in camera*). {

} (RFOF 1592, *in camera*). {

} (RFOF 1596, *in camera*; RX01714, *in*

}

(RX01714 at 001, *in camera*). {

} (RX01714, *in camera*; Toth, Tr. 5761-

62, *in camera*). Despite Complaint Counsel's assertion, {

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

{

}.

(Seibert, Tr. 5649, 5658, *in camera*; RX01667 at 002, *in camera*; RX01668 at 002, *in camera*;

RX01669 at 002, *in camera*; RX01713, *in camera*; RX01718, *in camera*; RX01714 at 001). {

} (RX01714, *in camera*).

1318. Mr. Seibert testified at trial that Daramic has not {
}. (Seibert, Tr. 5725, *in camera*). Mr.
Seibert testified that {
}. (Seibert, Tr. 5663-5664, *in camera*).

Response to Finding No. 1318:

Complaint Counsel Finding No. 1318 is inaccurate and incomplete for the reasons stated
in Respondent's Responses to Finding Nos. 1316 and 1317, which are incorporated herein. {
}

(RFOF 1509-1510, 1517, 1519-1521, 1565, 1585-1590, *in camera*). {

} (Toth, Tr. 5750-51, *in camera*). {

} (Seibert, Tr. 5645, *in camera*; RX01693, *in camera*). {

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

1319. Mr. Seibert testified that all of the {
}. (PX5076 (Seibert, Dep. at 33-34), *in camera*).⁶ When challenged at
his deposition that Daramic had never {

} (PX5076 (Seibert, Dep. at 30-31), *in camera*).

Response to Finding No. 1319:

Complaint Counsel Finding No. 1319 is inaccurate, incomplete and misleading. {

⁶ Mr. Seibert evaded this question at trial and had to be impeached with his deposition testimony. (Seibert, Tr. 5703-5706, *in camera*).

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

} (RFOF 14;

Seibert, Tr. 5648-49, *in camera*; Toth, Tr. 5749-50, *in camera*). {

} (RFOF

1506; Seibert, Tr. 5648-49, *in camera*; Toth, Tr. 5749-50, *in camera*). {

} (Seibert, Tr.

5652, *in camera*; Toth, Tr. 5749-50, *in camera*).

{

} (PX0835, *in camera*). {

} (Seibert, Tr. 6682-83, *in camera*; RX01724, *in camera*).

Second, {

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

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

{

} (*See Respondent's Response to Finding Nos. 1317-19, in camera*).

Third, {

} (Seibert, Tr. 5645, *in camera*; see also

Respondent's Response to Finding No. 1282).

Finally, Complaint Counsel's characterization of Seibert's testimony is completely false. Seibert did not evade this, or any, question and was not impeached by any testimony. Complaint Counsel continually presented Seibert with varying hypotheticals, without any of the necessary variables, and Seibert attempted to answer Complaint Counsel to the best of his abilities.

1320. Mr. Gillespie testified that Exide has {

} (Gillespie, Tr. 5814, *in camera*). Mr. Gillespie

testified Daramic has never {

} (Gillespie, Tr. 5814,

in camera).

Response to Finding No. 1320:

Complaint Counsel Finding No. 1320 is completely incomplete and misleading for the reasons articulated in Respondent's Response to Finding No. 1313, which is incorporated herein. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, {

} (RFOF 1521, *in*

camera). {

} (RFOF 1523;

Seibert, Tr. 5733-34, *in camera*). In addition, {

} (RX01668 at 002, *in camera*; Seibert, Tr. 5659-60, *in camera*;

Gillespie, Tr. 5839, *in camera*).

- Respondent's allegation in the fourth proffer that for Daramic to "retain any small amount of business from Exide in { }, or thereafter" it "will only be able to obtain such sales through a { }" is not accurate because Daramic has not offered a { } on motive, UPS, or deep-cycle separators

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1321. Daramic has not offered {
}. (Gillespie, Tr. 5808-5810, *in camera*). Daramic has also not offered to
{

(RX01667 at 002, *in camera*).

Response to Finding No. 1321:

Complaint Counsel Finding No. 1321 is incomplete and misleading. First, Complaint Counsel relies on Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. {

} (RX01667 at 002, *in camera*).

Second, {
} (Seibert, Tr.
5645, *in camera*). {
} (See Respondent's
Response to Finding No. 1324, 1326, *in camera*). {

} (RFOF 1517, *in camera*, RFOF 1526-1527, *in camera*; RFOF 1685, 1587, 1588, 1590,
1596). {
}.

{

.} (RFOF 1503, *in camera*) ({

}, *in camera*). With respect to these separators {

} (RX01668 at 002, *in camera*; Seibert Tr. 5734, *in camera*).

1322. As evidenced in previous findings, Daramic expects to {
}. (CCFOF 1253 – 1255, 1305 -
1306). However, Daramic has never {
}. (CCFOF 1312 - 1315). To this day, Daramic has only {
}. (CCFOF 1312, 1316-1320). However,
because Daramic is {
}. (CCFOF 1321).

Response to Finding No. 1322:

Complaint Counsel Finding No. 1322 is incorrect, inaccurate and incomplete. In response to this Finding, Respondent incorporates its response to Findings Nos. 1253-1255, 1305-1306, and 1312-1320. As previously stated, {

} (See Respondent's

Response to Finding No. 1279. {

} (See Respondent's

Response to Findings No. 1279-82, 1317-19).

Second, {

}

(RFOF 1521, *in camera*). {

} (RFOF 1523, *in camera*; Seibert, Tr. 5733-34, *in camera*). {

} (RX01668, *in camera*; RX01669,

in camera, Seibert, Tr. 5659-60, *in camera*; Gillespie, Tr. 5839, *in camera*). Furthermore, {

} (See

Respondent's Responses to Finding Nos. 1317-19).

Finally, Complaint Counsel's contention that {

.} (RFOF 201, 589; RX00303, *in camera*, RX00304; RX00305; RX00306; RX00307; RX00147, *in camera*; RFOFCOL 926-76).

Further, Complaint Counsel's contention that {

}. (See Respondent's Response to Finding No. 1321).

II. Exide is not a power buyer:

- { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1323. {

} (Seibert, Tr. 5645, *in camera*).

Response to Finding No. 1323:

Finding No. 1323 is incomplete and inaccurate. {

}

(RFOF 1528; *see also* Respondent's Response to Finding No. 1280, *in camera*; RX01720, *in camera*). This conduct, {

} (RFOF 1540, *in camera*; Seibert, Tr.

5677-78, *in camera*).

1324. Daramic has been unwilling to {

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

} (Seibert, Tr. 5690, 5715, *in camera*). {

(Seibert, Tr. 5716, *in camera*). }

Response to Finding No. 1324:

Complaint Counsel Finding No. 1324 is false and completely inaccurate. {

} (RFOF 1528; *see also* Respondent's Response to Finding No. 1280, *in camera*). Gillespie's testimony to the contrary is false. Gillespie has proven not to be credible and his testimony is given no weight. One of the most poignant examples of Exide's lack of dedication to the negotiation process {

} (*See* Respondent's Response to Finding No. 1280, *in camera*). {

} (RX01687 at 003, *in camera*; Seibert, Tr. 5686-87, *in camera*). This example is just one of many exemplifying {

} (*See* Respondent's Responses to Findings No. 1279-81).

Furthermore, { } (*See* Respondent's Responses to Finding Nos. 1279-81, 1326). {

} (RFOF 1509-10, 1517, 1521, *in camera*). {

} (RX01714, *in camera*). {

} (RX01714, *in camera*). {

} (Toth, Tr. 5749-50, *in camera*; RX01714 at 002, *in camera*).

Finally, Complaint Counsel, once again, completely manipulates the hearing testimony to suit their own needs. Respondent's Counsel's objection to an improper question by Complaint Counsel, whereby Complaint Counsel abandoned that line of questioning, is not evidence of anything except Complaint Counsel's improper questioning. (Seibert, Tr. 5715-16, *in camera*).

- Daramic has refused to provide Exide {
_____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1325. Daramic has never offered {

Toth Tr. 5750, *in camera*). {
} (CCFOF 1316 – 1318, 1320;
} (Gillespie, Tr. 5814-5815, *in camera*).

Response to Finding No. 1325:

Complaint Counsel Finding No. 1325 is completely incorrect, incomplete and misleading. In response to this Finding, Respondent incorporates its response to Finding Nos. 1279-80, 1312-1318, 1320.

- Daramic's proposed {
_____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1326. Exide currently pays { } for SLI separators in North America. (Gillespie, Tr. 3018-3020, 3059, *in camera*). {

} (Gillespie, Tr. 5807-5808, *in camera*). This fact is well-known by both companies, and is the result of {

camera). { } (Gillespie, Tr. 5807, *in*

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

Response to Finding No. 1326:

Complaint Counsel's proposed finding 1326 is inaccurate and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. Second, although Complaint Counsel is correct that {

} (RFOF 530-531, *in camera*), Complaint Counsel is incorrect that {

} (RFOR 530-531, *in camera*). Complaint Counsel also ignores significant evidence from the hearing when drawing the incorrect conclusion that "{

}" The evidence is unrefuted that since the hearing record was closed on June 22, 2009, {

} (RFOF 1513, 1521, 1523, 1527, *in*

camera; RX1665 at 004, *in camera*; RX1668 at 002 *in camera*; RX1669 at 002, *in camera*).

{ }.

(RFOF 1515, *in camera*; RX01697, *in camera*).

{

}. (RFOF 1521, *in camera*). {

}. (RFOF 1523, *in camera*; Seibert, Tr. 5733-34, *in camera*). {

}. (See CCFOF 1067, *in camera*).

The evidence is unrefuted that the reason why {

Q.

A.

}. (RFOF 1502, *in camera*). {

}. (RFOF

946, *in camera*). As Bob Toth testified repeatedly on November 12, 2009, {

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

camera; see also RFOF 1567, 1575, in camera). }

}. (Seibert, Tr. 5645, in

{

}. (Toth, Tr. 5751-52, in camera).

{

} (Seibert, Tr.

5649, 5658, in camera; RX01714, in camera) and, after {

}. (Toth, Tr. 5749, in camera; Seibert, Tr. 5662-63, in

camera; RX1667-002, in camera; RX1718-002, in camera). {

}. (RX01667 at 002, in camera; RX01683, in camera; RX01713 at 003, in

camera; RX01714 at 002, in camera). As Bob Toth {

}. }

(Toth, Tr. 5754-55, *in camera*).

{

}. (RFOF 1528, 1602, 1622, *in camera*). {

} (Gillespie, Tr. 3072-73, *in camera*) {

} (*see* RFOF 559-562, 603, *in camera*), {

}. (RFOF 1517, 1526-1527, 1585, 1587, 1588, 1590, 1596, *in camera*). {

}.

(Gillespie, Tr. 3068-3070, *in camera*). {

}.

1327. Notwithstanding the fact that Exide is Daramic's {

}. (PX5076 (Seibert, Dep. at 75-76), *in camera*).

Response to Finding No. 1327:

Complaint Counsel's proposed finding 1327 is inaccurate and misleading. First, Complaint Counsel's statement that {

}. Second, the citation to Mr.

Seibert's testimony is inaccurate and incomplete as Mr. Seibert, immediately prior to his answer, began to ask Complaint Counsel if he had something specific to consider, but was cutoff and then simply responded, in that context, that he did not know the answer to the question. (Seibert, Dep. at 75-76, *in camera*). As discussed above, {

} (RFOF 1521-1523, 1527, *in camera*). {

} (Toth, Tr. 5751, *in camera*). In

addition, {

} (RFOF 1517, 1521-1523, 1526, 1527, 1587-1588, 1592-1593, *in camera*;

RX1714, *in camera*). The import here is ignored by Complaint Counsel. {

} (RFOF 1521-1523, 1526, 1527, 1587-1588, *in camera*).

- {

_____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1328. {

} (PX5076 (Seibert, Dep. at 58), *in camera*). {

} (RX01685 at 001, *in camera*)

Response to Finding No. 1328:

Complaint Counsel's Finding No. 1328 is misleading. {

} (Seibert, Tr. 5684, 5707, 5715,

5723, *in camera*; RX01685, *in camera*). {

5722, *in camera*).

} (Seibert, Tr. 5681,

{

005, *in camera*).

}.” (RX01720 at

1329. Daramic has only agreed to { }.
(Seibert, Tr. 5707, *in camera*). Mr. Seibert testified that the {

} (PX5076 (Seibert, Dep. at 58), *in camera*).

Response to Finding No. 1329:

Complaint Counsel’s Finding No. 1329 is incorrect. Compliant Counsel completely misstates the evidence on the record. Mr. Seibert in fact testified {

} (Seibert, Tr. 5707, *in camera*). Mr. Seibert also testified that {

} (Seibert, Tr. 5680, *in camera*). {

}.

1330. {

} (Toth, Tr. 5766, *in camera*; see also Seibert, Tr. 5694-5695, *in camera*).

Response to Finding No. 1330:

Compliant Counsel's Finding No. 1330 is false, misleading and ignores the evidence on the record. First, {

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

} (RFOF 1541, *in camera*).

Second, {

} (Toth, Tr. 5739, *in camera*). At that time, {

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

} (RFOF 1576-82, *in camera*). And {

}.

(Toth, Tr. 5767, *in camera*).

Finally, Complaint Counsel's suggestion that {

} defies common sense and logic. {

} (Seibert, Tr.

5681, 5722, *in camera*). {

} (RFOF 1541-42, *in camera*). {

}.

1331. Mr. Seibert testified at his deposition that Daramic has not {

} (PX5076 (Seibert, Dep. at 27), *in camera*).

Response to Finding No. 1331:

Complaint Counsel's proposed finding 1331 is inaccurate and misleading. First, {

} (PX5076 (Seibert, Dep. at 27), *in camera*). Second, Mr. Seibert

later clarified his testimony that {

} (PX5076 (Seibert, Dep. at 102-103, *in camera*);

Seibert, Tr. 5702, *in camera*). {

} (RX01719, *in camera*). Third, {

} (RFOF 1521, 1587, *in camera*; Toth, Tr. 5750-51, *in*

camera).

- Daramic has reneged on a commitment to Exide to{
}

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1332. On August 13, 2009 Mr. Seibert informed Mr. Gillespie that {
} (RX01670, *in camera*).

Response to Finding No. 1332:

Complaint Counsel's Finding No. 1332 is misleading. Mr. Seibert did {

} (RX01670, *in camera*; RFOF 1546, *in camera*).

. (RX01670, *in camera*; RFOF

1529, *in camera*).

} (RFOF 1529, *in*

). {

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

1333. Mr. Gillespie testified that in August 2009, Daramic confirmed {

{ (Gillespie, Tr. 5800, *in camera*). Later, Daramic reneged on this

5801, *in camera*).

} (Gillespie, Tr. 5800-

Response to Finding No. 1333:

Complaint Counsel's Finding No. 1333 is misleading and unreliable. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

Second, {

} (RX01693, *in camera*;

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

}.
}

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

}.
}

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

- Daramic is refusing to {
_____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1334. In recent months, Daramic has been {

} (Gillespie, Tr. 5821-5822, *in camera*). On October 20, 2009, Mr. Seibert wrote to Mr. Gillespie notifying him that

{

} (RX01693 at 002, *in camera*).

Response to Finding 1334:

Complaint Counsel’s proposed finding 1334 is inaccurate, incorrect and misleading. First, Complaint Counsel cites only Gillespie’s opinion to support the first sentence of its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support the first sentence of this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support the first sentence of this proposed finding with any credible evidence. Second,

{

}. (RFOF 1529, *in camera*). {

}. (RFOF 1529, *in*

camera). {

}. (RFOF 1529, *in camera*). {

}. (RFOF 1531, 1533, *in camera*). {

} (RFOF 1529, 1533, 1535, *in camera*).

{ } (RFOF 1534, 1535, *in camera*). On top of that, {

} (RFOF 1541, *in camera*). {

} (RX01693, *in camera*;

RX01685, *in camera*; RX01679, *in camera*; RFOF 1544, 1545, *in camera*), {

} (RFOF 1546-

1547, *in camera*). {

} (RFOF 1546, *in camera*). {

} (RFOF 1542, *in camera*; RX01723 at 002 (

))). {

} (RFOF 1533, *in camera*). {

}.

(RFOF 1542, *in camera*; RX1693, *in camera*). {

} (Tr. 5886, *in camera*). The evidence adduced at the hearing demonstrates that {

} (RFOF 1517-1519, 1526, 1570, 1575, 1587, *in camera*). Bob Toth's uncontradicted testimony that {

} (Toth, Tr. 5746, *in camera*; see also RX01712 at 002 (“{ }”), *in camera*).

1335. {

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

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

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

Response to Finding No. 1335:

Complaint Counsel's proposed finding 1335 is inaccurate, incorrect and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. Second, {

} (RX01723 at 002, *in camera*; Gillespie, Tr. 5836, *in camera*),

and {

}. (RFOF 1533, 1542, *in*

camera). Gillespie's vague assertion that {

}. (RX01726; RX01723 at 002, *in camera*).

Third, Complaint Counsel's statement that {

}. (*See* Respondent's Response to Finding No. 1334). {

}. (RFOF 1542, *in camera*). {

}. (RFOF 1547, *in camera*; RX01693,

in camera; RX01681, *in camera*). {

}.
}

(RFOF 1548, *in camera*; RX01681, *in camera*; RFOF 1541, *in camera*).

Finally, Complaint Counsel's proposed finding suggesting that {

Tr. 5867, *in camera*)(emphasis added). Gillespie's testimony is contradicted by substantial evidence in the record. The evidence in the record demonstrates that {

}.” (Gillespie,

}. (RX01687, *in camera*).

{

}. (RX01670, *in camera*;

RX01671, *in camera*; Seibert, Tr. 5674-5677, *in camera*; Seibert, Tr. 5714, *in camera*).

{

}, (Seibert, Tr. 5675, *in*

camera), {

}, (RX01717, *in camera*), and then {

}. (RFOF 1529, *in camera*). {

}:

- RX01671, *in camera* ({
- RX01685, *in camera* ({

});

}.");

- RX01679, *in camera* ({

}."); and

- RX01680, *in camera* ({

}.").

{

}. (Seibert, Tr. 5685-86, *in camera*; RX01714, *in camera*; RX01687, *in camera*; RX01597, *in camera*). As set forth above, {

}. Complaint Counsel's proposed finding is not true.

Moreover, Gillespie's testimony is directly contradicted by the facts, leading this Court to once again find Gillespie not to be a credible witness.

1336. Daramic's refusal to {

} (Gillespie, Tr. 5805, *in camera*). Daramic is the only one of Exide's 15,000 suppliers that has

{ } (Gillespie, Tr. 5822, *in camera*).
Daramic's refusal to {

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

Response to Finding No. 1336:

Complaint Counsel's proposed finding 1336 is inaccurate, incorrect and misleading. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. Second, {

}." (RX01693 at 002, *in camera*; RFOF 1535-1537, 1541-1542, *in camera*). {

}. (RX01693 at 002, *in camera*; RFOF 1604, *in camera*; Gillespie, Tr. 5869-70, *in camera*). {

}. (RFOF 1526, 1574-1575, 1600, *in camera*; Seibert, Tr. 5691, *in camera*).

- Daramic has reneged on {

_____}

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1337. In September 2009 Daramic had agreed to {

} (RX01685 at 001, *in camera*).

Response to Finding No. 1337:

Complaint Counsel's Finding No. 1337 is misleading and incorrect. {

} (RX01693, *in camera*; RX01680, *in camera*;

RX01685, *in camera*; Seibert, Tr. 5681, 5684, *in camera*). {

} (Seibert, Tr. 5684, 5707, 5715,

5723, *in camera*; RX01685, *in camera*).

{

} (RX01685, *in*

camera). (Seibert, Tr. 5676-77, 5732, *in camera*). Mr. Seibert's email states:

{

}

(RX01685, *in camera*). {

}

(RX01685, *in camera*).

{

}. (Siebert, Tr. 5684-85, *in camera*; Gillespie, Tr. 5840-

41, *in camera*; RX01681, *in camera*). {

}. (Gillespie, Tr. 5840, *in camera*). {

}.

1338. However, by October 20th, when {

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

Response to Finding No. 1338:

Complaint Counsel's Finding No. 1338 is incorrect and misleading. {

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

} (RX01685, *in camera*).

} (Siebert, Tr. 5684-85, *in camera*; Gillespie, Tr.
5840-41, *in camera*; RX01681, *in camera*). {

} (Gillespie, Tr. 5840, *in camera*).

{

}.
}

Complaint Counsel's proposed suggestion that {

} is incorrect and misrepresents Gillespie's testimony to this Court.
Gillespie's actual testimony was that {

} (Gillespie, Tr. 5867, *in camera*)(emphasis added). Gillespie's testimony is contradicted by substantial evidence in the record. The evidence in the record demonstrates that {

} (RX01687, *in camera*).

} (RX00976, *in camera*, PX0728, *in camera*).

{

} (RX00976, *in camera*). {

} (PX0728, *in camera*).

1339. { } (Gillespie, Tr. 5801, *in camera*). In response to the question whether Daramic would give {

(Seibert, Dep. at 71-72), *in camera*). } (PX5076

Response to Finding No. 1339:

Complaint Counsel's Finding No. 1339 is misleading. In further response, Respondent incorporates its response to Finding Nos. 1337-38.

- { _____ }

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1340. {

} (Gillespie, Tr. 5829, *in camera*). Mr. Gillespie testified that Exide expects to {

5826, *in camera*).

} (Gillespie, Tr. 5825-

Response to Finding No. 1340:

Complaint Counsel's Finding No. 1340 is incomplete, repetitive and misleading, and draws a false conclusion. For its response to this finding, Respondent incorporates its responses to Finding Nos. 1249-57. Further, it is also telling that Complaint Counsel relies solely on the testimony of Gillespie to support its finding. Gillespie's testimony is not credible and should be given no weight. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence.

- Daramic has threatened {

}

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1341. During discussions about a {

(Gillespie, Tr. 5817-5818, *in camera*). Mr. Gillespie understood Mr. Bryson's comment to be {

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

Response to Finding No. 1341:

Complaint Counsel Finding No. 1341 is incorrect, incomplete, misleading and not supported by any viable evidence. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Gillespie has proven not to be credible and his testimony is given

no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel fails to support this proposed finding with any credible evidence. There is no documentation to support Gillespie's statements.

Furthermore, {
}. (Gillespie, Tr. 5818, *in camera*). There is absolutely no evidence
to support the contention that {
} Gillespie's testimony of {

.} (Gillespie, Tr.
5850, *in camera*; see also Respondent's Response to Finding Nos. 1281, 1294, 1315, *in camera*).

{
} (Seibert, Tr. 5652, *in camera*; Toth, 5747-49, 5772, *in camera*). {

}

1342. Exide believes that {
} (Gillespie, Tr. 5829-5830, *in camera*). Mr. Gillespie testified that if
Exide were {

} (Gillespie, Tr. 5818, 5829, 5867, *in camera*).

Moreover, Exide's industrial battery manufacturing facilities accounted for more than 35% of Exide's net sales in its most recent quarter. (RX01726 at 006, 015).

Response to Finding No. 1342:

Complaint Counsel's Finding No. 1342 is inaccurate and misleading. Again, Complaint Counsel cites only Gillespie's testimony to support the first two sentences of its proposed finding. Gillespie has proven not to be credible and his testimony should be given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence to attempt to support this assertion. Complaint Counsel has introduced no documents of this alleged threat and relies solely on Gillespie's statement that such threat occurred, thus this finding should be disregarded in its entirety. Complaint Counsel also did not call Mr. Bryson to the stand when faced with Gillespie's lack of credibility.

First and foremost, { }
set forth in Complaint Counsel's proposed finding. The record is clear that {

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

}.
}

(Gillespie, Tr. 5817-5818, *in camera*; Response to Finding Nos. 1281, 1315, *in camera*).

{ }.

(Toth, Tr. 5739-44, 5749-51, *in camera*).

Further, {

}. (RFOF 1503, *in camera*; Gillespie, Tr. 5855-56, *in camera*). Moreover, this finding also completely ignores the undisputed evidence that {

}. (RFOF 1552, *in camera*; RX01687 at 002, *in camera*). {
}

{

}. (RFOF 1552, *in camera*).

Finally, the last sentence of this proposed finding is misleading because it considers Exide's worldwide net sales, rather than Exide's net sales in North America (which is the geographic region alleged by Complaint Counsel). Exide's Form 8-K dated November 5, 2009 demonstrates that Exide's net sales of industrial products in the Americas accounts for less than 9% of its total net sales for its most recent quarter. (RX01726 at 015).

- Daramic is attempting to {
_____}

The foregoing is not a proposed finding of fact and as such no reply is necessary. To the extent a reply is warranted, Respondent states that Complaint Counsel's statement is incorrect for the reasons stated below.

1343. Daramic has attempted to link any {
}. (Gillespie, Tr. 5819, *in camera*).
Polypore's general counsel explained to Mr. Gillespie that Daramic's reasoning for linking the {

} (Gillespie, Tr. 5820, *in camera*). Exide

understood from these comments that Daramic was attempting to {

} (Gillespie, Tr. 5820, *in camera*).

Response to Finding No. 1343:

Complaint Counsel Finding No. 1343 is inaccurate. First, Complaint Counsel cites only Gillespie's testimony to support its proposed finding. Complaint Counsel did not call Mr. Bryson as a witness, even when faced with Gillespie's lack of credibility. Gillespie has proven not to be credible and his testimony is given no weight. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Given the multitude of written proposals that were exchanged between Exide and Daramic during recent months, it is especially telling that Complaint Counsel cites to no documentary evidence to support their position in this finding.

{

} (Toth, Tr. 5752, *in camera*; see also Respondent's Response to Findings Nos. 1267-71, 1277, *in camera*).

1344. As the above findings indicate Exide is not a power buyer. {

} (CCFOF 1326
- 1327). Moreover, Daramic's refusal to provide Exide {
} (CCFOF 1320, 1325), along with Exide's inability to
{
} (CCFOF 1317,
1324); its inability to have {
} (CCFOF 1328 - 1330, 1332
- 1336); its inability to have {
} (CCFOF 1337 -
1339); its inability to {
} (CCFOF 1256, 1340); its inability to {
} (CCFOF 1341 - 1342); and its inability to {

} (CCFOF 1343), all indicate that Exide is not a power buyer.

Response to Finding No. 1344:

Complaint Counsel's proposed finding 1344 is inaccurate, incorrect and misleading for the reasons previously stated in Response to Proposed Finding Nos. 1317, 1324, 1326-1130, 1332-1339, 1256, and 1340-1343, which are incorporated herein. As previously stated, to the extent Complaint Counsel cites to Gillespie's testimony to support its proposed finding, Gillespie has proven not to be credible and his testimony is given no weight. Moreover, it is telling that Complaint Counsel offers no credible evidence from Exide to attempt to support its findings. Complaint Counsel introduced no exhibits to support this proposed finding even though it had ample opportunity to do so. Complaint Counsel called no witness from Exide, other than Gillespie, to offer evidence at this hearing. Noticeably absent was Gordon Ulsh, Exide's CEO. Complaint Counsel has failed to support its proposed findings with credible evidence from Exide.

While it is not necessary to reiterate all of the inaccuracies in Complaint Counsel's proposed finding, which this finding for some odd reason summarizes, certain points bear mentioning. First, {

}. (See

Respondent's Response to Finding Nos. 1326-27, 1313). As much as Complaint Counsel would like to ignore the facts, the evidence shows that {

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

{

} . (RFOF 1535, 1541-1542, *in camera*; RX01723 at 002, *in camera*; Gillespie, Tr. 5836-37, *in camera*). {

} . (RFOF 1541, *in camera*).
{

}, (RFOF 1529, 1539-40 *in camera*), and {
}, (RFOF 1549, *in camera*), {
}. (RX01704, *in camera*;
RX01668 at 002, *in camera*). {
}, (RFOF 1540, *in camera*;
Gillespie, Tr. 5849, *in camera*), or {

}. (RFOF 1061-1122, *in camera*). {

} (RFOF 1528, 1597, 1599, 1601-1602, *in camera*). {
}

III. Other (Credibility):

1345. At trial, when Mr. Seibert was asked {
} (Seibert, Tr. 5701, *in camera*). At his deposition, Mr. Seibert gave the following testimony:

(PX5076 (Seibert, Dep. at 27), *in camera*).

Response to Finding No. 1345:

Complaint Counsel's proposed finding 1345 is incomplete and misleading. Both in the deposition and at the hearing on November 12, 2009, Mr. Seibert attempted to clarify his testimony on the subject of {
}. First, in his deposition, while the categorically broad, and hence vague, question was posed to him of whether {
}" (PX5076; Seibert, Dep. at 27, *in camera*). He went on to clarify {

(PX5076 (Seibert Dep. 102-103), *in camera*).

{

}. (RX01719, *in camera*). {

}. (RX01719, *in camera*). At the hearing, {

}. (Seibert, Tr. 5702, *in camera*.) Mr. Seibert's testimony has been accurate throughout and unrefuted. It bears noting that Complaint Counsel, despite having ample opportunity to do so, did not produce any evidence to contradict Mr. Seibert's testimony. Complaint Counsel did not call { } at the hearing on November 12 to

rebut any of Mr. Seibert's testimony. As such, Mr. Seibert's testimony is unrefuted and Complaint Counsel's suggestion that Mr. Seibert's testimony is not credible is rejected.

1346. Mr. Seibert testified in his deposition that he had not {
}. (PX5076 (Seibert, Dep. at 27), *in camera*). The deposition began at 12:51 pm at the offices of Parker Poe on October 27. (PX5076 (Seibert, Dep. at 3), *in camera*). At the end of the deposition, after a lengthy break and under redirect, Mr. Seibert testified that {
}. (PX5076 (Seibert, Dep. at 102), *in camera*). In his deposition testimony, Mr. Seibert made no mention of {
}. At trial, Mr. Seibert testified that {
} (Seibert, Tr. 5703, *in camera*). Mr. Seibert's testimony at trial, that he had communicated at his deposition that Daramic had {
}. (Seibert, Tr. 5703, *in camera*; PX5076 (Seibert, Dep. at 102), *in camera*).

Response to Finding No. 1346:

Complaint Counsel's proposed finding 1346 is inaccurate, incorrect and misleading. As discussed in response to Finding No. 1345, which is incorporated herein, Mr. Seibert clarified the testimony that he gave earlier in the day at his deposition to vague questioning. In clarifying his testimony, Mr. Seibert testified that {
}. (PX5076 (Seibert, Dep. at 102-103), *in camera*).
Mr. Seibert's testimony was accurate. {
}. (RX01719, *in camera*). {
}. (RX01719, *in camera*). Complaint Counsel, despite having ample opportunity to do so, did not produce any evidence to contradict Mr. Seibert's testimony. Complaint Counsel did not call {
} at the hearing on November 12 to rebut any of Mr. Seibert's testimony. As such, Mr. Seibert's testimony is unrefuted and Complaint Counsel's suggestion that Mr. Seibert's testimony is not

credible is rejected. In addition, Complaint Counsel's statement regarding a "lengthy break" and the suggestion of some impropriety are wholly unsupported by any evidence and completely baseless.

1347. When Respondent produced its exhibits to Complaint Counsel it included a letter from {

}.

(RX01719, *in camera*). The timing of this letter, {

} is extraordinarily suspicious. (RX01719, *in camera*; Seibert, Tr. 5703, *in camera*).

Response to Finding No. 1347:

Complaint Counsel's proposed finding 1347 is inaccurate, incorrect and misleading. First, as discussed in responses to Finding Nos. 1345 and 1346, which are incorporated herein, Mr. Seibert did not "alter" his testimony at his deposition. Rather, Mr. Seibert offered clarification of his prior answer given the vagueness created by Complaint Counsel's questioning, which he is certainly entitled to do. The fact that {

} (PX5076 (Seibert, Dep. at 102-103), *in camera*). {

} (RX1719, *in camera*). There is nothing "suspicious" about these events, and Complaint Counsel's opinion in this regard, as with their other views of this case, is without any basis and must be disregarded. Again, the fact that Complaint Counsel chose not to call {
} to the stand at the hearing speaks loudly to the complete lack of any validity to their charge.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9327

IN THE MATTER OF
POLYPORE, INTERNATIONAL, INC.

COMPLAINT COUNSEL'S
PROPOSED CONCLUSION OF LAW

Most of Complaint Counsel's proposed conclusions of law are verbatim repetitions of conclusions of law that were filed at the conclusion of the initial hearing. Most of Complaint Counsel's proposed conclusions of law consist of erroneous statements of legal principles to which Respondent has already responded and to which no additional response is necessary. Some of Complaint Counsel's proposed conclusions of law are actually erroneous factual conclusions some of which require supplementary responses.

Respondent's responses to Complaint Counsel's proposed conclusions of law are as follows:

1348. A *prima facie* violation of Section 7: (1) the "line of commerce" or product market; (2) the "section of the country" or geographic market; and (3) the transaction's probable effect on concentration in the product and geographic markets. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

Response to Conclusion of Law No. 1348:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 10 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 10.

1349. Finding a *prima facie* violation of Section 7 creates a rebuttable presumption of anticompetitive effects and shifts the burden of going forward with evidence to Respondent. Respondent have the burden of producing evidence that shows that the market share statistics supporting the *prima facie* case give an inaccurate account of the acquisition's probable effects on competition. *Baker Hughes*, 908 F.2d at 982-83; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998).

Response to Conclusion of Law No. 1349:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 11 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 11.

1350. The appropriate lines of commerce within which to evaluate the probable competitive effects of the acquisition are separators for flooded lead-acid batteries in the following markets: (1) deep-cycle; (2) motive; (3) Automotive (“SLI”); and (4) uninterruptable power supply stationary (“UPS”).

Response to Conclusion of Law No. 1350:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 12 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 12.

1351. The appropriate geographic area within which to evaluate the probable competitive effects of the acquisition is North America.

Response to Conclusion of Law No. 1351:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 13 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 13.

1352. A merger that significantly increases market shares and market concentration beyond already high levels is so inherently likely to lessen competition substantially that it is presumptively unlawful under Section 7 of the Clayton Act. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (U.S. 1963); *Baker Hughes*, 908 F.2d at 982-83; *PPG*, 798 F.2d at 1502-03; *Cardinal Health*, 12 F. Supp. 2d at 52 (“under Section 7 of the Clayton Act, a prima facie case can be made if the government establishes that the merged entities will have a significant percentage of the relevant market - enabling them to raise prices above competitive levels”).

Response to Conclusion of Law No. 1352:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 14 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 14.

1353. The Herfindahl-Hirschman Index (“HHI”) is an appropriate measure of market concentration. *E.g.*, *University Health*, 938 F.2d at 1211 n.12 (HHI is “most prominent

method” of measuring market concentration); *FTC v. Staples*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997); *Ivaco*, 704 F. Supp. at 1419.

Response to Conclusion of Law No. 1353:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 15 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 15.

1354. Complaint Counsel established its *prima facie* case by showing that the acquisition produces a firm controlling a percentage share and HHI concentration levels in each of the four relevant markets that make the merger inherently likely to lessen competition substantially, which means that the merger is presumptively unlawful under Section 7 of the Clayton Act. *Brown Shoe*, 370 U.S. at 343.

Response to Conclusion of Law No. 1354:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 16. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 16. Respondent supplements its original response as follows: the proposed conclusion is false as to the alleged SLI market because any percentage shares and HHI concentration levels have not been revised or formulated to take into account changes in this data shown by the evidence introduced at the Reopened Hearing on November 12, 2009.

1355. Complaint Counsel established that Daramic and Microporous were the number one and two competitors in the deep-cycle, motive, and UPS markets and that no other company provides effective competition. Complaint Counsel established that Microporous was at least the third best alternative for customers in the SLI market. The acquisition of Microporous by Daramic significantly increased concentration in the relevant product markets in North America, and resulted in highly concentrated markets.

Response to Conclusion of Law No. 1355:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 17 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 17.

1356. Having established a *prima facie* case, the burden of production and proof shifts to the defendants to rebut this presumption of anticompetitive harm. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (U.S. 1974); *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83. “The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.” *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). Respondent has not demonstrated that the market share statistics give an inaccurate prediction of the acquisition's probable effects on competition. “To meet their burden, the defendants must show that the market-share statistics . . . ‘give an inaccurate prediction of the proposed acquisition’s probable effect on competition.’” *Cardinal Health*, 12 F. Supp. 2d at 54 (quoting *Staples*, 970 F. Supp. at 1083); see *Baker Hughes*, 908 F.2d at 991.

Response to Conclusion of Law No. 1356:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 18 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 18.

1357. The power buyer argument is not itself independently adequate to rebut a *prima facie* case. *Chicago Bridge & Iron Co. N.V.*, 534 F.3d 410, 440 (5th Cir. 2008); *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 61 (D.D.C. 1998).

Response to Conclusion of Law No. 1357:

The unqualified proposition stated here is false because it is not accepted or followed by all courts. The court relied only on the fact of power buyers in *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400 (S.D. Iowa 1991) in determining that post-acquisition the industry was vigorously competitive because of the impact of powerful buyers. The court held similarly in *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990) when it found that the large buyers could purchase product outside the relevant geographic market area. In *FTC v. R.R. Donnelley & Sons Co.*, 1990 WL 193674 at 4 (D.D.C. 1990), although the court found that the FTC had failed to establish a viable product market, it said that “the evidence demonstrates that even if these customers constituted a separate market, their own size

and economic power, and the other characteristics of the ‘market’ make any anti-competitive consequences very unlikely.”

1358. The presence of powerful buyers can be considered “along with other such factors as the ease of entry and likely efficiencies.” *Chicago Bridge & Iron Co. N.V.*, 534 F.3d 410, 440 (5th Cir. 2008) (quoting *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 58 (D.D.C. 1998)).

Response to Conclusion of Law No. 1358:

Of course, the presence of powerful buyers “can” be considered along with other factors. Indeed, Respondent has produced evidence of many other “factors” in this case, which show that the acquisition has not had and will not have any tendency to lessen competition substantially. Those factors are dealt with in Respondent’s proposed findings of fact submitted earlier and listed in Respondent’s response to Complaint Counsel’s proposed conclusion of law number 23. The bigger issue is the one provoked by Complaint Counsel’s proposed conclusion of law number 1357: whether the presence of powerful buyers alone can rebut a prima facie case or demonstrate that a merger or acquisition would be unlikely to lessen competition substantially? As noted in Respondent’s response to Complaint Counsel’s proposed conclusion of law number 1357, courts have held that the presence of powerful buyers can alone be an adequate defense.

1359. The presence of multiple supply alternatives is a critical factor in establishing the applicability of a power buyer argument.

Response to Conclusion of Law No. 1359:

This proposed conclusion of law, for which no authority is cited, is false and irrelevant to the facts of this case. Respondent has produced evidence in this case to show that there are powerful buyers of PE separators who demand competitive markets, that there are many suppliers of PE separators in the global market and that entry barriers (including barriers to sponsored entry) are low. In light of these facts, any proposed conclusion of law that focuses on

an absence of “multiple supply alternatives” is irrelevant. Respondent has submitted many proposed findings of fact bearing on these issues, which are identified in Respondent’s responses to Complaint Counsel’s proposed conclusions of law numbers 13, 19, 20, 23 and in Respondent’s proposed findings of fact, numbers 1500 - 1623.

1360. In order to show precompetitive impact of power buyers Respondent must show that buyers continually play suppliers off against one another to establish a defense. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1419 (S.D. Iowa 1991).

Response to Conclusion of Law No. 1360:

This proposed conclusion of law is false and it is not supported by the decision in Archer-Daniels-Midland. Although the court noted that buyers generally “play suppliers off against one another,” it entered no holding that such was necessary “to show [the] precompetitive [sic] impact of power buyers.” Moreover, in many of the other cases that have recognized and applied the “power buyer” defense, no such requirement has been imposed. United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990); FTC v. R.R. Donnelley & Sons Co., 1990 WL 193674 at 3 (D.D.C. 1990); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 674 (D. Minn. 1990). It is quite evident that powerful buyers in an industry can induce suppliers to offer competitive prices and other terms without “playing” suppliers “off against each other.” Moreover, the evidence in this case shows that {

} . Respondent references and incorporates here its proposed findings of fact relating to these matters, including numbers 306-311, 469 - 485 and 1500 – 1623.

1361. When the presence of powerful customers with the ability to protect themselves from anticompetitive price increases has been established, the presence of smaller, less

powerful customers in the relevant market invalidates a power buyer defense. *United States v. United Tote*, 768 F.Supp.1064 (D. Del. 1991); *FTC v. Cardinal Health*, 12 F.Supp. 2d 34, 40 (D.D.C. 1998).

Response to Conclusion of Law No. 1361:

This proposed conclusion of law is false. The court in the Tote case identified some 109 small purchasers (768 F. Supp. at 1085) and in Cardinal Health, the court believed there may have been 27,000 independent pharmacies who were unlikely to be considered power buyers. 12 F. Supp.2d at 60. The court in United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1416 (S.D. Iowa 1991) recognized the power buyer defense despite the fact that it believed there were approximately 1000 soft drink bottlers who purchased HFCS. By contrast, in the instant case, there are few customers (no more than five) in North America that purchase SLI separators. This proposed conclusion of law is false, however, because the courts that have applied the power buyer defense have done so notwithstanding the existence of small customers. United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1416 (S.D. Iowa 1991); United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990); FTC v. R.R. Donnelley & Sons Co., 1990 WL 193674 at 3 (D.D.C. 1990); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 674 (D. Minn. 1990).

1362. The presence of small buyers undermines a power buyer argument unless the smaller purchasers possess similar bargaining power to their larger counterparts, with a demonstrated ability to negotiate “meaningful discounts” from suppliers in the relevant market. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1419 (S.D. Iowa 1991).

Response to Conclusion of Law No. 1362:

This proposed conclusion of law, which appears to be an attempt to isolate and describe one aspect of one case, is false. The court in Archer-Daniels-Midland found that customers generally negotiated prices and terms with suppliers; that some customers did not “play one

supplier off against another,” apparently believing that they received nonprice benefits; that other customers were protected by suppliers believing the Robinson-Patman Act prevented them from engaging in price discrimination; and that still other buyers received benefits by entering into tolling arrangements with suppliers and forming cooperatives to enter into such arrangements. 781 F. Supp. at 1419-20. Thus, the Archer-Daniels-Midland court identified various ways, in addition to the ability to negotiate meaningful discounts, in which buyers protected themselves in the HFCS market. Other cases that have recognized and applied the power buyer defense have not imposed a requirement that smaller buyers be shown to have the ability to negotiate meaningful discounts from suppliers in the relevant market. United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990); FTC v. R.R. Donnelley & Sons Co., 1990 WL 193674 at 3 (D.D.C. 1990); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 674 (D. Minn. 1990). Moreover, the record in this case shows that the few purchasers of SLI separators in North America in addition to {
}. Respondent references and incorporates here its proposed findings of fact relating to these matters, including numbers 734 – 859 and 1500 – 1623. (*See also* RX01719, *in camera*).

1363. The validity of the power buyer argument depends, in part, on the ability of the large buyers to “directly affect the market price” of the input or product in question. *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1416 (S.D. Iowa 1991).

Response to Conclusion of Law No. 1363:

This proposed conclusion of law is false because, once again, it is apparently an attempt to focus merely on one aspect of a particular case. As noted above in response to Complaint Counsel’s proposed conclusion of law number 1362, the court in Archer-Daniels-Midland took notice of many ways in which smaller buyers were protected. Any such conclusion of law would make no sense. Thus, in the instant case, a small number of SLI separator customers in North

America individually negotiate price and other terms for relatively long-term supply contracts for a differentiated product. These circumstances are completely different from those in Archer-Daniels-Midland where 1000 or more customers bought a homogeneous product for which a “market price” would be expected. The power buyer defense has been recognized and applied in other cases that did not require a showing that large buyers were able to directly affect the market price. United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990); FTC v. R.R. Donnelley & Sons Co., 1990 WL 193674 at 3 (D.D.C. 1990); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 674 (D. Minn. 1990). Respondent references and incorporates here its response to Complaint Counsel’s proposed conclusion of law number 1362.

1364. Respondent has not demonstrated that it is constrained by power buyers.

Response to Conclusion of Law No. 1364:

This proposed conclusion of law, which is actually a proposed conclusion of fact, is unsupported and false. Respondent has proffered many proposed findings of fact {

} . Respondent

references and incorporates here its proposed findings of fact relating to these facts, 306 – 311, 469 – 485 and 1500 – 1623, and RX 01719, *in camera*.

1365. Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight. *In re Chi. Bridge & Iron Co. N.V.*, 139 F.T.C. 553, 583 n.97 (F.T.C. 2005); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) (“Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.”); *B.F. Goodrich Co.*, 110 F.T.C. 207, 341 (1988).

Response to Conclusion of Law No. 1365:

This proposed conclusion of law is misleading because, when combined with Complaint Counsel's proposed conclusion of law number 1366, it concludes that a defendant or respondent would never be able to offer a defense in a post-consummation merger case because all of its evidence would be rejected as having been the subject of manipulation. Respondent acknowledged in Respondent's Post-Trial Brief for Reopened Hearing at pp. 20-21 that post-acquisition evidence may be rejected or given little weight if it is determined that it was the result of manipulation. However, Respondent also pointed out there that "several decisions have relied on post-acquisition evidence to determine that the acquisition had no anticompetitive effect. See e.g., United States v. Int'l Harvester Co., 564 F.2d 769, 778 (7th Cir. 1977)(the evidence showed "intensification in competition since [the acquisition]"); Lektro-Vend. Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981)(post acquisition evidence showed that "Vendo's [the acquiring company] post-acquisition shares and profits dramatically declined"); Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974)(post-acquisition evidence showed that defendant lost money and market share); United States v. Falstaff Brewing Corp., 383 F.Supp. 1020 (D.R.I. 1974)("post-acquisition evidence showed that competition remained intense and that the acquired company's profits and market share declined after the geographic extension merger." 660 F.2d at 276).

1366. The events, transactions, and evidence presented by Respondent are subject to manipulation by it. This evidence is entitled to little or no weight.

Response to Conclusion of Law No. 1366:

This proposed conclusion of law, which is actually a proposed conclusion of fact, is both false and ludicrous. By this proposed conclusion, Complaint Counsel would apparently consign *all* of Respondent's evidence, including the evidence presented at the main hearing and at the

November 12 hearing, to the trash bin. Respondent believes that it can safely assume that the court will not be tempted to adopt any such sweeping and draconian recommendation. Moreover, the main focus of the November 12 hearing was on the extent to which {

}.

It must surely be clear to all, except apparently to Complaint Counsel, that these events were not “manipulated” by Respondent. While litigation strategies may have their place, {

}.

Respondent references and incorporates here its proposed findings of fact relating to these facts, numbers 306-311, 469 - 485 and 1500 – 1623.

1367. Respondent has not produced any significant evidence rebutting the presumption of a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Because Respondent did not produce evidence sufficient to rebut the presumption of a violation of Section 7 of the Clayton Act, the burden of producing further evidence of anticompetitive effects did not shift to Complaint Counsel.

Response to Conclusion of Law No. 1367:

This is a verbatim duplication of Complaint Counsel’s original conclusion of law number 23 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel’s original conclusion of law number 23.

1368. Although Complaint Counsel is not required to prove the existence of actual anticompetitive effects resulting from the merger, such evidence, either in the form of unilateral post merger price increases or coordinated interaction, negates any attempt to rebut the FTC’s *prima facie* case, and independently establishes a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Conclusion of Law No. 1368:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 24 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 24.

1369. The Acquisition violates Section 7 of the Clayton Act because "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. The Acquisition also constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

Response to Conclusion of Law No. 1369:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 29. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 29. Respondent supplements its original response as follows: Respondent references and incorporates herein its responses to Complaint Counsel's proposed conclusions of law numbers 1348 – 1378.

1370. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2008).

Response to Conclusion of Law No. 1370:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 30 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 30.

1371. Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

Response to Conclusion of Law No. 1371:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 31 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 31.

1372. Prior to the Acquisition, Daramic engaged in monopolistic conduct and/or attempts to monopolize, which constituted unfair methods of competition in violation of Section 5 of the FTC Act.

Response to Conclusion of Law No. 1372:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 39 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 39.

1373. To meet its burden of proof under Count III of the Complaint, Complaint Counsel may establish an offense of monopolization or attempted monopolization patterned on standards of liability under Section 2 of the Sherman Act. *Cement Inst.*, 333 U.S. at 694.

Response to Conclusion of Law No. 1373:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 40 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 40.

1374. Complaint Counsel makes out a *prima facie* case of monopolization, and gives rise to a presumption of violation, by demonstrating two elements: 1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

Response to Conclusion of Law No. 1374:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 41 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 41.

1375. Complaint Counsel makes out a *prima facie* case of attempted monopolization, and gives rise to a presumption of violation, by demonstrating four elements: 1) that the defendant possesses monopoly power, and 2) has engaged in predatory or anticompetitive conduct with 3) a specific intent to monopolize, and 4) a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951).

Response to Conclusion of Law No. 1375:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 42 to which no supplemental response by Respondent is necessary. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 42.

1376. Daramic's anticompetitive conduct meets the standards of liability for monopolization or attempted monopolization under Section 2 of the Sherman Act, and constitutes a violation of the FTC Act.

Response to Conclusion of Law No. 1376:

This is a virtually verbatim duplication of Complaint Counsel's original conclusion of law number 52. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 52, provided that in incorporating its earlier response, Respondent amends that response so that whenever the word, "exclusionary," is used, it be deemed to be "exclusionary or anticompetitive." Respondent also supplements its earlier response to incorporate herein its responses to Complaint Counsel's proposed conclusions of law numbers 1348 – 1378.

1377. Complaint Counsel met its burden of proof in support of Count I, Count II, and Count III of the Complaint.

Response to Conclusion of Law No. 1377:

This is a verbatim duplication of Complaint Counsel's original conclusion of law number 53. Respondent references and incorporates its response to Complaint Counsel's original conclusion of law number 53. Respondent also supplements its earlier response to incorporate

herein its proposed findings of fact, numbers 1500 – 1623, and its responses to Complaint Counsel’s proposed conclusions of law numbers 1348 – 1378.

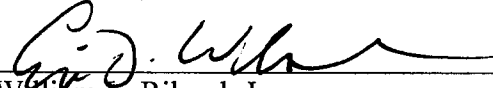
1378. Divestiture is the appropriate and natural remedy. *In re Chi. Bridge & Iron Co.*, 138 F.T.C. 1024, 1161 (F.T.C. 2005). “The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.” *United States v. E.I. du Pont de Nemours and Co.*, 366 U.S. 316, 329 (1961). Divestiture is “simple, relatively easy to administer, and sure. It should always be in the forefront of a court’s mind when a violation of § 7 has been found.” *Du Pont*, 366 U.S. at 330-1.

Response to Conclusion of Law No. 1378:

This is essentially a duplication of Complaint Counsel’s original conclusions of law numbers 54, 55 and 56. Respondent references and incorporates its responses to Complaint Counsel’s original conclusions of law numbers 54, 55 and 56. Respondent also supplements its earlier response as follows: “Divestiture . . . is a harsh remedy which should not be ordered without an opportunity for the presentation and consideration of less drastic alternative forms of relief appropriate to remedy the antitrust violation.” *Kennecott Coper Corp. v. Curtiss-Wright Corp.*, 449 F. Supp. 951, 968 (S.D.N.Y.), *aff’d in part and rev’d in part*, 584 F.2d 1195 (2d Cir. 1978); “[D]ivestiture is a severe remedy that is to be avoided when other forms of injunctive relief can adequately protect against further anticompetitive conduct without the same degree of economic dislocation.” *International Travel Arrangers v. NWA, Inc.*, 1990 U.S. Dist. LEXIS 11723 at 9 (D. Minn. 1990). Where divestiture is necessary, it should be applied only to the assets involved in production in the market where a violation of Section 7 of the Clayton Act was found. *United States v. Waste Management, Inc.*, 588 F. Supp. 498, 514 (S.D.N.Y. 1983)(total divestiture requested by the FTC rejected; divestiture limited to Dallas assets where a violation found since no violation found in Houston).

Dated: December 11, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2009, I caused to be filed one copy via electronic mail delivery and an original and two copies via hand delivery of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law on Reopened Hearing* [PUBLIC], and that a paper copy with an original signature is being filed with:

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

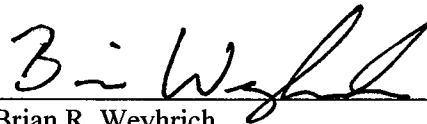
I hereby certify that on December 11, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand delivery of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law on Reopened Hearing* [PUBLIC] upon:

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

I hereby certify that on December 11, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing *Respondent's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law on Reopened Hearing* [PUBLIC] upon:

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