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ANDERSON, Circuit Judge:

Polypore International appeals the Federal Trade Commission's decision

finding a violation of § 7 of the Clayton Act and or an

The much smaller Microporous (formerly known as Amerace) manufactured pure rubber battery separators (called Flex-Sil) for use in deep-cycle batteries and a line of rubberized PE-based separators (CellForce) for use in motive batteries. Microporous did not yet actually sell in the SLI battery market although for several years they had been investigating entry into that market. Microporous operated one plant in Piney Flats, Tennessee, and constructed one in Feistritz, Austria, which was not yet operational and was intended to serve European customers. Microporous had also purchased equipment for another production line that the parties refer to as the "line in boxes" and which constituted some of th Ò thàdy

for motive batteries. Entek and Daramic alone competed in the SLI market, with Entek controlling 52% of sales to Daram

Daramic responded to this information by convincing JCI to enter into a long-term supply contract by suggesting that it would cut off supply to JCI's European facilities if JCI declined Daramic's long-term contract. Microporous in fact ran sample SLI separators for JCI in 2003 and 2004, and obtained for its product the status of "qualified" by JCI. For other reasons, however, JCI ultimately entered into a contract with Entek. Micro wit

reduce prices if it did not acquire Microporous. Indeed, Daramic froze its 2009 prices because of fear about Microporous. One battery producer, EnerSys, used Microporous's prices in the motive market as leverage to bring down Daramic's prices, succeeding in that effort in 2004. Polypore was also concerned that it would lose EastPenn's business if it did not act.

The president of Daramic put Microporous on the top of his list of potential acquisitions to "eliminate price competition." The 2008 budget predicted that it could increase the prices of CellForce and Microporous's industrial products if it did acquire Microporous. Microporous was in the process of expanding its production capacity in both North America and Europe, constructing a new plant in Feistritz, Austria, with two PE lines that could produce either motive or SLI battery separators. Its plan was to shift production of its motive battery separators for European customers to Austria so that it could increase that production for domestic customers in the United States. A March 2005 memo from the Daramic head of sales to the CEO warned that Microporous's plans for expansion into a second line would result in a loss of customers for Daramic. Through the next two years, the threat of Microporous's expansion was the subject of numerous memoranda, and acquisition was discussed as a means to avoid costly competition.

The Commission issued an administrative complaint on September 9, 2008.

Specifically relevant to the issues in this appeal, the FTC charged that Polypore's acquisition of Microporous may substantially lessen competition or tend to create a monopoly for several types of battery separators, in violation of § 7 of Clayton Act.[2] After a four-week hearing, the ALJ issued an extensive opinion holding that the acquisition was reasonably likely to substantially lessen competition in four relevant markets. It ordered the divestiture of all acquired assets, including the plant in Austria. Polypore appealed the decision to the Commission, which issued a comprehensive opinion affirming the decision for three of the relevant markets – SLI, motive, and deep-cycle – but not for the fourth, UPS batteries. Thus, it issued a modified divestiture order. On appeal, Polypore argues that the Commission erred when it employed the Philadelphia National[3] presumption to find that Polypore had illegally merged to a duopoly in the SLI market. It also asserts that the Commission erred when it found one market for both Microporous's and Polypore's deep-cycle battery separators, and that Entek would not enter the motive battery separator market. Finally, Polypore challenges the Commission's inclusion

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[2] The complaint also charged Polypore with entering into an unlawful joint marketing agreement with Hollingsworth & Vose, in violation of § 5 of the FTC Act, and that Daramic monopolized the alleged relevant markets, in violation of § 5, by executing contracts with large customers that would preclude or deter Microporous from competing effectively. The ALJ found against Polypore on the first count but against complaint counsel on the second. Neither decision was appealed to the Commission.

[3] United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715 (1963).

of Microporous's Austrian plant in the divestiture order.

III. DISCUSSION

A. SLI Separators

Polypore argues th

"elaborate proof of market structure, market behavior, or probable anticompetitive effects." Id. at 363, 83 S. Ct. at 1741. Instead, the Coerranti

tentative agreement with Pacific Northwest was terminated. The Court held that the acquired company was shown to have been a substantial factor in the California market: "Though young, it was prospering and appeared strong enough to warrant a 'treaty' with El Paso that protected El Paso's California markets.–@

purchased a new one that could produce the SLI separators. It had begun discussions with several companies and had produced a sample product satisfactorily for at least one large customer. It had even submitted quotes and entered into memoranda of understanding with another large customer. Both Polypore and El Paso certainly considered the companies that they acquired to be competitive threats. Both companies lowered their prices and gave other concessions in response to their customers' dealings with the acquired companies. Polypore began to discuss the possibility of acquiring Microporous to eliminate competition and developed the MP Plan to remove Microporous as a competitive threat not only in the deep-cycle market but also in the SLI market. As the Court stated in El Paso, the Clayton Act is about probabilities and not certainties. Polypore clearly viewed Microporous as a serious threat and sought to acquire it to eliminate that threat.

We conclude that the facts of the instant case are sufficiently similar to those in El Paso such that it guides our decision in this case. In both cases, the pre-acquisition relevant market was highly concentrated.[5] In both cases, the acquisition ensured a continuation of the high concentration and eliminated the decrease in

[5] El Paso supplied more than 50% of the gas consumed in California and was the only out-of-state provider. Here, Daramic controlled 48% of the SLI market to Entek's 52%, and one battery producer testified that the two did not act as competitors.

concentration that would result from the acquired company's entry into the market. In both cases, the pre-acquisition market activity by the acquired company – although resulting in no actual sales – had a substantial, actual pro-competitive effect on the market.[6] In both cases, the perception by the acquiring company of the competitive threat posed by the acquired company provided additional evidence of the acquired company's competitive presence.[7] Indeed, the instant case is stronger for the government than was El Paso in that here, there was additional evidence that Polypore increased SLI prices following the acquisition.

As noted above, in concluding that the acquisition may substantially lessen competition in the SLI market, the Commission applied the Philadelphia National presumption. Polypore's primary challenge to the Commission's application of the presumption is that the Commission erred by treating Microporous as an actual competitor, rather than using the potential competitor analysis. Although we have noted that the instant case seems very close in principle to El Paso, it is true that the

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[6] In El Paso, Pacific Northwest's dealings with the utility customer caused El Paso to depart from its previous offer of interruptible supply and offer the utility a long-term contract for firm deliveries and at lower prices. In the instant case, Microporous's dealings with East Penn caused Polypore to make price concessions to East Penn. Similarly Microporous's overture to JCI caused Polypore to seek a longer term contract.

[7] See Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983) ("Evidence of intent is highly probative . . . because knowledge of intent may help the court to interpret the facts and to predict consequences.") (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244 (1918)).

correctly found that the merger substantially lessened competition and violated § 7 of the Clayton Act.[12]

B. Deep-Cycle Separators

Polypore argues that its product and Microporous's product for deep-cycle batteries were not close competitive substitutes and so should not be considered part of the same product market. Polypore cites United States Anchor Manufacturing, Inc. v. Rule Industries, Inc., 7 F.3d 986, 995-99 (11th Cir. 1993), where we held that if customers perceive a significant quality difference between the products, especially where there is a wide disparity in price, the court will treat the products as being in separate markets. Polypore argues that Microporous's pure rubber separators were recognized as being superior in deep-cycle applications and that customers were wi

qualified Daramic HD for use and another exclusively used Microporous's product. Ninety percent of the market was in Microporous's hands and accounted for most of Microporous's sales.

"Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." U.S. Anchor, 7 F.3d at 995 (quotations and citations omitted). As such, it is a factual question that we review for clear error. United States v. s of busine

Here, the Commission based its finding on the switch of several battery producers from Flex-Sil to Daramic HD. Daramic HD increased its share of the market, at Flex-Sil's expense, from 3.8% in 2005 to 10.6% in 2007. The Commission specifically cited the switch by U.S. Battery and Exide, with the latter using both Flex-Sil and Daramic HD in its golf cart batteries, which make up 80% of its sales. Significantly, the Commission also pointed to the successful threat by three companies to switch to Daramic HD to avoid a price increase by Microporous. If the two brands were not interchangeable, the threat would not have been successful. There is also evidence that Microporous considered the two competitors: in its own pre-acquisition assessment of its value to Polypore, Microporous noted that Polypore would gain complete control of the deep-cycle separator market if the acquisition occurred.

There is ample evidence to support the Commission's finding that there was only one market for deep-cycle battery separators. Several of the battery producers used both products in their deep-cycle batteries and used the presence of Daramic HD to bring down Microporous's prices. While the industry recognized that Flex-Sil, being a pure rubber separator, was superior, it was willing to substitute Daramic HD when it could in order to keep prices lower. Thus, although there were distinct prices, there were not distinct customers. The products were used for

Although Entek was approached by both Exide and

there was excess production capacity at the Tennessee plant. Finally, Polypore argues that the Commission did not explain why an Asian or European separator manufacturer would not be fully satisfied with just the North American facility, which would satisfy its need for a foothold in North America.

The Commission has broad discretion in the formulating of a remedy for unlawful practices. Jacob Siegel Co. v. FTC, 327 U.S. 608, 611, 66 S. Ct. 758, 760 (1946). Here, the Commission did not abuse its discretion when it ordered the divestiture of the Austrian plant. The Commission reasoned that the Austrian plant needed to be divested to restore the competition eliminated by the acquisition and provide the acquirer with the ability to compete. Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 1149 (1972) ("The relief in an antitrust case must be 'effe

supply local customers, which in turn made Microporous a more effective competitor. These are all reasonable considerations such that we will not disturb the order.[13]

IV. CONCLUSION

For the reasons stated above, we conclude that the Commission is due to be affirmed. The Commission did not err when it treated the acquisition as a horizontal merger, found that there was a single market for deep-cycle separators, determined that Entek would not enter the motive market, and included Microporous's Austrian plant in its divestiture order.

AFFIRMED .

[13] Polypore argues in its reply brief that the divestiture order should have contained a "safety valve," like that found in Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008), which permitted the exclusion of certain assets in the divestiture order if the acquirer and the monitor trustee both found them unnecessary. However, Polypore neither raised this issue before the Commission nor in its initial brief so the issue is waived. See Nerdlus v. Denny's, Inc., 628 F.3d 1270, 1297 (11th Cir. 2010) (initial brief); Cotherman v. FTC, 417 F.2d 587, 591-92 (5th Cir. 1969) (exhaustion before the FTC).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Clerk of Court

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July 11, 2012

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 11-10375-EE
Case Style: Polypore International, Inc. v. Federal Trade Commission
Agency Docket Number: FTC 9327

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against petitioner.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in