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Eleventh Circuit Upholds FTC Order Dissolving Consummated Combination of Battery Separator Producers

Jeffrey May (Wolters Kluwer) · Thursday, July 12th, 2012

More than four years after Polypore International Inc. acquired rival battery separator manufacturer Microporous Products L.P., the U.S. Court of Appeals in Atlanta has determined that the transaction was anticompetitive. The appellate court yesterday upheld a December 2010 opinion of the Federal Trade Commission, which held that the that the merger of the two producers of battery separators—membranes placed between the positive and negatively-charged plates in batteries to prevent electrical short circuits—for flooded lead-acid batteries was illegal in three of the four North American markets identified in the agency's complaint.

FTC Complaint

According to the FTC's 2008 complaint, the consummated transaction led to decreased competition and higher prices in several North American markets for battery separators, a key component in flooded lead-acid batteries. The four markets identified were: (1) deep-cycle separators for batteries used primarily in golf carts; (2) motive separators for batteries used primarily in forklifts; (3) automotive separators used in car batteries; and (4) uninterruptible power supply (UPS) separators used in batteries that provide backup power in the event of power outages.

Each of the relevant product markets defined in the complaint are types of battery separators — membranes that are placed between the positive and negative plates of flooded lead-acid batteries. The separators are essentially porous electric insulators that prevent electrical short circuits while allowing ionic current to flow through the separators and between the positively and negatively charged lead plates of the battery.

Deep-cycle separators are made of either rubber or a blend of rubber and PE, and are a necessary component that enables the batteries to be frequently exhausted and then recharged. They are used primarily in golf carts and floor scrubber batteries. Motive separators are made of PE, a blend of rubber and PE, or sometimes polyvinylchloride (PVC), and are used mainly in forklift batteries. Automotive separators are made of PE and are used in cars for starter, lighter, and ignition (SLI) power. UPS separators are made of PE, as well as a blend of rubber and PE. They are used in batteries that supply uninterruptible power to critical data centers and buildings in the event of a power outage. The complaint also alleges an alternative market for all PE battery separators.

The complaint stated that Polypore's acquisition of Microporous left only two flooded-lead acid battery separator companies in North America, Polypore and Entek International, LLC and that

Entek operates only in the automotive separator market. In addition, before the acquisition Polypore and Microporous were competitors in each relevant market, and Microporous was uniquely situated to compete with Polypore for North American customers due to its location and the breadth of product offerings.

The complaint contended that Polypore and Microporous were direct competitors in the deep-cycle battery separator market and that the acquisition was a merger to monopoly in that market. Similarly, the companies were direct competitors in the motive separator market, and because they were the only firms in the North American market, the merger also led to a monopoly in that market. Polypore and Entek are direct competitors and the only companies selling SLI separators in North America, and competition between them continues. However, at the time of the acquisition, Microporous was preparing to enter the automotive separator market, a market in which Microporous had successfully manufactured and sold products in the past, and the merger eliminated this actual and potential competition.

Commission Analysis

The appellate court concluded that the Commission correctly analyzed the acquisition as a horizontal merger. The Commission applied a traditional burden-shifting framework in reviewing the merger. It decided that the transaction reduced competition in three of the relevant markets — SLI, motive, and deep-cycle – but not for the fourth, UPS batteries.

The appellate court rejected Polypore's argument that the Commission should not have applied a presumption of illegality and should not have treated Microporous as an actual competitor in the SLI market. Polypore unsuccessfully argued that the Commission should have used only the potential competition doctrine, and not the presumption of *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 83 S. Ct. 1715 (1963), because Microporous had not entered the SLI market at the time of the acquisition.

"To overcome the *Philadelphia National* presumption, Polypore would need to show that the merger to duopoly did not have an anticompetitive effect," according to the court. "This it cannot do."

The court also ruled that the Commission did not err when it held that Polypore had not shown that Entek was a participant in the motive battery market or that it had plans to enter it to counteract any anticompetitive effects of the merger to monopoly in that market. In addition, the court found that there was ample evidence to support the Commission's finding that there was only one market for deep-cycle battery separators. Polypore had argued that its product and Microporous's product for deep-cycle batteries were not close competitive substitutes and so should not have been considered part of the same product market.

Divestiture Order

The court also upheld the Commission's divestiture order. Polypore had questioned whether the FTC should have included Microporous's Austrian plant in its divestiture order. The company argued that the relief was beyond the authority of the agency, noting that the Commission had specifically limited the relevant markets to North America and held that battery separator producers outside of North America did not compete here.

According to the court, the FTC had broad authority in fashioning relief and justified 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,” the court explained.

The July 11 decision is *Polypore International, Inc. v. FTC*, No. 11-10375.

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