

IN THE
Supreme Court of the United States

POLYPORE INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In judging the competitive effects of an acquisition under section 7 of the Clayton Act, 15 U.S.C. § 18, is it proper to review the transaction as a combination of two current competitors and to apply the presumption of liability announced in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), instead of applying the more exacting standards that govern mergers of potential competitors, where, prior to the acquisition, the acquired company had a zero share of the relevant market, had no firm orders or contracts to supply the relevant product, and had neither determined to enter nor formulated an approved business plan to enter the relevant market?

2. What legal standards properly govern potential competition cases under section 7 of the Clayton Act?

3. In crafting a remedy for alleged competitive harms under section 7 of the Clayton Act, may the Federal Trade Commission order the unconditional divestiture of a production plant that was not in operation at the time of the acquisition and that was never intended to serve the relevant markets in which the alleged harms were found?

RULE 29.6 STATEMENT

Petitioner Polypore International, Inc. is a publicly traded company. Petitioner has no parent corporation, and no publicly traded company has a ten-percent or greater stock ownership interest in petitioner.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a-21a, is published at 686 F.3d 1208 (2012). The Final Order and Opinion of the Federal Trade Commission, Pet. App. 22a-170a, is unpublished. The Initial Decision of the Administrative Law Judge, Pet. App. 171a-830a, is unpublished.

JURISDICTION

The Federal Trade Commission (“FTC” or “Commission”) exercised jurisdiction pursuant to 15 U.S.C. §§ 44 & 45. The Commission’s Final Order and Opinion issued on November 5, 2010, and was served on petitioner on November 29, 2010. The Eleventh Circuit had jurisdiction over the appeal under 15 U.S.C. § 45(c). The court of appeals entered its judgment on July 11, 2012. Pet. App. 1a. A petition for rehearing was denied on October 17, 2012. Pet. App. 831a-832a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The questions presented involve the application of section 7 of the Clayton Act, 15 U.S.C. § 18, which provides in pertinent part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any

part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

INTRODUCTION

This case presents three important issues arising under section 7 of the Clayton Act: (1) the distinction between mergers of current competitors and mergers of potential competitors (*i.e.*, firms that do not compete in a particular relevant market at the time of the merger but may compete at some point in the future); (2) the application of section 7 to mergers of potential competitors; and (3) the limits of the FTC's authority to order divestiture remedies for alleged violations of section 7. In each of these areas, fresh guidance from this Court is required to resolve disarray in the lower courts.

First, as exemplified by the decision of the Eleventh Circuit below, there is substantial confusion in the courts of appeals concerning how to distinguish mergers of current competitors, which this Court has held are subject to rules of presumptive illegality, from mergers of potential competitors, which this Court has held are subject to far more exacting legal standards. This confusion is due to the inconsistent characterization by this Court of its own decision in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), which the Court last addressed nearly 40 years ago in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

With respect to the largest and most important market at issue in this case, the Eleventh Circuit held that the merging companies were properly treated as current competitors at the time of the transaction, even though the acquired company had zero share of the relevant market before the acquisition, had no firm orders or contracts to supply the relevant product to any customers, and had neither determined nor formulated an approved business plan to enter the relevant market. Indeed, the last word from the acquired company's board of directors on the question was a memorandum instructing the company's CEO not to enter the relevant market without express approval from the board. No such approval was ever given.

In nonetheless treating the companies as current competitors, the Eleventh Circuit held controlling this Court's nearly 50-year-old precedent in *El Paso*, which it viewed as involving a merger of current competitors. The court of appeals was influenced by this Court's subsequent statement in *Marine Bancorporation* describing *El Paso* as a case involving the merger of two "actual," not "potential," competitors. Viewed in light of more recent jurisprudence, however, including decisions that conflict with the Eleventh Circuit's approach here, *El Paso* is more properly characterized as a case involving the combination of potential competitors and subject to the potential competition doctrine.

But based on its view that the merging parties were current competitors in the most important product market at issue, the court of appeals (like the FTC) placed dispositive reliance on the burden-shifting presumption of liability established by this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963)—an

evidentiary shortcut that this Court reserves for mergers of current competitors that result in a significant increase in concentration in the relevant market. The court of appeals relied on the *Philadelphia National Bank* presumption of liability here even though this Court did not apply the presumption in the *El Paso* case, decided just one year after *Philadelphia National Bank*, and has not applied the presumption in any case involving the merger of potential competitors. In relying on the presumption of liability in a case where the acquired company had a zero share of the relevant market, had neither determined to enter nor had an approved plan to enter the relevant market, and, at best, had some undetermined probability of potentially competing at some point in the future, the court of appeals' decision stands in stark conflict with decisions of this Court and of other circuits.

The present petition offers an ideal opportunity for this Court to undertake a fresh examination in this area and to provide much-needed clarification for the lower courts on how to distinguish between mergers of current competitors and mergers of potential competitors.

Second, this case presents a good opportunity to resolve the conflicts long dividing the courts of appeals over the legal standards that govern the analysis of so-called potential competition cases under section 7, where the claim is that the effect of the merger may be substantially to lessen competition even though at the time of the merger there was no competition between the merging firms in the relevant market. Evidently recognizing the weakness of its primary conclusion that this case involved a merger of current competitors in the largest product market at issue, the Commission added

a cursory footnote to its Final Order and Opinion (well after the conclusion of the agency's administrative trial) purporting for the first time to analyze the transaction, in the alternative, as a merger of potential competitors. Polypore challenged this alternative ruling as legally and factually deficient before the court of appeals. While the Eleventh Circuit incorrectly held that this case involved a merger of current competitors and therefore saw no need to address potential competition doctrine, the Commission's alternative analysis brings into stark focus the doctrinal conflicts that have long infected this area of section 7 law. If Polypore is correct that the challenged transaction must be analyzed as a combination of potential competitors with respect to the key product market at issue, this case presents a well-suited vehicle for this Court to resolve these long-simmering conflicts, which also have resulted from a lack of guidance from this Court.

Finally, the Eleventh Circuit created yet another conflict with decisions from other courts of appeals when it upheld the FTC's overly broad divestiture order. Even though all the competitive harm alleged to result from the acquisition was confined to North America, and the FTC specifically found that producers outside North America were not effective alternative suppliers for North American customers, the agency nevertheless ordered the divestiture of a production plant located in Feistritz, Austria, that had never produced the relevant products at the time of the acquisition and was constructed to serve only customers in Europe, not in North America. In affirming the unconditional divestiture of this out-of-market facility, the Eleventh Circuit abdicated the responsibility to provide meaningful review of FTC remedial orders, as required by this Court's precedents and consistently applied by other circuits.

STATEMENT

At issue in this case is the FTC's antitrust challenge to the consummated acquisition of Microporous Products L.P. ("Microporous") by petitioner Polypore International, Inc. ("Polypore" or "petitioner"). Following an administrative trial, the Commission concluded that the challenged acquisition violated section 7 of the Clayton Act in one or more relevant markets. Pet. App. 38a-95a.¹ The Commission ordered Polypore to divest all of the acquired assets of the former Microporous. Pet. App. 98a.

A. Factual Background

1. At the time of the acquisition, Polypore and Microporous each manufactured a variety of "battery separators," which are membranes installed between the positive and negative plates in flooded lead-acid batteries to prevent short circuits and to regulate the flow of electrical current between the plates. Pet. App. 191a.

Through its "Daramic" business unit, Polypore primarily made pure polyethylene, or "PE," battery separators for use in automotive and "motive power" batteries. *Id.* at 198a; *see id.* at 26a-27a. Automotive batteries—also known as starter-lighter-ignition, or "SLI," batteries—are used in cars, trucks, buses, boats, and jet skis; while "motive power" batteries are used in

1. Polypore's acquisition of Microporous closed on February 29, 2008. Because it did not meet the size thresholds specified under the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, the transaction was not subject to the HSR pre-closing notice and waiting-period requirements.

mobile industrial machines, such as forklifts and mining equipment. *Id.* at 26a. Daramic also made a much smaller volume of latex-coated PE-based separators for more specialized “deep-cycle” batteries, which are used mostly in golf carts and floor scrubbers. *Id.* At the time of the transaction, Daramic operated two production plants in the United States and five overseas in Europe and Asia. *Id.* at 25a.

The acquired firm, Microporous, was much smaller than Daramic. It manufactured pure rubber battery separators for use exclusively in deep-cycle batteries and a line of rubberized PE-based separators primarily for motive power applications. *Id.* at 27a-28a. It did not manufacture or supply any pure-PE battery separators or any separators for use in SLI batteries. *See id.* At the time of the acquisition, Microporous operated one plant in Piney Flats, Tennessee, and had constructed a plant in Feistritz, Austria, which was not yet operational but was intended to serve only customers in Europe. *Id.* at 27a. Microporous had also purchased equipment for an additional production line (a so-called “line in boxes”) for installation at either Piney Flats or Feistritz. *Id.*

2. In challenging the acquisition under section 7, the FTC alleged (and the Commission ultimately found) that SLI battery separators, motive power battery separators, and deep-cycle battery separators constituted separate relevant product markets. *Id.* at 32a-33a. The FTC further alleged (and the Commission found) that for purposes of analyzing competitive effects under section 7, the geographic scope of each of these three relevant markets was limited to North America. Only sales to customers in North America from separator manufacturing plants

located in North America were relevant to the Commission's analysis. *See id.* at 43a-60a.² The Commission concluded that no separator plants outside North America could effectively supply the relevant markets because of cost and quality issues. *Id.* at 59a.

3. Of the three relevant markets found by the Commission, the North American market for SLI battery separators was by far the largest and most significant, amounting to three-quarters of all the commerce at issue. *Id.* at 27a n.7 (citing Finding 261). According to the FTC, prior to the acquisition, Polypore accounted for around 48 percent of sales in this alleged market, while its primary competitor, a company called Entek, accounted for the remaining 52 percent. *Id.* at 61a. The Commission specifically found that Microporous had zero share of the SLI market. *Id.*; *see id.* at 311a-312a.

Microporous also had no approved plan to enter the SLI market. The FTC produced evidence indicating that Microporous had considered producing separators for automotive battery makers and had preliminary discussions with such customers, but these discussions never came to fruition. Microporous had no firm orders or contracts to supply pure PE or SLI separators prior to the acquisition. *See id.* at 635a (citing Finding 691), 411a, 637a (citing Findings 715, 720 and 721). Moreover, Microporous's board of directors did not approve of the

2. The FTC staff initially also claimed that the acquisition violated section 5 of the FTC Act, 15 U.S.C. § 45, but both the administrative law judge and the Commission applied only the legal standards of section 7, *see* Pet. App. 38a-43a; *id.* at 555a, and section 7 was the only basis for liability before by the Eleventh Circuit, *id.* at 2a.

company's developing PE battery separators for SLI applications. In fact, in a memorandum sent in November 2007, the Microporous board instructed the company's CEO that he was not to commit Microporous to an SLI separator business without express approval from the board. *See* Pet. App. 835a-836a ("[T]he Board does not endorse a pure PE growth strategy competing head-to-head with large competitors (*i.e.*, Daramic, Entek). ... [A]ny ... exceptions must be approved by Board on a case-by-case basis."). There is no evidence in the record that the board ever gave that approval.

B. Proceedings Below

1. The FTC's allegations were tried before an administrative law judge ("ALJ"), who ruled in favor of the FTC. *Id.* at 34a.³ With respect to the largest relevant market at issue, the SLI market, the ALJ found that Microporous was a current competitor at the time of the acquisition. *See id.* at 643a. On the basis of this and other findings, the ALJ ordered Polypore to divest all of the acquired Microporous assets, including the Feistritz plant. *Id.* at 36a. The order required the unconditional divestiture of the Feistritz facility, even though the FTC alleged and the ALJ found that (1) Microporous had been an effective competitor throughout its existence without ever operating the Feistritz plant, (2) all relevant markets were limited to battery separators produced at plants in North America and sold to customers in North America, and (3) the Feistritz plant had never produced battery

3. The ALJ made three other rulings, *see* Pet. App. 36a, none of which was raised before the Eleventh Circuit or is at issue in this petition.

separators and was constructed to serve only customers in Europe. *See id.* at 24a, 96a-105a.

2. On appeal, the Commission concluded that the acquisition violated section 7 in the three relevant markets, and it affirmed the unconditional divestiture order. *Id.* With respect to the key market for SLI battery separators, the Commission agreed with the ALJ that the acquisition should be analyzed as a merger of two current competitors. *Id.* at 65a. On that basis, the Commission then took the crucial further step of relying on the presumption of liability that this Court held in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), applies only to mergers that produce a significant increase in concentration in the relevant market. *See* Pet. App. 75a (concluding that the evidence was sufficient “to create a presumption that the merger was ... unlawful in the SLI market”). Thus, the Commission shifted the burden to petitioner to rebut the presumption that the acquisition would have anticompetitive effects in the SLI market, and the Commission concluded that petitioner failed to meet that burden. *Id.* at 85a (concluding that Polypore “failed to rebut the strong presumption of likely [anticompetitive] effects in a merger to duopoly in the SLI market”).

Unlike the ALJ, the Commission on appeal felt the need to add a short footnote to its opinion stating an alternative conclusion for the SLI market based on potential competition doctrine (in other words, assuming that Microporous was not actually a current competitor in the SLI market but only a potential future entrant). *See id.* at 75a-76a n.41.

3. The Eleventh Circuit upheld the Commission's decision and order. In doing so, the court, like the Commission, analyzed the acquisition as a merger of two current competitors in the SLI market. *See* Pet. App. 8a-16a. The Eleventh Circuit held that this Court's decision in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), involved a merger of current competitors and was so "similar to the instant case" that it compelled the legal conclusion that Microporous must be treated as a current competitor in the SLI market at the time of the acquisition. Pet. App. 10a. Like the Commission, the court also placed dispositive reliance on the *Philadelphia National Bank* presumption of liability. *See id.* at 13a-16a. Unlike the Commission, however, the court concluded that because the case involved a merger of current competitors and was resolved by application of the *Philadelphia National Bank* presumption, there was no need to apply the alternative potential competition doctrine. *Id.* at 16a n.12.

The Eleventh Circuit also approved the Commission's divestiture remedy in its entirety. In doing so, the court failed to reconcile the fundamental disconnect between the order mandating unconditional divestiture of a European plant that was not in operation at the time of the acquisition and that was constructed only to serve customers located in Europe, and the fact that all the harm found by the Commission was strictly limited to competition for customers in North America from production facilities located in North America. *See id.* at 20a-21a. The court also neglected to acknowledge the tension that this decision creates with the decisions of other courts of appeals.

REASONS FOR GRANTING THE PETITION

The Court should grant review to bring much-needed clarity to the legal line that distinguishes mergers of current competitors from mergers of potential competitors, as well as the proper circumstances for application of the *Philadelphia National Bank* presumption of liability. The Court should also grant review to dispel the longstanding confusion dividing the courts of appeals over the legal standards that govern potential competition cases. Finally, this Court should grant review to resolve a conflict between the courts of appeals over the limits of the Commission's authority in crafting divestiture remedies for violations of section 7.⁴

4. The court of appeals also upheld the Commission's rulings that the acquisition would produce competitive harms in the alleged North American markets for deep-cycle and motive power battery separators, but those rulings, which are not separately challenged in this petition, cannot provide an independent basis to support the Commission's order. In affirming the ALJ's liability determination and approving the divestiture order, the Commission considered all of the competitive effects of the transaction taken as a whole and recognized that the alleged market for SLI separators (of which Microporous had a zero share) accounted for three-quarters of all the sales at issue. *See* Pet. App. 12a-13a n.7; *see also id.* at 97a (reasoning that because the agency had established liability in all "three of the relevant markets" found by the Commission, "any doubts as to remedy should be resolved in favor of broader relief"). There is therefore no basis in the record to conclude that the Commission's liability analysis or divestiture order would have been the same without consideration of the all-important SLI market. At a minimum, invalidation of the Commission's conclusions with respect to SLI competition would necessitate a new hearing for petitioner on overall liability.

A. Review Should Be Granted to Resolve Confusion About the Distinction Between Mergers of Current Competitors and Mergers of Potential Competitors and the Proper Application of the *Philadelphia National Bank* Presumption of Liability.

At the time of the acquisition, Microporous was, at most, a potential entrant into the SLI market. It was not making or selling separators for SLI batteries, had no firm offers or contracts to supply such separators, had not determined to enter this market, and had no approved business plan to enter. Nevertheless, the Eleventh Circuit treated Microporous as a current competitor in the SLI market in mistaken reliance on this Court's opinion in *El Paso*, 376 U.S. 651. *See* Pet. App. 10a-13a. The court then compounded the consequences of this error by applying the presumption of liability that this Court held in *Philadelphia National Bank* is reserved for mergers of current competitors that significantly increase concentration in a relevant market. *See* Pet. App. 13a-16a.

These misguided holdings betray the lower courts' confusion caused by a lack of guidance from this Court, which last addressed the distinction between current and potential competitors and the scope of the potential competition doctrine in 1974. A key source of that confusion is this Court's own misleading characterization of the *El Paso* case, which the Eleventh Circuit specifically relied upon here. *See* Pet. App. 13a.

1. In *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), this Court recognized that there is an essential legal distinction between mergers of current

competitors and mergers of potential competitors. Because of the high degree of speculation required to predict the circumstances in which future competition might be affected by the elimination of a firm not competing in the relevant market at the time of the merger, the Court has imposed a heavier burden of proof to establish a claim under section 7 of the Clayton Act in potential competition cases than in mergers of firms that are current competitors at the time of the merger. The Government must prove three essential elements: (1) the relevant market is “substantially concentrated”; (2) the potential entrant has the “characteristics, capabilities, and economic incentive” to render it a perceived potential *de novo* entrant; and (3) the potential entrant’s premerger presence on the fringe of the relevant market “in fact tempered oligopolistic behavior on the part of existing participants in that market.” *Id.* at 624-25.

Under *Marine Bancorporation*, no presumption or other evidentiary shortcuts can establish the required elements of a potential competition claim. Instead, there must be substantial direct evidence that the premerger presence of the potential entrant on the edge of the market has had a significant current procompetitive influence on the behavior of the firms in the market. See *Tenneco, Inc. v. FTC*, 689 F.2d 346, 355 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499, 509 (2d Cir. 1980).⁵

5. See also 5 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1126h, at 92 (3d ed. 2009) (hereinafter “Areeda & Hovenkamp”) (“The threat of entry might influence present market occupants to behave more competitively than they otherwise would, but the circumstances in which that would occur are limited and perhaps exceptional. *Actually proving such an effect is extremely difficult.*”) (emphasis added).

2. Unfortunately, at the same time it was emphasizing the critical doctrinal importance of distinguishing mergers of current competitors from mergers of mere potential competitors in *Marine Bancorporation*, the Court spawned confusion concerning the legal line that divides these two distinct categories of section 7 cases when it described its earlier opinion in *El Paso* as “an actual-competition rather than a potential-competition case,” 418 U.S. at 623. But as this Court recognized in other decisions later echoed by lower courts, the transaction addressed in *El Paso* is more correctly viewed as a combination of potential competitors, not a merger of current competitors, and that conclusion is supported by the later development of the potential competition doctrine.

In *El Paso*, the Government challenged El Paso Natural Gas Co.’s acquisition of Pacific Northwest Pipeline Corp. on the ground that the effect of the acquisition may be substantially to lessen competition in the sale of natural gas in California. At the time of the acquisition, Pacific Northwest was a large interstate supplier of natural gas that operated in several States at the edge of the relevant geographic market, but, unlike its acquirer, El Paso, Pacific Northwest did not yet supply any customers in California. *See id.* at 661.

The Court’s opinion suggests that Pacific Northwest (in stark contrast with Microporous in the present case) had already made the decision to enter the relevant market (California), had adopted an approved plan to enter, and was actively setting that plan into motion. The Court emphasized that Pacific Northwest had made offers to serve customers in California, had entered into

contracts to obtain the necessary volume of gas needed to supply California customers, and had made preliminary arrangements to distribute gas in California. *See id.* at 660-61. Furthermore, Pacific Northwest had entered into contracts with the acquiring company, El Paso, governing their respective rights to serve customers in and around California. *See id.* at 653-59. Based on these factors, the Court concluded that Pacific Northwest was “shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso.” *Id.* at 658; *see also id.* at 654-55 (noting that Pacific Northwest had entered into a preliminary supply contract with one of El Paso’s substantial customers, compelling El Paso to make significant price and delivery concessions in order to retain that customer).

But all these factors are hallmarks of a potential competitor poised to enter from the fringe of the relevant market, not a current competitor already participating in the market. Moreover, at the time of the acquisition, Pacific Northwest was not in a position to supply gas to customers in California in the very near future because to do so would have required negotiating a major long-term delivery contract, obtaining regulatory approval from the Federal Power Commission, and constructing pipeline connections into California (none of which had yet occurred). *See id.* at 653-54, 657-60 (describing the high entry barriers in the natural gas market). Thus, in analyzing section 7 liability, the Court in *El Paso* expressly focused on the effect that Pacific Northwest had had “merely as a *potential competitor* in the California market.” *Id.* at 659 (emphasis added).

Consistent with that understanding, this Court referred to *El Paso* as a potential competitor case in two subsequent decisions. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964) (describing *El Paso* as a case “where a corporation sought to protect its market by acquiring a potential competitor”); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 536 n.13 (1973) (citing *El Paso* as a case about the “loss of a pro-competitive on-the-fringe influence”). See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 586 (1967) (Harlan, J., concurring) (citing *El Paso* as a case involving “the exclusion of what would promise to be an important independent competitor from the market”).

In later recharacterizing *El Paso* as “an actual-competition rather than a potential-competition case” in *Marine Bancorporation*, the Court was striving to distinguish *El Paso* from the case before it, which involved a merger of banks prohibited by state law from expanding into each other’s territories, see 418 U.S. at 609-10. The Government in *Marine Bancorporation* had “dropped all allegations concerning actual competition” between the banks and was pleading only the prospective loss of potential competition, *id.* at 614-15, but the Court concluded that the Government’s various theories of potential competition failed to account for the state law constraint, which prevented the acquiring bank from opening new branches in the relevant geographic market (Spokane, Washington). See *id.* at 632-41. “[I]t must be assumed,” the Court reasoned, that bankers in Spokane were aware of this regulatory barrier, and thus it was “improbable” that the acquiring bank had “exert[ed] any meaningful procompetitive influence over Spokane banks by ‘standing in the wings.’” *Id.* at 639-40. The *El Paso* case

was different, the Court noted, because of the degree to which Pacific Northwest's looming presence on the fringe of the California natural gas market, and the perception that it was taking affirmative steps to enter that market, had already made it an "actual" competitive factor causing El Paso to temper substantially its behavior toward major customers. *See id.* at 623-24 & n.24 (citing commentators).

The distinctions between the two cases drawn in *Marine Bancorporation* certainly go far toward explaining why the Government's earlier section 7 challenge to the merger of natural gas producers succeeded while the challenge to the bank merger failed. But those distinctions only establish that *El Paso* was a particularly strong case for application of the potential competition doctrine, not that it is properly read as falling outside the category of potential competition cases altogether. Thus, the Court's effort to distinguish *El Paso* in *Marine Bancorporation* is not helpful as legal guidance and has inevitably blurred the important doctrinal line between mergers of current competitors and mergers of potential competitors.⁶

Most courts of appeals since *Marine Bancorporation* have seen through this line-blurring and have recognized that *El Paso* involved the merger of potential competitors.

6. Commentators in recent years have observed that this Court's characterization of *El Paso* as an "actual-competition" case tends to obscure the distinction for purposes of section 7 analysis between "horizontal" mergers (involving current competitors) and mergers that involve extension into new markets. *See Areeda & Hovenkamp* ¶ 1123 ("[T]he *El Paso* case thus serves to remind us that potential competition shades into actual competition and that the horizontal and conglomerate categories are not absolutely distinct").

Accordingly, in clear tension with the holding below, the Third, Fifth, Seventh, and Eighth Circuits have relied upon *El Paso* as a potential competition case. See *Univ. Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30, 39 (5th Cir. 1977) (citing *El Paso* for the proposition that “potential competition is also protected by section 7”); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 329 (8th Cir. 1982) (citing *El Paso* for the proposition that “[t]he preservation of potential competition in concentrated markets is an important goal of antitrust policy”); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) (citing *El Paso* in describing potential competition in the relevant market); *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 268 n.19 (3d Cir. 1998) (citing *El Paso* as one of the “cases articulating [the potential competition] theory”).

And, in contrast with the Eleventh Circuit’s decision here, courts of appeals have generally defined mergers of current competitors as ones involving direct rivalry that provided customers in the relevant market current alternative choices. See, e.g., *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010) (noting that in cases where the merging firms produce different products or operate in different markets, a merger must be challenged under the potential competition theory); *Miss. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 858-59 (2d Cir. 1974) (categorically distinguishing mergers involving “two direct competitors,” which the court referred to as “horizontal” mergers, from vertical mergers and product-extension mergers); *Gen. Foods Corp. v. FTC*, 386 F.2d 936, 944 (3d Cir. 1967) (holding that conglomerate mergers—which include mergers of potential competitors—are distinct from mergers of current direct competitors, also termed “horizontal” mergers).

By specifically relying on *Marine Bancorporation's* characterization of *El Paso* as “an actual-competition rather than a potential-competition case,” and by ruling on that basis that the present case must be analyzed under section 7 as a merger of current competitors, the Eleventh Circuit has now obliterated the important legal distinction between mergers of current competitors and mergers of potential competitors, in direct conflict with these decisions from other circuits. *See* Pet. App. 13a-14a (relying on *Marine Bancorporation* to hold that *El Paso* was not a potential competition case and on that basis to reject Polypore’s potential competition arguments concerning the SLI market).

4. In the present case, the conflict between the Eleventh Circuit’s misapprehension of *El Paso* and the approach taken by other circuits had a crucial impact, because the Eleventh Circuit’s dispositive reliance on the *Philadelphia National Bank* presumption of liability (like the Commission’s) was expressly founded on its conclusion that the combination of Polypore and Microporous was a “merger to duopoly” of current competitors in the SLI market. *See* Pet. App. 15a; *see also id.* at 13a-14a. The Eleventh Circuit’s application of the presumption of liability also created a conflict, both with decisions of this Court and with the decisions of other courts of appeals.

In *Philadelphia National Bank*, this Court, relying on now-dated economic literature purporting to show a link between market concentration and economic performance, held that a merger that “produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market,” is presumed likely to lessen competition

substantially, absent a showing by the defendant that the merger is "not likely to have such anticompetitive effects." 374 U.S. at 363. There was no well-accepted economic literature then or now purporting to show the circumstances in which a merger of potential competitors might lessen competition at a time in the future. Certainly, there was no basis for a rule of presumptive liability applied to potential competition mergers, and this Court did not offer such a rule when presented with the *El Paso* case the next year, or when analyzing any subsequent potential competition case.

The *Philadelphia National Bank* presumption can have no application in a potential competition case. To invoke the presumption, the Government must prove not only that the relevant market was highly concentrated, but also that the merger itself produced a significant increase in the concentration of the market. Necessarily, therefore, the presumption of liability only applies to the combination of current competitors. A potential entrant or other firm not yet supplying customers in the relevant market at the time of the merger (like Microporous in the SLI market) has a market share of zero, and thus, by definition, its combination with a firm already participating in the market cannot increase the level of concentration.

That truism is manifestly demonstrated by this Court's decision in *El Paso* itself, in which the Court did not apply the presumption, even though *El Paso* was decided just one year after *Philadelphia National Bank*. The reason is obvious: However strong was Pacific Northwest's competitive influence on the California natural gas market, and however clear the harm to competition from its acquisition by El Paso, Pacific Northwest had no

customers in California at the time of the acquisition, and so the acquisition could not have increased concentration in the market, significantly or otherwise. The Eleventh Circuit recognized that this Court “did not expressly invoke the presumption” in *El Paso*, and yet the court of appeals specifically relied on *El Paso* as the basis for invoking the presumption of liability here. Pet. App. 13a. That holding is impossible to square with this Court’s opinions in *Philadelphia National Bank* and *El Paso*.

The Eleventh Circuit’s reliance on the presumption in this case also conflicts with the decisions of several courts of appeals that have honored the basic rule that only mergers of current competitors may be eligible for the presumption. See, e.g., *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990) (Thomas, J.) (characterizing the *Philadelphia National Bank* presumption as part of the “basic outline of a section 7 horizontal acquisition case”); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981 (2d Cir. 1984) (explaining that the *Philadelphia National Bank* presumption is based on the idea that “large market shares are a convenient proxy for appraising the danger of monopoly power resulting from a horizontal merger”).⁷

The Court should grant this petition to clear away these doctrinal conflicts that cloud the consistent application of section 7.

7. By “horizontal” merger, these courts are referring to the merger of firms that are direct and current rivals in the relevant market at the time of the transaction, as distinct from “non-horizontal” mergers, which include mergers of potential competitors, vertical mergers, and conglomerate mergers. See 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 377-93 (7th ed. 2012).

B. Review Should Be Granted to Resolve Conflicts Among the Courts of Appeals Over the Legal Standards Governing Potential Competition Cases.

Although the Eleventh Circuit failed to analyze Polypore's acquisition of Microporous as a potential competition case in the market for SLI battery separators, the Commission included a footnote in its opinion citing potential competition doctrine as an alternative basis for liability. Pet. App. 75a-76a n.41. Accordingly, if petitioner is correct that the acquisition was not properly analyzed as a merger of current competitors, the alternative basis given by the Commission will be at issue in this case.

The Commission's potential competition footnote was woefully deficient, both because it lacked substantial evidentiary support in the record and because it was flawed as a matter of law. The footnote purported to rely on two factual assumptions (both vigorously contested by Polypore): (1) that Microporous was the only firm in a position to enter the North American SLI market and was likely to enter, and (2) that Polypore perceived Microporous as a competitive threat and reacted by offering customers more competitive terms. *See id.*⁸ Thus, the Commission

8. Contrary to the implication in the Commission's footnote, the record evidence cited to support the assertion that Polypore (via its Daramic business unit) had offered more favorable terms to customers because of competitive pressure from Microporous did not actually relate to SLI battery separators. *See* Pet. App. 61a (citing findings related to Daramic price concessions to Crown Battery, Douglas Battery, and East Penn Battery); *id.* at 423a-426a, Findings 820-821, 824-825, 827-829 (making clear that Crown evidence involved motive power separators); *id.* at

purported to rely on both of the two theories that have been advanced to support potential competition cases: the “actual potential competitor” theory and the “perceived potential competitor” theory. The application of these theories has generated a thicket of legal conflicts among the courts of appeals, and this case gives the Court a good opportunity to bring order to this fractured area of section 7 jurisprudence.

1. This Court has twice reserved judgment on whether the “actual potential competitor” theory states a claim under section 7. *See Marine Bancorporation*, 418 U.S. at 602; *Falstaff Brewing*, 410 U.S. at 537. The Court’s hesitation reflects the highly speculative nature of this theory, which rests entirely on a finger-to-the-wind prediction about the *future potential* “for long-term deconcentration of an oligopolistic market,” not on any evidence that the threat of entry by the acquired firm had produced real procompetitive benefits in the market prior to the acquisition, 418 U.S. at 625. For the same reason, legal scholars have also voiced basic skepticism about this theory.⁹

427a-429a, Findings 831-840 (making clear that East Penn’s “automotive” division included deep-cycle batteries and that East Penn had only purchased motive power separators from Microporous); *id.* at 430a-431a, Findings 842-848 (making clear that Douglas only made motive power and deep-cycle batteries). Similarly, the documents cited below as evidence that Polypore was concerned about losing customers to Microporous focused primarily on motive power (or “industrial”) separators; none addressed or predicted any near-term effect on competition in the sale of SLI separators. *See id.* at 5a-6a.

9. *See, e.g., Areeda & Hovenkamp* ¶ 1124, at 62 (“[Section 7] coverage is clearest when a merger terminates a present

That skepticism has produced a split in the circuits over the validity and application of the actual potential competitor theory. Only one court of appeals, the Eighth Circuit, has ever condemned a combination of firms based solely on this theory. See *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (cited by the Commission below, Pet. App. 75a-76a n.41). Meanwhile, two other circuits have refused to accept it. The Second Circuit has stressed “the wholly speculative nature of the ‘eventual entry’ test” and concluded that “such uncabined speculation cannot be the basis of a finding that Section 7 has been violated.” *BOC Int’l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977). See also *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (noting that “some respected authorities have voiced understandable doubt” about the validity of the actual potential competition theory). The Fourth Circuit has also declared the “novelty of the doctrine and the absence of definitive authority sanctioning it.” *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 296-98 (4th Cir. 1977). Even the FTC itself has recognized the perilously speculative nature of the theory. See *B.A.T. Indus.*, 104 F.T.C. 852, 919-20, 926 (1984) (describing the doctrine as “a rather peculiar theory

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

of competitive injury” and emphasizing that it “focuses upon the prospect of *future* injury because a currently noncompetitive industry will not become as competitive as it might have as a consequence of the merger or acquisition at issue”).

2. There is also a division in the lower courts over the standard of proof for potential competition cases. Following the lead of the FTC in its seminal *B.A.T. Industries* decision, the Fourth and D.C. Circuits favor a “clear proof” standard for showing likelihood of future entry. See *Atl. Richfield Co.*, 549 F.2d at 294-95 (holding that the government must produce “clear proof” that the acquiring firm would in fact have entered the relevant market); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (applying a “clear proof” standard in the context of standing analysis and concluding that “a potential competitor cannot achieve standing merely by demonstrating his intention to enter a field; he must also demonstrate his preparedness to do so.”). Cf. *B.A.T. Indus.*, 104 F.T.C. at 926 (“Our review of the legal and economic bases for the actual potential competition doctrine has persuaded us that clear proof that independent entry would have occurred but for the merger or acquisition should be required to establish that a firm is an actual potential competitor.”); *id.* at 922 (noting that actual potential competitor theory requires proof that the potential entrant had settled on a concrete plan and had taken “actual steps toward entry”).

In contrast, the Second, Fifth, and Eighth Circuits have suggested that the standard will be “reasonable probability” of future entry. See *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (holding that the government

must put forth evidence that the acquiring firm “would likely have entered the market in the near future”); *Mercantile Tex. Corp. v. Bd. of Governors*, 638 F.2d 1255, 1268-69 (5th Cir. 1981) (requiring the plaintiffs to show a “reasonable probability” of entry but—recognizing the ambiguity in such a standard—also demanding a showing that the acquiring firm “would prefer the opportunity [to enter the market] over other opportunities for expansion or investment.”); *Yamaha*, 657 F.2d at 977-79 (concluding that section 7 was violated because the respondent “probably” would have entered the market independently absent the joint venture).

In the context of perceived potential competitor theory, the Second Circuit has imposed a high standard of proof on the Government, requiring direct and substantial evidence that the premerger presence of the potential entrant on the edge of the market has had a significant current procompetitive influence on the behavior of the firms in the market. See *Tenneco, Inc. v. FTC*, 689 F.2d at 355; *Siemens Corp.*, 621 F.2d at 509. In contrast, the Eleventh Circuit here has now gone so far the other way as to apply a *presumption of liability* shifting the evidentiary burden of rebutting the presumption to the merging parties on the basis of factors (such as the asserted perception of Microporous as a likely entrant) that ought to be germane only to the perceived potential competition doctrine outlined in *Marine Bancorporation*. See Pet. App. 13a-16a. That approach could not present a starker conflict with the analytical standards applied by the Second Circuit.

3. All of the conflicts delineated above are at play in the present case, since the Commission invoked both

potential competition theories in its cursory footnote without adequately laying out specific evidence sufficient to satisfy either theory. Accordingly, the Court should use the opportunity offered by this case to clear the tangled underbrush from the orchard of the potential competition doctrine.

C. Review Should Be Granted to Resolve a Circuit Split Concerning the FTC's Authority to Order Divestiture of Operating Assets Unconnected to the Competitive Harms Found.

Finally, the Eleventh Circuit's decision to accept the Commission's divestiture remedy raises an issue of exceptional importance: What are the limits of the Commission's authority to order divestiture of a production asset that was never used to serve the relevant markets at issue and was never even intended for such use? This issue, too, involves a conflict among the courts of appeals.

1. The Eleventh Circuit blessed the Commission's unconditional order requiring Polypore to divest a production plant located in Feistritz, Austria, even though the facility bears no logical relation to the section 7 violations found by the Commission, and, indeed, its divestiture runs directly contrary to the FTC's theory of competitive harm in this case. *See* Pet. App. 19a-21a. The sum total of the court's analysis of this issue was one opaque sentence declaring that the Commission's stated reasons involved "reasonable considerations such that we will not disturb the order." *Id.* at 21a.

The FTC staff had alleged and the Commission found that all three of the relevant markets in this case,

and all of the competitive harms, were confined entirely to North America. *See id.* at 57a-60a. The relevant competition involved only battery separators produced at plants in North America and delivered to customers in North America. *See id.* The Commission specifically found that because of cost and quality issues, no producers could effectively compete for customers in the relevant markets from production facilities located in Europe or Asia, and overseas production facilities had no significant likelihood of serving the North American markets in the foreseeable future. *See id.* at 59a-60a; 491a-512a, Findings 1051-1126. The Feistritz plant was not yet operational at the time of the acquisition, and it was undisputed that the plant had been constructed by Microporous solely to supply customers in Europe. *See id.* at 27a. Furthermore, the Commission emphasized that Microporous was an effective competitor for North American separator customers prior to the acquisition with its single plant in Piney Flats, Tennessee.

Under the Commission's own theory of liability, therefore, the divestiture of Microporous's Piney Flats plant would fully restore any competition lost as a result of the acquisition. This Court has held that the purpose of a divestiture remedy in a merger case under the antitrust laws is to restore the competition that was lost, and the relief ordered may not be punitive. *See, e.g., United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. ... and relief must not be punitive").¹⁰

10. *See also Reynolds Metals Co. v. FTC*, 309 F.2d 223, 230-31 (D.C. Cir. 1962) (striking portion of Commission's divestiture order and noting that "[d]ivestiture is an extremely harsh remedy,

In rationalizing the overbroad scope of the remedy here, the Commission claimed that divestiture of the Feistritz plant was necessary to allow an acquirer to maintain sufficient capacity at the Piney Flats plant to compete effectively for business in North America. Pet. App. 98a-99a. But this justification is undermined by the record. At the time of trial, the Piney Flats production lines were operating at less than 40 percent of capacity. *Id.* at 838a (Tr. 3647 (Trevathan)). Any acquirer would thus have ample room to expand and increase competition in North America. The divestiture of the “line in boxes” would further enhance the package of North American production assets for the acquirer.

The Commission also claimed that customers prefer global suppliers with multiple plants in multiple countries. Pet. App. 102a-103a. In advancing this argument, however, the Commission ignored the fact that Microporous was *not* a global supplier with multiple plants in multiple countries prior to the acquisition. In addition, the Commission did not consider why a sale of Microporous’s U.S. production facilities to an existing foreign separator manufacturer, with experience and expertise in the relevant product markets, would not be a fully adequate remedy. This option would give the acquiring manufacturer a significant North American presence in addition to its existing overseas facilities.

and should be decreed as to property obtained by [] an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition” (citing *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S. Ct. 971 (1951), and *United States v. Nat’l Lead Co.*, 332 U.S. 319, 351-52, 67 S. Ct. 1634, 1649 (1947)).

The jarring disconnect between the competitive harms found and the order to divest the Austrian facility raises the serious implication that the divestiture order has crossed the line between reasonable remedy and improper punishment.

2. The acceptance here of the Commission's unconditional order requiring divestiture of the Feistritz plant runs counter to decisions from other courts of appeals that have applied the legal standards governing FTC remedies and have held that the Commission's remedial authority is not without limits. The remedy must relate logically to the harms identified by the Commission and to the specific markets found to be at issue, and courts have struck down or modified aspects of FTC remedies that are not reasonably connected to the competitive harms or that go beyond the bounds of the relevant markets where a violation has been found. *See, e.g., Seeburg Corp. v. FTC*, 425 F.2d 124, 129-30 (6th Cir.) ("While the FTC has wide latitude in remedying such violations, its order must be reasonably related to the violation found.") (citing *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1952)), *cert. denied*, 400 U.S. 866 (1970); *see also Beatrice Foods Co. v. FTC*, 540 F.2d 303, 314 (7th Cir. 1976) (modifying portions of order not reasonably related to violations found); *Abex Corp. v. FTC*, 420 F.2d 928, 933 (6th Cir.) (striking portions of order as overbroad and unrelated to violations found), *cert. denied*, 400 U.S. 865 (1970).

The Eleventh Circuit's decision, moreover, conflicts with the principal authority on which the Commission itself relied to defend its divestiture order—the Fifth Circuit's opinion in *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008).

The court of appeals in *Chicago Bridge* upheld an FTC order requiring divestiture of all the assets of the acquired firm in a merger case, including assets for the production of water tanks, even though the relevant product market at issue was the market for cryogenic gas storage tanks. In doing so, the court accepted the FTC's argument that although the water tank assets were unrelated to the production of cryogenic tanks, their divestiture was necessary to enable the spun-off entity to compete on an "equal footing," since the water division would provide a consistent revenue stream to supplement the sporadic sales of the cryogenic tank division. *Id.* at 441.

Significantly, however, the divestiture order at issue in *Chicago Bridge* "carefully devolve[d] discretion to [the acquirer] and a third-party monitor [not the Commission] to determine how assets must be divided to effectuate the order and its general remedial purpose," and, the court pointed out, the Commission's opinion approving the order specifically "included a provision that allows the exclusion of the water assets if the acquirer and monitor trustee both find them unnecessary." *Id.* at 441-42 (internal quotation marks omitted). "Accordingly," the court stated, "as we read the Commission's order," *Chicago Bridge* was "required to divest to the new separate entity no more nor less of the [acquired firm's] assets as [were] necessary for the new entity to compete ... in the relevant markets," and only by "[c]onstruing the Commission's order as having this meaning and intent" did the Fifth Circuit "conclude that the Commission did not abuse its discretion" in fashioning this extraordinary divestiture remedy. *Id.* at 442.

In the present case, the Commission's order requiring divestiture of the Feistritz plant is unconditional. Neither

the Commission's opinion nor its final order included any provision, like the one the court found so significant in *Chicago Bridge*, that would allow Polypore to withhold the Feistritz plant from the divestiture where that plant is not needed to enable a suitable buyer, such as an existing international producer of battery separators, to compete effectively for sales in North America using the domestic production assets of Microporous (including both the Piney Flats plant and the additional "line in boxes"). Based on the reasoning and analysis set forth in *Chicago Bridge*, it is apparent that the Fifth Circuit would not have given the present divestiture order the rubber-stamp approval conferred by the court of appeals below.¹¹

In conflict with the decisions of the Fifth, Sixth, and Seventh Circuits identified above, as well as with the

11. The Eleventh Circuit ruled that Polypore had "waived" the "issue" of whether the divestiture order should contain a provision, like the one in *Chicago Bridge*, permitting Polypore to retain the Feistritz plant if a buyer did not need the plant to compete effectively in North America. *See* Pet. App. 21a n.13. But throughout these proceedings Polypore had consistently challenged the necessity of divesting the Austrian plant and had argued that it was legal error for the Commission not to consider whether a divestiture of only Microporous's domestic production assets to "a major global manufacturer" with existing separator plants overseas would be "a fully adequate remedy for the competitive effects found" by the Commission. *Id.* at 841a; *id.* at 844a n.8. It was not petitioner's burden to propose specific amendments to the Commission's divestiture order, which petitioner opposed in its entirety. In any event, the important point here is that there is now an intolerable conflict between the Eleventh Circuit and other courts of appeals, including the Fifth Circuit, over the limits of the FTC's authority to order the divestiture of out-of-market production assets.

general legal parameters governing the FTC's remedial authority announced by this Court, the Eleventh Circuit's opinion essentially holds that the Commission's section 7 divestiture orders are free from any meaningful judicial review and from any logical limits, even including the underlying theory of competitive harms supporting the Commission's case. The result of this ruling is that the important legal boundary between permissible remedial orders and forbidden punitive orders is effectively erased. This Court should grant review to resolve these conflicts and to repudiate the Eleventh Circuit's dangerous precedent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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