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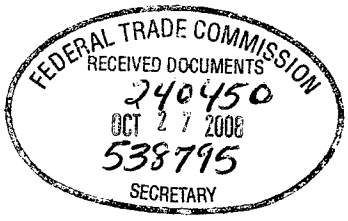

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**Docket No. 9327**
Polypore International, Inc.,	)	
a corporation.	)	**PUBLIC**

COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S MOTION TO DISMISS COUNTS II AND III
OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM

The motion to dismiss filed by Respondent, Polypore International, Inc. ("Polypore"), evinces a failure to understand the basic structure of the Federal Trade Commission Act. Congress has empowered the FTC to prosecute violations of Section 5 of the FTC Act, including conduct constituting "unfair methods of competition." The FTC does not and cannot directly enforce the Sherman Act. *However*, conduct that violates the Sherman Act (monopolization, unreasonable restraints of trade) is generally deemed to constitute an unfair method of competition, and hence a violation of Section 5 of the FTC Act as well. It follows that if the Commission's Complaint against Polypore states a cause of action under Sherman Act standards – and it certainly does – then the Complaint necessarily states a cause of action under Section 5 of the FTC Act.

Complaint Counsel's statement, in an earlier filing, that the Complaint includes no claim under the Sherman Act simply acknowledged that reality. The Commission's claims against Polypore must and do arise under the FTC Act and the Clayton Act. With this clarified and understood, Polypore's motion to dismiss is without substance.

The bulk of Polypore's Memorandum is devoted to arguing that Section 5 does not prohibit anticompetitive conduct except insofar as that conduct violates the Sherman Act. This contention is erroneous, but also irrelevant. The Complaint properly alleges claims consistent with Sherman Act liability standards that entitle Complaint Counsel to relief under Section 5. Therefore it is not necessary for this Court to explore or delineate the outer bounds of Section 5.

Specifically, Count II of the Complaint challenges: (i) an agreement between competitors Polypore[1] and Hollingsworth & Vose ("H & V") to allocate markets, and (ii) Polypore's acquisition of Microporous Products, L.P. ("Microporous"). Each transaction constitutes an unreasonable restraint of trade. Each and all of the elements of a standard Sherman Act Section 1 violation are adequately alleged. Indeed, Polypore's Memorandum does not assert or identify any pleading deficiency here.

Count III of the Complaint challenges conduct amounting to monopolization and attempted monopolization. Again, each and all of the elements of a standard Sherman Act Section 2 violation are adequately alleged. Monopoly power is alleged in Paragraphs 21, 38(c), 39, 42 and 43. Exclusionary conduct is alleged in Paragraphs 2, 4, 19-31, 38-41, and 47. And specific intent to monopolize is alleged in Paragraphs 26, 46 and 47.

Polypore's selective parsing of the Complaint is inconsistent with liberal pleading rules and the standards governing a motion to dismiss.

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[1] The Complaint refers to "Daramic" in its specific allegations. Daramic is the operating subsidiary of Polypore that manufactures battery separators. This Response will refer to Polypore throughout, including in connection with the Complaint.

I. THE RELATIONSHIP BETWEEN SECTION 5 OF THE FTC ACT AND THE SHERMAN ACT

The Commission is an independent regulatory agency established by Congress to administer the Federal Trade Commission Act, including the Section 5 prohibition on "unfair methods of competition."[2] Congress deliberately left this phrase undefined "so that the parameters of the Commission's powers and the scope of its administrative and judicial functions could be responsive to a wide variety of business practices."[3]

The FTC does not directly enforce the Sherman Act.[4] (The Sherman Act is enforced by the Department of Justice, by private claimants, and by state attorneys general.) However, the Commission's authority under Section 5 of the Sherman Act reaches conduct that violates the Sherman Act. Stated somewhat differently, in applying Section 5, the Commission employs liability standards developed under the Sherman Act. Numerous Supreme Court[5] and FTC cases[6] confirm these simple propositions.

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2 15 U.S.C. § 45.

3 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 643 (6th ed. 2007) (hereinafter ANTITRUST LAW DEVELOPMENTS).

4 15 U.S.C. §§ 1-7.

5 *California Dental Assn. v. FTC,* 526 U.S. 756, 762 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). *See also* ANTITRUST LAW DEVELOPMENTS 647 and n. 42.

6 *In the Matter of Rambus, Inc.*, FTC Docket No. 9302, Opinion of the Commission at 27 and n. 5, 30 n. 141 (Aug. 2, 2006), reversed on other grounds, *Rambus, Inc. v. FTC,* File Nos. 07-1086 and 07-1124 (D.C. Cir., April 22, 2008); *In the Matter of Schering Plough Corp., et al.,* FTC Docket No. 9297, Opinion of the Commission at 4, 83 n. 107 (December 8, 2003), vacated on other grounds by *Schering Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); *In the Matter of California Dental Ass'n.,* 121 F.T.C. 190, 297-99 (March 25, 1996); reversed on other grounds, *California Dental Ass'n,* 526 U.S. at 781.

Complaint Counsel's earlier filing does not (as Polypore claims) "admit" to having "failed to plead a viable Section 2 claim."[7] Instead, Complaint Counsel stated that the claims in this case arise under the FTC Act and the Clayton Act.[8]

Polypore is apparently concerned that, in the present case, Complaint Counsel intends to interpret Section 5 in a manner that sweeps broader than the prohibitions of the Sherman Act. Polypore argues at length that this enforcement strategy, if pursued, would be improper. How this abstract argument becomes the centerpiece of a motion to dismiss is somewhat mystifying. Polypore's denunciation of a "pure" Section 5 case (what Polypore calls a "sub-Sherman Act" claim) is both legally untenable and wholly irrelevant.

The argument is legally untenable because it conflicts with Supreme Court precedent. Section 5 encompasses Sherman Act violations, *and also* reaches conduct that violates the "spirit" or policies of the other antitrust laws – that is, conduct that is similar in its likely competitive effect to other violations – but not technically within the letter of those statutes.[9] In any event, this Court need not address whether Section 5 reaches beyond the Sherman Act. The issue is irrelevant because each claim in the Commission's Complaint states a cause of action under traditional Sherman Act standards.

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[7] Polypore Memorandum at 7.

[8] The complete text of Complaint Counsel's representation is as follows: "There is no claim under the Sherman Act in this complaint, which is brought solely under Sections 5 (FTCA) and 7 (Clayton Act)." Complaint Counsel's Response to Respondent's Motion for a More Definite Statement at 3 (Sept. 30, 2008).

[9] *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 554; *Motion Picture Adver. Serv.*, 344 U.S. at 394-95; *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 981 n. 14 (8th Cir. 1981) ("Section 5 is a general prohibition against unfair methods of competition. It includes *but is not limited to* the specific acts and practices condemned by the Sherman and Clayton Acts.") (emphasis supplied). *See also* ANTITRUST LAW DEVELOPMENTS 648-656.

II. LEGAL STANDARD FOR A MOTION TO DISMISS

Section 3.11(b)(2) of the FTC Rules of Practice requires that a complaint contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). If a fair reading of the complaint shows that its allegations, if proven, "are sufficient to make out the violation," then denial of the motion to dismiss is proper. *In re Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315, Administrative Law Judge's Order Denying Respondent's Motion to Dismiss Count II of the Complaint (June 2, 2004) (located at <http://www.ftc.gov/os/adjpro/d9315/040602orddenymodismiss.pdf>). This standard does not require "detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). Rather, the complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests. *Id. See also Muir v. Navy Fed'l Credit Union,* 529 F.3d 1100, 1108 (D.C. Cir. 2008).

In evaluating a motion to dismiss, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 127 S. Ct. 2197, 2200 (2007) (per curiam). In addition, all reasonable inferences from those allegations are rendered in favor of the plaintiff. *Cleveland v. Caplaw Industries,* 448 F.3d 518, 521 (2d Cir. 2006). *See also Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493 (1986); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007) ("'we accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief'"); *Evanston Northwestern Healthcare, supra,* Order at 3.

III. COUNT II PROPERLY ALLEGES UNLAWFUL RESTRAINTS OF TRADE

According to Polypore, Count II deficiently alleges violations of Sherman Act Section 2. This reflects further confusion on the part of the respondent. Actually, Count II properly alleges the elements of two violations of the FTC Act, Section 5, patterned after Sherman Act Section 1. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33 (D.C.Cir. 2005) (Explaining that the analysis under Section 5 for a Section 1 claim is the same). Specifically, Count II charges that:

(i) Polypore's acquisition of Microporous is an unreasonable restraint of trade;[10] and

(ii) Polypore's agreement with H & V to allocate markets is an unreasonable restraint of trade.

The latter agreement, if proven, is a per se violation of the antitrust laws. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is "unlawful per se"); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (same); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991); *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).[11] The Polypore Memorandum does not identify any deficiency with regard to the Sherman Act Section 1 allegations in the Complaint.[12]

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[10] An acquisition constitutes concerted action, and may be challenged under Section 1 of the Sherman Act. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990).

[11] Where a complaint asserts a per se violation of Section 1, it is not necessary to allege a relevant market or market power. *Campfield v. State Farm Mutual Automobile Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008); *In re European Rail Pass Antitrust Litig.*, 166 F. Supp. 2d 836, 844 (S.D.N.Y. 2001). *See also In the Matter of Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309, 2005 FTC LEXIS 124, at *46-47 (June 21, 2005) (in per se case, not necessary to prove a relevant market).

[12] *See* Polypore Memorandum at 4 (arguing only that Count II of the Complaint

IV. COUNT III PROPERLY ALLEGES MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

Count III charges that Polypore has monopolized and/or attempted to monopolize each of five relevant markets.[13] This is clearly within the ambit of Section 5. *Cement Inst.*, 333 U.S. at 694 (§ 5 reaches all conduct that violates § 2 of the Sherman Act). Attempted monopolization claims typically allege an unsuccessful or unconsummated attempt to *achieve* monopoly power. The primary liability theory advanced here is that Polypore attempted through anticompetitive means to *maintain* monopoly power. Polypore suggests that this claim is somehow improper.[14]

The Supreme Court upheld an attempt to maintain monopoly claim in *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951), concluding that: "[A] single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." The Court of Appeals for the Fifth Circuit endorsed the attempt to maintain monopoly theory in *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990-91 (5th Cir. 1983). *See also United States v. Microsoft Corp.*, 253 F.3d

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"must be dismissed as to claims of monopolization or attempted monopolization").

[13] The five product markets are: (1) deep-cycle battery separators; (2) motive battery separators; (3) automotive battery separators; (4) UPS battery separators; and (5) all high performance polyethylene ("PE") separators. The relevant geographic market is North America.

Monopolization and attempted monopolization claims may be pursued simultaneously. *See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002), cert. denied, *U.S. Tobacco Co. v. Conwood Co., L.P.* 537 U.S. 1148 (2003); *see also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶806f4 (3d ed. 2008) (hereinafter Areeda & Hovenkamp) (An antitrust plaintiff "may plead both offenses and allow the court to base its disposition on either or neither offense as the evidence emerges.").

[14] Polypore Memorandum at 15.

34, 58 (D.C. Cir. 2001) (A firm violates Section 2 "when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct.").

Thus, the claims are legally sound. The remaining question is whether the essential elements are adequately alleged. The offense of monopolization has two elements: (1) that the defendant possesses monopoly power in a relevant market, and (2) the acquisition or maintenance of that monopoly power through predatory or anticompetitive conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 (1985); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 932 (6th Cir. 2005).

The offense of attempted monopoly maintenance has 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 maintaining monopoly power. *Cf. Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *Lorain Journal*, 342 U.S. at 154. The Complaint properly alleges each and every element.

A. Monopoly Power and Dangerous Probability of Maintaining Monopoly Power

As to four of the five markets, Polypore's monopoly power is alleged in Paragraph 42 ("In automotive, motive, UPS, and all PE markets [Polypore] has historically maintained monopoly power."). *See also* Paragraph 38(c) (alleging that acquisition of Microporous created a monopoly in motive market); Paragraph 39 (alleging that, even prior to the acquisition of Microporous, Polypore had monopoly power in motive, UPS, and all PE markets). Polypore avers that this is insufficient because the date is unspecified. It is reasonable to infer, however, that the time frame referenced here includes all times relevant to the Complaint, up to and including the present day. This reading is confirmed by Paragraph 43, which indicates that entry

is not likely to dissipate Polypore's current monopoly position in the automotive, motive, UPS, and all PE markets.

As to the fifth market, deep-cycle, monopoly power is alleged in Paragraph 21 ("There are no other deep-cycle battery separator competitors in the world . . . . Post-acquisition [of Microporous], [Polypore] has a monopoly in this market."). Polypore acknowledges that this allegation is sufficient.[15]

The various allegations that Polypore possesses monopoly power, possessed monopoly power, and has maintained such monopoly power over time are equivalent to, or support the inference that, the company has a dangerous probability of maintaining monopoly power in all five markets.[16] Also, viewed in the light most favorable to the plaintiff, the allegations that in each relevant market entry barriers are high (Paragraphs 33-37, 43), and that entry is unlikely (Paragraphs 32, 36, 43), further support an inference that Polypore has a dangerous probability of maintaining monopoly power. Finally, Paragraph 44 (read in conjunction with Paragraph 39) alleges that Polypore's exclusionary conduct (described below) "carried the dangerous probability" of maintaining monopoly power in all five markets.

B. Exclusionary Conduct

The Complaint alleges that Polypore engaged in three types of exclusionary conduct designed to acquire or maintain monopoly power. First, Polypore acquired Microporous

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[15] Polypore Memorandum at 14.

[16] *See, e.g., Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756-57 (10th Cir. 1999) (complaint stating defendants' unlawful conduct drove only competitor from market adequately alleged both "dangerous probability" element of attempt offense and possession of monopoly power element of monopolization offense). *Cf. Conwood,* 290 F.3d at 782-83 n.2 (evidence proving possession of monopoly power similarly supported attempt claim).

(affecting all five markets).[17] Acquisition of a competitor is a type of exclusionary conduct that may be challenged under Section 2.[18] Second, Polypore entered into a market allocation agreement with H & V (affecting the automotive, motive, UPS and all PE markets) and attempted to enter into a market allocation agreement with Microporous (potentially affecting all five markets).[19] This too is exclusionary conduct that may be challenged under Section 2.[20] Finally, Polypore bullied its customers and pressured them to enter into exclusive supply agreements (affecting the automotive, motive, UPS and all PE markets).[21] These coercive bargaining tactics are a type of exclusionary conduct that may be challenged under Section 2.[22]

C. Specific Intent

With regard to the Microporous acquisition, Polypore's specific intent to maintain monopoly power is alleged in Paragraph 26 ("fundamental purpose" of Microporous acquisition "was to restrain competition unreasonably"). With regard to the market allocation agreements, Polypore's specific intent to maintain monopoly power is alleged in Paragraph 47 (intent to

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[17] Paragraphs 2, 4, 19, 20, 21-31, 38(a)-(h).

[18] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *see generally* Areeda & Hovenkamp, ¶¶701a-d.

[19] Paragraphs 38(a), 41, 47.

[20] *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966); *United States v. American Airlines*, 743 F.2d 1114, 1118 (5th Cir. 1984).

[21] Paragraphs 39-40.

[22] *Lorain Journal*, 342 U.S. at 152-53: *Microsoft,* 253 F.3d at 70 (exclusionary contracts with OEMs relegated rival to inferior distribution opportunities); *United States v. Dentsply International, Inc.*, 399 F.3d 181, 190 (3d Cir. 2005) (defendant liable for monopolization where it had "threatened to sever access" of dealers to multiple products and otherwise "pressure[d]" them to enter exclusive dealership agreements.).

"prevent them [H & V] from entering the PE separator market"). With regard to the coercive bargaining tactics, Polypore's specific intent to maintain monopoly power is alleged in Paragraph 46 (intent to "destroy competition").

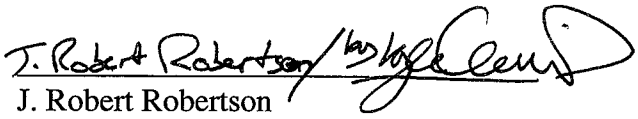
In addition, specific intent to monopolize may be inferred from allegations of exclusionary conduct (*see* Point IV.B., above). *M & M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 166 (4th Cir. 1992) (en banc) ("Specific intent may be inferred from the defendant's anticompetitive practices."); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987) ("specific intent need not be proven by direct evidence but can be inferred from the defendant's anticompetitive practices or other proof of unlawful conduct.").

CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss Counts II and III of the Complaint for failure to state a claim should be denied.

Dated: October 27, 2008

Respectfully submitted,



J. Robert Robertson
Complaint Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W. (H-374)
Washington, DC 20580
Telephone: (202) 326-2641
Facsimile: (202) 326-2884

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2008, I filed *via* hand and electronic mail delivery an original and two copies of the foregoing Complaint Counsel's Response to Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on October 27, 2008, I served *via* hand and electronic mail delivery three copies of the foregoing Complaint Counsel's Response to Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

I hereby certify that on October 27, 2008, I served *via* electronic mail delivery a copy of the foregoing Complaint Counsel's Response to Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim with:

William L. Rikard, Jr.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
williamrikard@parkerpoe.com

By: 

Linda D. Cunningham
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2638
lcunningham@ftc.gov