ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT OR, IN THE ALTERNATIVE, FOR AN ORDER REQUIRING CLARIFICATION OF THE ALLEGATIONS OF, AND RELATED TO, COUNTS II and III OF THE COMPLAINT

Respondent Polypore International, Inc. ("Polypore," "Daramic" or "Respondent"), pursuant to Rules 3.11(c) and 3.22 of the Rules of Practice of the Federal Trade Commission ("Commission" or "FTC"), 16 C.F.R. §§ 3.11(c) and 3.22, respectfully moves for a More Definite Statement or, in the Alternative, for an Order Requiring Clarification of the Allegations of, and Related to, Counts II and III of the Complaint. Rule 3.11(c) provides, in pertinent part, that "[w]here the respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, such respondent may move for a more definite statement of the charges against it before filing an answer." Grant of this motion is necessary in order for Polypore completely and effectively to answer the Complaint and to plan for discovery in this case.

Respondent must have a more definite statement or clarification of the allegations and charges contained in Counts II and III of the Complaint because it cannot determine on the face of the existing Complaint whether the monopolization claim, although asserted on the basis of Section 5 of the FTC Act, is grounded (1) on the elements of the monopolization offense that have been developed under Section 2 of the Sherman Act, (2) on unknown elements of an

unknown monopolization offense that the FTC intends to assert by way of a freestanding Section 5 claim, (3) on elements of the attempt to monopolize offense that have been developed under Section 2 of the Sherman Act, (4) on unknown elements of an unknown attempt to monopolize offense that the FTC intends to assert by way of a standalone Section 5 claim, or (5) all or some of the above.

ARGUMENT

The charging paragraphs of Counts II and III (¶¶s 51 and 53) are worded identically. Both charge Polypore with engaging in unfair methods of competition "through the acquisition of Microporous, and the other conduct alleged herein." But Count III has the bold title, "**Monopolization,**" while Count II has the bold title, "**Unfair Method of Competition.**" The result is that this pleading fails to inform Polypore of what it is being charged. Pursuant to Count III, the question is whether the FTC will seek to prove the elements of a Sherman Act Section 2 monopolization offense or, instead, with Count II will it seek to prove some other unspecified, undefined, unpled and unknown but, presumably, lesser elements of a Section 5 offense? Respondent does not and cannot know the answer to this question, yet the answer is key to how Respondent formulates its response to the Complaint and frames its discovery plan. The content of these paragraphs fails to explicate the headings, stating only, as noted, that unfair methods of competition have occurred with no reference to monopolization or attempt to monopolize.

1. Despite critical judicial decisions and learned commentary, the FTC apparently takes the position that it can file Section 5 cases even where the alleged conduct did not violate the Sherman or Clayton Acts.

Over thirty-five years ago, the Supreme Court indicated in *dictum* that the Commission could challenge under Section 5 practices that do "not infringe either the letter or the spirit of the antitrust laws." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). The Court, however, affirmed the Circuit Court's action in setting aside the FTC's order. Subsequently,

other courts rebuffed efforts of the FTC to bring such cases[1] and the FTC itself in the *General Foods* case rejected the argument of its complaint counsel that the predatory pricing practices at issue violated Section 5 even though they didn't violate Sherman Section 2.[2] Scholarly comment has been in agreement with these later decisions and actions.[3]

More recently, however, the FTC obtained consent decrees in some "invitation to collude" cases brought under Section 5 where there would have been no Section 1 Sherman Act violation.[4] The Commission took similar action in March 2006 in the *Valassis Communications* case[5] and two Commissioners thereafter stated that they would support such actions by the Commission in the future.[6] None of these actions has been reviewed or approved by a court.

Most recently, in January of this year, the Commission in a 3-2 vote announced in the *Negotiated Data Solutions* ("*N-Data*") case that it has authority to bring antitrust-type cases under Section 5 as unfair methods of competition where the conduct does not violate either the Sherman or Clayton Acts.[7] Since the current FTC has decided that it can bring such cases, even

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[1] *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *E. I. du Pont de Nemours & Co. v. FTC* ("*Ethyl*"), 729 F.2d 128 (2d Cir. 1984).

[2] *In re General Foods Corp.*, 103 F.T.C. 204 (1984).

[3] E.g., 2 Philip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 302(h) (2006) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman And Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'"); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable.")

[4] 1 ABA Section of Antitrust Law, Antitrust Law Developments 654-56 (6th ed. 2007).

[5] *In the matter of Valassis Communications, Inc.*, FTC File No. 051 0008 (March 16, 2006).

[6] Commissioner J. Thomas Rosch, "Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief," The National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar (July 6, 2006); *In the matter of Rambus, Inc.*, Docket No. 9302. Concurring Opinion of Commissioner Jon Leibowitz, 4, 11 (August 2, 2006).

[7] *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094, Analysis of Proposed Consent Order to Aid Public Comment ("Analysis to Aid Public Comment") 3-4 (January 23, 2008) and Statement of the Federal Trade Commission 1-2 and footnote 5 (January 23, 2008). However, Chairman Majoras, in her dissenting statement, noted that "[t]he majority has not identified a meaningful limiting principle that indicates when an action . . . will be considered an 'unfair method of competition.'" Dissenting Statement of Chairman Majoras 4.

if it has not articulated what the elements of such Section 5 claims would be, one of the questions raised is whether it has done that here.

2. The allegations of the Complaint are confusing and unclear and require clarification.

For purposes of assessing the allegations of the Complaint, it is necessary to recall the elements of the Sherman Act Section 2 offenses of monopolization and attempt to monopolize. The elements of the offense of monopolization are (1) "possession of monopoly power in the relevant market" and (2) "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 407, 124 S.Ct. 872, 878-79 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698 (1966)). "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 890-91 (1993).

Regarding allegations of monopoly power

Paragraphs 21 - 25 of the Complaint contain factual allegations regarding the five alleged product markets.[8] Those paragraphs allege monopolies for the "deep-cycle" and "motive separator" markets but not for the purported automotive, UPS or PE separator markets. Paragraph 21 alleges that post-acquisition Daramic has a monopoly in the purported deep-cycle market and paragraph 22 alleges that Microporous and Daramic "were the only competitors in motive separators." But paragraph 23 makes no such allegation regarding the claimed automotive market, stating instead that Daramic and Entek compete in that market. Although

[8] Poplypore disputes the markets alleged by the FTC and will assert its defenses with respect to these allegations to the extent necessary at the Hearing before the ALJ in this matter.

paragraphs 24 and 38(b) state that Microporous and Daramic were the only companies selling separators in the alleged UPS market, elsewhere it says that they were selling "in different segments" of that market, and the word "monopoly" doesn't appear. As for the entire asserted PE separator market, paragraph 25 also makes no allegation of monopoly, stating instead that Daramic, Microporous and Entek sold the product. Similarly paragraph 38(b) and (c) allege monopolies in the alleged deep-cycle and motive markets but not in automotive, UPS or PE separators. Paragraph 45 alleges only "market/monopoly power" and maintenance of "market power." These allegations fall short of the allegations of monopoly power required by Sherman Act standards.

Respondent cannot determine whether the Complaint's failure to allege monopoly power in the alleged automotive, UPS and PE separator markets means that the Complaint attempts but fails to allege the Sherman Act monopolization offense, whether it attempts but also fails to allege the Sherman Act attempt to monopolize offense, or whether it attempts to allege some freestanding Section 5 monopolization offense, the elements of which are uncertain.

The quoted language indicates that the FTC has attempted to make allegations that are outside of those reached by the Sherman Act. *E.g.*, the allegations relating to the UPS market claim that Microporous and Daramic were the only sellers but then note that they were selling "in different segments" of the alleged market. Thus, it appears that the FTC is simultaneously claiming a monopoly but then admitting something less by the reference to "different segments." Further, it appears that the FTC is alleging that this is a monopoly that Section 5 would recognize but Section 2 of the Act would not.

The same questions exist with respect to the peculiar allegations of paragraph 45 which refer to maintenance of "market power" as opposed to monopoly power. Again, the FTC appears to be alleging a lesser standard covered by Section 5, that does not satisfy Section 2.

A more definite statement or clarification regarding these matters is necessary to enable Respondent to respond to the Complaint.

Regarding allegations of acquisition, enhancement or maintenance of monopoly power

For all of the five markets alleged by the FTC, paragraph 39 does not allege that Polypore "maintained" monopoly power but that it "*attempted* through anticompetitive means to maintain monopoly power." (Emphasis added.) It is true that paragraph 42 alleges that "[i]n automotive, motive, UPS and all PE markets Daramic has historically maintained monopoly power." This claim, however, appears to be keyed to some undefined historical period antedating the events of the Complaint and, in any event, fails to allege that this "historical maintenance" resulted from any actions alleged in the Complaint.

The Complaint plainly fails to allege maintenance of monopoly power in the five purported markets, instead alleging an "attempt to maintain market power." Respondent is entitled to know whether the FTC is contending that an "attempt to maintain market power" violates Sherman Act Section 2, or that it violates FTC Act Section 5. Respondent cannot determine from the pleading either the statutes it is accused of violating or the elements of the offense(s) that it is accused of violating. It needs a more definite statement or clarification regarding these matters in order to respond to the Complaint.

Regarding allegations of attempt to monopolize

Regarding the alleged PE separator market, paragraph 44 alleges a "dangerous probability that, if successful, [the conduct alleged] would give [Polypore] the ability to lesson or destroy competition." These words, however, are at odds with the "attempt to maintain monopoly power" claim of paragraph 39 or the maintenance of market power concept of paragraph 45 of the Complaint.

The allegations relating to a "dangerous probability" capture the phrase, as noted above, that is associated with a Sherman Act attempt to monopolize as opposed to monopolization. But the Sherman Act standard requires more: a "dangerous probability of achieving monopoly power," not a "dangerous probability . . . [of] lesson[ing] or destroy[ing] competition." An allegation of a Sherman Act attempt to monopolize offense, of course, also requires the allegation of a "specific intent to monopolize," words which are not to be found in the Complaint.

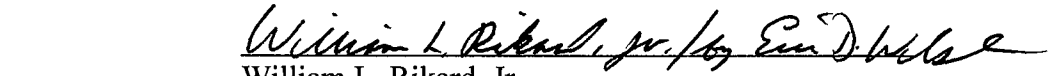
Respondent cannot determine whether the Complaint marks an unsuccessful attempt to allege a Sherman Act attempt to monopolize or whether it is an attempt to allege some watered down attempt to monopolize claim that the FTC will contend is subject to attack under Section 5 of the FTC Act.

CONCLUSION

For the foregoing reasons, Respondent Polypore respectfully requests the Court to order the Commission to provide a more definite statement or clarification regarding the allegations and charges contained in Counts II and III of the Complaint.

Dated: September 25, 2008

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2008, I caused to be filed via hand delivery and electronic mail delivery an original and one copy of the foregoing ***Respondent's Memorandum in Support of Motion for a More Definite Statement or, in the Alternative, for an Order Requiring Clarification of the Allegations of, and Related to, Counts II and III of the Complaint***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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I hereby certify that on September 25, 2008, I served via hand delivery and first-class mail delivery a copy of the foregoing ***Respondent's Memorandum in Support of Motion for a More Definite Statement or, in the Alternative, for an Order Requiring Clarification of the Allegations of, and Related to, Counts II and III of the Complaint*** with:

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

I hereby certify that on September 25, 2008, I served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Memorandum in Support of Motion for a More Definite Statement or, in the Alternative, for an Order Requiring Clarification of the Allegations of, and Related to, Counts II and III of the Complaint*** with:

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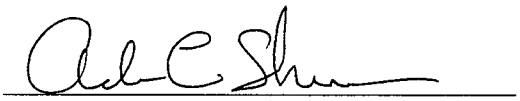

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