

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
Polypore International, Inc.,)
a corporation.)
)

PUBLIC

Docket No. 9327

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INTRODUCTION

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PX0803. There are good reasons that Daramic would have trouble convincing its customers that it is not a monopolist: its acquisition of Microporous, its closest and only competitor, gave it a monopoly in the deep-cycle and motive separator markets, and preserved its monopoly in the UPS separator market. The acquisition also eliminated a third competitor in the market for automotive battery separators (“SLI”), leaving only Daramic, the dominant supplier, and Entek in North America.

It is also no wonder that customers have had trouble with Polypore’s oppressive discovery demands in this case when this monopolist: (i) sued Microporous to keep it from competing; (ii) bought Microporous to keep it from competing; (iii) eliminated other competition; (iv) held back supply and service from customers; (v) raised prices immediately after the acquisition of Microporous; (vi) sued one customer for not agreeing to the higher prices; and (viii) threatened another customer with a lawsuit if it did not agree to higher prices. In short, Daramic’s unrestrained exertion of market power is shocking.

Yet, as your Honor has explained, to prove a Section 7 violation, Complaint Counsel needs to prove far less than what is alleged in this case. Complaint Counsel need show only that “the effect of [the] acquisition may be substantially to lessen competition, or tend to create a monopoly.” *In re Chicago Bridge & Iron Co., N.V., et al.*, 2003 WL 21525006, Dkt. No. 9300 (Initial Decision, June 18, 2003) [hereinafter, “CB&I Initial Decision”] at 84-85, *aff’d*, 2003 WL 22217293 (F.T.C.

¹ Daramic LLC (“Daramic”) is Respondent Polypore International, Inc.’s (“Polypore”) operating subsidiary that manufactures and sells the types of battery separators at issue in this case. Microporous Products Limited Partners (“Microporous”) was synonymous with Amerace, and industry documents refer to them synonymously.

Sep. 10, 2003), *aff'd Chicago Bridge & Iron Co., N.V., et al. v. FTC*, 534 F.3d 410 (5th Cir. 2008), (citing 15 U.S.C. § 18 and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963)). To show that competition “may be substantially” lessened, all that Complaint Counsel must show is that the acquisition would produce “a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of the firms in that market.” *CB&I Initial Decision*, at 88 (Citations omitted).

Daramic’s market share in North America for deep-cycle, motive and UPS battery separators is now 100%. For SLI, it is just under 50%, with only one remaining supplier, Entek. Prior to the acquisition, Microporous had been the maverick. It was the largest supplier of deep-cycle separators and was rapidly expanding in the other markets. The elimination of Microporous, a strong viable competitor in all of these markets, significantly lessened competition.

Daramic has asserted only two factual defenses to this strong prima facie case: potential entry and efficiencies. But there are no entrants anywhere in the world for deep-cycle, motive, or UPS battery separators. And in SLI, there are none even preparing to enter North America. Elsewhere in the world, the few fringe players in SLI cannot possibly compete against Daramic or Entek in North America; nor is there any evidence that any will do so.

Daramic has not even attempted to offer any evidence of the elements of an efficiencies defense, and thus it cannot possibly reach the level of extraordinary efficiencies required to offset Complaint Counsel’s prima facie case. Nor has Daramic offered any evidence to counter Complaint Counsel’s evidence of monopolistic behavior, except to say that it is simply raising prices and suing or threatening to sue its customers to recover cost increases. This behavior proves that Daramic’s market power is now uncontested.

In short, we respectfully suggest that this illegal acquisition and Daramic’s conduct have harmed competition significantly and that only a full divestiture and a cease and desist order will

eliminate the anti-competitive effects caused by Daramic.

I. Factual Background

A battery separator is a porous electronic insulator placed between two plates of opposing polarity in flooded lead-acid batteries (“flooded batteries”) that prevents electrical short circuits while allowing ionic current to flow through the separator. Separators are the most highly engineered component of a battery and even small chemical and physical differences in separators have a large impact on the quality and function of the battery.

As a result of Daramic’s acquisition of Microporous on February 29, 2008, there is only one manufacturer of deep-cycle, motive, and UPS separators in North America today, and only two manufacturers of SLI separators. The merger is a final step in a long history of exclusionary conduct by Daramic intended either to monopolize or to protect its existing monopoly power in flooded battery separator markets.

Daramic’s exclusionary behavior began almost 10 years ago, soon after Microporous acquired its polyethylene (“PE”) battery separator technology from a company called Jungfer. Jungfer built the PE separator line located in Piney Flats, Tennessee for Microporous in 2001. Daramic acquired Jungfer almost immediately thereafter and shut it down

REDACTED and then sued Microporous to prevent it from selling SLI in Europe. PX2124-002; PX2241.

While much of the exclusionary conduct at issue in this case revolves around Respondent’s efforts to prevent Microporous from expanding its presence in Daramic’s PE markets, Daramic also entered into illegal market division agreements. When Daramic learned that an Absorbent Glass Mat (“AGM”) separator manufacturer, Hollingsworth & Vose (“H&V”), might enter one or more of the markets for PE separators, it entered into an agreement with H&V,

PX0169-001; PX0035-005. This market division agreement took effect March 23, 2001,

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PX0094; PX0158. This agreement is an unreasonable, horizontal restraint of trade and is illegal.

Daramic's actions had the intended consequences of eliminating the possibility of future competition, but only by acquiring Microporous did Daramic fully succeed in its efforts. Daramic documents demonstrate that as early as 2003 Daramic understood that Microporous was planning to expand.

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Shortly thereafter, Daramic began a campaign of exclusionary conduct. After Daramic learned in 2003 that Microporous

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PX0744-001. The President of Daramic then put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic simply as **REDACTED** PX0932.

In 2005, when Daramic learned that Microporous planned to build a line to support business, it concluded that Microporous

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PX0168-002. Daramic decided that it should fight this threat because

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PX0694-001. Indeed, when it became clear that intended to switch to Microporous in 2006, Daramic used the threat of cutting off supply to force to extend its contract

Id. at -001; PX1211-001; PX0456. **REDACTED**

When Daramic learned that another customer, intended to shift a portion of its separator purchases to Microporous it took steps to prevent from moving its

business. In response to an **REDACTED** Daramic would only quote for what was effectively 100% of **REDACTED** needs. Because of capacity restraints at Microporous and Entek, Daramic knew its capacity was essential to **REDACTED** and its response prevented **REDACTED** from switching any of its business to Microporous.

The last steps taken by Daramic to exclude Microporous occurred in 2007, just prior to the merger. In 2007, Daramic devised the **REDACTED** Pursuant to this plan, Daramic entered into long-term, exclusionary contracts with key customers to prevent Microporous from contracting with them. Daramic believed that by contracting with these customers, Microporous' expansion could be slowed. Daramic's conduct prevented Microporous from acquiring sales opportunities needed for its expansion. Despite Daramic's continued efforts, Microporous finally managed to build a new facility in Feistritz, Austria in 2008. Polypore bought Microporous just weeks before the new factory was set to begin full commercial production. Microporous' European expansion would have freed up significant capacity for the North American markets and Microporous had marketed this capacity in North America for months before it was acquired.

Daramic thus believed that it needed to **REDACTED**
PX0168-002; PX0694-001. Daramic believed an acquisition would **REDACTED**

PX0932. Polypore finally acquired Microporous on February 29, 2008.²

Polypore's documents analyzing the 2008 acquisition of Microporous demonstrate its anti-competitive intent. Presentations to Polypore's Board highlight that:

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²Although valued at \$76 million the transaction **REDACTED**

PX0954-006.
On receiving several customer complaints shortly after the acquisition was announced, the FTC staff requested that Polypore hold the former Microporous separate during the FTC proceedings. PX0290; PX0291. Polypore refused. PX0955-005.

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PX0203-088. Indeed, Daramic management asserted to the Polypore Board that **REDACTED**

Id. All of the financial projections that were done at Polypore and presented to the Polypore Board of Directors incorporate expectations and assumptions that the merger would eliminate competition from Microporous and allow for higher prices. The management of the former Microporous conveyed similar analyses to their board, asserting that as a result of the acquisition,

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PX0049-001.

These predictions proved to be prescient. The acquisition reduced or completely eliminated competition in four markets for flooded battery separators: (1) deep-cycle separators; (2) motive separators; (3) UPS separators; and (4) SLI separators. There are no effective substitutes for the Microporous and Daramic products in the first three markets, and only one competitor in SLI separators for North America. As a result, Daramic has gained significant market power. Since the acquisition, it has forced customers to pay higher prices.

In SLI separators, Polypore eliminated Microporous as an emerging competitive threat whose presence had already had a significant competitive impact. The only other competitor to Daramic in this product market is Entek. Microporous had targeted an expansion into this business for years, and had competed to supply two SLI separator customers:

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It was only because of Daramic's efforts to ward off the

Microporous threat that Microporous had not secured commercial sales. Yet, Microporous' efforts to obtain business with SLI customers had already led to lower SLI separator pricing.

The acquisition also eliminated Microporous as a uniquely positioned entrant into the UPS market. Prior to the acquisition Daramic had a monopoly in the North American market for UPS separators for flooded batteries. Microporous, however, had developed a PE separator for the UPS market that competed with Daramic's product and was testing it with customers. By virtue of its location and expertise, Microporous was uniquely situated to enter this market. Absent the acquisition, Microporous would have entered the market for UPS separators and disrupted Daramic's monopoly. The acquisition eliminated this actual potential competition.

There is no evidence of timely, likely, or sufficient entry from any other competitor that would counter such anti-competitive effects. Indeed, no other competitor has attempted to enter the North American market despite Polypore's achievement of monopoly in three of the four markets at issue and its anti-competitive conduct, including increased prices and its litigation and threatened litigation against customers who will not accept these monopolistic price increases. Nor is there any evidence of efficiencies that benefit competition or customers.

The only effective remedy for the unlawful acquisition is to restore competition by requiring that Polypore divest the complete Microporous business, including its recently completed plant in Feistritz, Austria, the equipment purchased for its expansion in North America, all of the former Microporous' intellectual property, and the business and employees associated with those facilities. Because Polypore's exclusionary conduct has effectively reduced competition in these markets for nearly ten years, Complaint Counsel also seeks the divestiture of additional PE manufacturing lines, that contracts be voidable at any customer's request, and that a monitor trustee be appointed at Polypore's expense to ensure that Polypore does not take anti-competitive actions that reduce the effectiveness of the Commission's remedy in this matter. Finally, the ALJ should void the market

division agreement with H&V and enjoin similar future agreements. Complaint Counsel also seeks additional orders consistent with these remedies.

II. Polypore's Acquisition of Microporous Has Increased Market Power and Reduced Current and/or Potential Competition Significantly in the Markets for Deep-Cycle, Motive, SLI and UPS Battery Separators

Section 7 of the Clayton Act prohibits acquisitions “in any line of commerce or in any activity affecting commerce . . . [if] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18; *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). The Supreme Court has explained that Section 7 uses the word “may,” because it “deals in ‘probabilities, not certainties.’” *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505, (1974) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Complaint Counsel may demonstrate its prima facie case by showing that the acquisition would lead to “undue concentration in the market for a particular product in a particular geographic area.” *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). This evidence creates a “‘presumption’ that the merger will substantially lessen competition.” *Id.* (citations omitted). Upon such a showing, the burden shifts to Respondent to rebut the presumption with evidence that “‘shows that the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant market.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D. D.C. 1997). Respondent cannot do so here.

A. The Relevant Product Markets are Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries

In determining relevant product markets, courts have traditionally considered two factors: “[1] the reasonable interchangeability of use [and 2] the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325. In other words, the issue is

“whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.” *Staples*, 970 F. Supp. at 1074 (internal quotations omitted). “[T]he determination of the relevant market in the end is ‘a matter of business reality – of how the market is perceived by those who strive to profit in it.’” *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted). Thus, “‘industry or public recognition of the [market] as a separate economic’ unit matters because we assume that economic actors usually have accurate perceptions of economic realities.” *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 219 (D.C. Cir. 1986).

There are four relevant markets in which to properly assess the anti-competitive impact of Polypore’s acquisition of Microporous: 1) separators for deep-cycle batteries; 2) separators for motive power batteries; 3) separators for UPS batteries; and 4) separators for SLI batteries.³

1. Deep-Cycle Battery Separators are a Product Market

The deep-cycle separator market comprises separators used in golf cart and scrubber batteries. Due to the technical requirements of deep-cycle batteries, the only separators considered effective by purchasers in this market are made from rubber and PE-rubber. These rubberized separators are unique in that they offer the ability for the battery to outlive batteries with conventional PE separators while being constantly discharged and then recharged (cycling) after exhausting up to 100% of the battery’s energy. Deep-cycle batteries contain an antimony additive that facilitates this cycling process. *See, e.g.*, PX1791-001. The deposition of antimony onto the negative plate, sometimes called “antimony poisoning” drastically reduces the cycle life of the battery. *See, e.g.*, PX1791-001; PX1124-001. Deep-cycle batteries require separators containing rubber to suppress antimony poisoning. *See, e.g.*, PX1791-001; PX0072-020; PX0798. Pure PE

³ Complaint Counsel also asserts an alternative relevant market comprising all battery separators made with PE.

does not sufficiently suppress the transfer of antimony in a deep-cycle battery. In a deep-cycle application, a battery with a pure PE separator would last far fewer cycles. PX1124. Using a PE separator could risk a golf cart not lasting a full round of golf.

Microporous' Flexsil is a natural rubber separator that is recognized as the industry standard for deep-cycle batteries. **REDACTED** for a

less expensive separator, Microporous developed a PE-rubber separator called CellForce. The addition of rubber allows the PE separator to achieve antimony suppression similar to Flexsil, but at a significantly lower cost. *See* PX0798-003-004. Daramic introduced a competing PE-rubber separator, HD⁴, several years ago, and had been gaining market share ever since. *See, e.g.*, PX1744-004; PX1071; PX0222-001; PX0033-040; *see also*, PX0736-002

PX0316-002. According to the former CEO of Microporous, HD was the only competitor to Microporous' Flex-Sil and CellForce products for deep-cycle batteries. PX0920-013; PX0906-016. There are no economic substitutes for rubber or PE-rubber separators for deep-cycle batteries. PX0319-007 **REDACTED**

For these reasons deep-cycle separators made from rubber or a blend of PE and synthetic or natural rubber are a relevant product market in which to assess the competitive impact of the merger.

2. Motive Separators are a Relevant Market

The motive power battery market is composed primarily of batteries for forklifts. *See, e.g.*, PX0922-016; PX0185-006; PX1786-113

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counterweights in the design of industrial vehicles and are among the largest batteries made. *See* PX2110-035. These batteries require separators which are much thicker and larger than other separators. In North America, motive separators are made of PE or PE-rubber.

Evidence of a separate motive separator market is found in Respondent's documents. Microporous' former owners wrote that

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PX1124-002. *See also, e.g.,* PX0072-020;

PX0185-006. Daramic's documents also describe a separate motive market. A Daramic marketing flyer describes the motive market as follows:

the requirements for traction batteries in respect of mechanical properties and chemical stability are considerably higher than for starter separators. [A] forklift battery is typically operated for about 40,000~50,000 hours in charge – discharge service whereas a starter battery only for 2000 hours. The requirements as to electrical resistance are lower because of the typically low current densities for traction batteries. These differences are reflected in the design of the modern traction battery separator material.

PX1790-001 (emphasis added). Motive separators are in fact distinguished from other types of battery separators and are a separate market based on technical and physical properties of the separator as demanded by the specific end use of the battery in which they are contained.

The demand for motive power battery separators is inelastic, as purchasers do not consider any other type of battery separator as an adequate substitute. Purchasers of motive separators consistently testify that they would not switch to PVC, or any other material, in the event of a five percent increase in the price of Daramic's motive separators.

3. UPS Separators are a Product Market

Battery separators used in UPS batteries are a relevant product market. The UPS battery market comprises mainly batteries used to provide temporary back-up power supply in the event of an unplanned outage to critical data centers and buildings. UPS batteries are designed to sit idle for extended periods of time then, when needed, provide a quick burst of sustained current for a few

minutes until a generator is engaged or an orderly shutdown is made.

The market for flooded UPS battery separators consists of separators made from PE. Daramic's UPS PE product has the vast majority of sales. Daramic also manufactures a product called DARAK in Europe that can be used in flooded UPS batteries, but it is more than two times more expensive. A small but significant and nontransitory increase in price ("SSNIP") in Daramic's PE product to North American customers would not cause switching to DARAK or rubber because of the significant price difference and because Daramic controls the price and sales of both. Finally, Amersil's PVC made in Europe is considered suspect by many North American purchasers because it can degrade at higher temperatures. Thus a SSNIP in Daramic's UPS separators would not lead customers to switch to other materials.

4. Starting, Lighting, Ignition ("SLI") Battery Separators

SLI separators is a relevant market in which to assess the impact of Polypore's acquisition of Microporous. The SLI application is predominately an automotive end use. SLI batteries are used to provide a quick and unsustained surge of current primarily to start the engine after which the car's engine becomes the source of power. The SLI market is the largest separator market. PX0131-032.

Separators for SLI are made from PE. SLI batteries contain little or no antimony and do not require a rubberized separator. SLI separators must have a very low electrical resistance ("ER"). PX0913-004; PX0669-019. The low ER is achieved partly due to the thin profile of the separator. *See, e.g.*, PX0669-004. These attributes of PE account for its being recognized as the best material from which to make a separator for a flooded battery for an SLI application. In some parts of the world, other material is used but in decreasing quantities, as even these more remote regions are progressively converting to PE. PX0923-016-017. North American battery manufacturers would

not switch to these inferior SLI materials in response to a SSNIP.⁵ PE battery separators for SLI batteries are, for all of these reasons, a relevant product market in which to assess the competitive impact of Polypore's acquisition of Microporous.

B. The Relevant Geographic Market is North America

The relevant geographic market is that geographic area “to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition.” *Staples*, 970 F. Supp. at 1073 (quoting *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994)). The geographic market can be proven by demonstrating that it is the smallest region within which a hypothetical monopolist could “profitably impose at least a ‘small but significant and nontransitory’ increase in price.” *Merger Guidelines* § 1.21. A monopolist of all North American separator production could profitably increase prices to North American customers for each relevant product by a SSNIP.

Currently, North American battery manufacturers only buy separators for use in their North American flooded batteries from Daramic and, with respect to SLI separators, Entek. Other than Daramic, there is not a single producer of separators for lead acid batteries who manufactures or sells a deep-cycle battery separator outside of North America. PX0911-031; PX0906-028. Likewise there are no producers of UPS or motive separators outside of North America who are currently capable of meeting the specifications of North American UPS or motive battery manufacturers.⁶ PX0911-031. A SSNIP in deep-cycle, UPS, and motive separators will not be defeated by an

⁵ AGM batteries require AGM separators, and AGM separators are not compatible with flooded batteries and are thus not in the relevant market. Purchasers of SLI separators for flooded batteries cannot switch to using an AGM separator and would not switch to producing AGM batteries in response to a SSNIP. *See, e.g.*, PX0513.

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increase in purchases from producers of any of these three products outside of North America since there are currently no such producers. To the extent that a company entered one of these three product markets outside of North America, they would face the same geographic barriers discussed with respect to SLI separators below, and therefore would still not be in the North American geographic market.

There is no evidence that customers located in North America have ever sourced any of the relevant products from anywhere but North America.

a single instance in which an Asian producer has ever supplied a North American customer with any of the relevant products. PX0902-022-023; PX0909-012; PX0911-031; PX0264-003; PX0506. Indeed, of the hundreds of thousands of documents produced in this matter, Daramic has not been able to point to any evidence that Asian producers are selling any of the relevant products to any North American customer.

Nor would a price increase entice imports. For example, Daramic/Microporous and Entek all raised prices on all of their relevant products in North America in 2007, 2008, and 2009 and not one customer began importing separators for any of the relevant products from outside of North America. PX0263-003; PX0371; PX0911-031. Significantly, in 2006, when Daramic declared force majeure and informed its North American customers that they would not receive all of their separator requirements, customers were unable to import any of the relevant products from any producer. The same was true in October 2008 when Daramic declared force majeure because of a strike at its Owensboro, KY plant: customers were unable to substitute any of the relevant products from other producers outside of North America despite a lack of complete supply from Daramic.⁷ Indeed at least one company had to idle its lines for days while it waited for product from Daramic

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REDACTED

This would not be a durable solution.

during the strike. These two instances demonstrate that non-North American suppliers are not available even when there is a large and significant increase in price, much less a SSNIP.

North American battery manufacturers prefer to source their PE separators from local suppliers. Having a local source of supply reduces the time and expense needed to get the product to the customers, which reduces the risk of a disruption in the supply chain. *See* PX0923-020-021; PX0920-024-026, PX0910-018-019. For example, [REDACTED] told Microporous that it must build a PE separator plant in Europe to supply their European battery production facility, instead of continuing to source its needs from Microporous' plant in Piney Flats, TN. PX0910-018-019. If the separator manufacturer is local it has a better opportunity to quickly troubleshoot technical problems that a customer may be having with its separators or the customers machines.

The only Asian producer of SLI separators who can produce the most common thickness of SLI separators used in North America (6 mm) is a Chinese company called Baoding Fengfan Rising Battery Separator Company ("BFR"). [REDACTED] have studied the possibility of importing SLI separators from China and found it to be uneconomical. PX1522. BFR

[REDACTED]

Adding shipping and other costs, such as China's VAT,

[REDACTED]

BFR will not supply North America in response to a SSNIP.

The evidence in this case indicates that a North American monopolist in all four product markets would lose very little, if any, sales to products outside the geographic market. PX0033-007. Thus the relevant geographic market to analyze deep-cycle battery separators, motive battery separators, UPS battery separators, and SLI battery separators is North America.

C. The Acquisition is Likely to Lessen Competition in the Relevant Markets in Violation of Section 7

Section 7 of the Clayton Act prohibits any acquisition of stock or assets “where in any line of 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*.” 15 U.S.C. § 18 (2008) (emphasis added). “Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.” *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); see *CB&I Initial Decision* at 87-88. In the markets for deep-cycle, motive, and UPS separators, the acquisition eliminated the only competition and is presumptively illegal. *United States v. Franklin Electric Co., Inc.*, 2000 U.S. Dist. LEXIS 20676, *20 (W.D. Wis. 2000).

A starting point for analyzing the competitive effects of acquisitions is the level of concentration in a market. All of the battery separator markets identified in the Commission’s Complaint are highly concentrated, as measured by the Herfindahl-Hirschman Index (“HHI”). Three of the markets, after the acquisition, are 100% monopolies. A monopoly market share raises the strongest level of concern that could be associated with a merger.⁸ *Merger Guidelines* § 1.5.

As in *Chicago Bridge*, the high concentration and the evidence of substantial direct competition establishes a very strong presumption of anti-competitive effects in each of the relevant markets. *CB&I Initial Decision* at 96; see also *Chicago Bridge*, 138 F.T.C. 1024, 1053 (January 6, 2005) (Opinion of the Commission) (“Accordingly, the evidence ‘creates, by a wide margin, a presumption that the merger will lessen competition.’”) (quoting *Heinz*, 246 F.3d at 716). Respondent must come forward with compelling evidence that the history of direct competition between Daramic and Microporous, and the monopolistic market shares that Daramic now enjoys,

⁸ Concentration is best measured in this case using dollar sales. *Merger Guidelines* § 1.41.

somehow do not create a strong inference of anti-competitive effects.

“If the Government’s prima facie case anticipates and addresses the respondent’s rebuttal evidence, as in this case, the prima facie case is very compelling and significantly strengthened.” *See Chicago Bridge*, 534 F.3d at 426. The compelling evidence that Respondent would need to avoid liability is not present in this case. Rather, Respondent’s documents demonstrate that it understood that acquiring Microporous would eliminate competition and allow it to increase price in the markets of concern in this case. This evidence strengthens Complaint Counsel’s prima facie case, reinforces the already strong presumption of anti-competitive effects, and adds to Respondent’s burden to overcome the Commission’s case.

1. The Acquisition Established a Monopoly in Markets for Separators Used in Motive Power and Deep-Cycle

In two of the markets alleged in the Commission’s Complaint - separators for deep-cycle and motive power batteries - Daramic has gained a monopoly by acquiring Microporous. For years, Daramic and Microporous were the only two firms competing to supply customers in North America in these two markets, and the competition between them grew increasingly intense, to the benefit of the key customers. After the merger, however, the benefit of that competition was lost.

a. Deep-Cycle Monopoly

Prior to the acquisition, deep-cycle had been Microporous’ strongest market and their share has exceeded 90 percent. However, in 2005, Daramic introduced the HD separator as a direct competitor to Microporous’ Flex-Sil separator. Daramic began to take customers from Microporous and grew its market share steadily from the low single digits to **REDACTED** by 2007. PX0033-040. Daramic has grown its share by developing new products and competing on price and service. *See, e.g.*, PX0413-005. Following Daramic’s introduction of HD, Daramic informed customers that it was “aggressively pursuing” sales into the “golf cart/deep-cycle battery market.” PX1071.

Daramic's efforts to expand the sales of Daramic HD to deep-cycle customers included touting the costs savings that would accrue to customers from the purchase of the product. PX0261-007. In fact, Daramic HD was priced lower than Flex-Sil in every instance where Microporous and Daramic competed for deep-cycle business. PX0442-002.

There is no evidence of deep-cycle competition from any other firms besides Daramic and Microporous. Despite imposing steep price increases on deep-cycle separators since the acquisition, Daramic has not lost deep-cycle business to any competitor. *See* PX0911-020. Post-acquisition, Daramic took steps to limit access to lower priced HD product. When one customer tried to increase its purchases of the lower priced HD,

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PX0224-002. As a result of the

acquisition, Daramic thus acquired a monopoly in the sale of deep-cycle battery separators to North American customers. *See, e.g.*, PX0076-002.

b. Motive Power

In 2007, Microporous had **REDACTED** of the motive market, while Daramic

PX0033-042. There are no other competitors. However, Microporous was aggressively targeting customers to gain business and, just before the acquisition, had displaced Daramic as a supplier to **REDACTED** motive separator customer. Microporous estimated that by 2010, its market share would be close to 60 percent, and Daramic's close to 40 percent. In any event, the post-acquisition market share is 100 percent (i.e., a monopoly).⁹

Microporous' efforts at EnerSys and other customers put competitive pressure on Daramic to respond by reducing its prices. *See* PX0247; PX0153-002

⁹ The acquisition increases the HHI, as measured by dollar sales of deep-cycle separators in North America, by 1663, from 8337 to 10000. PX0033-042. The post-acquisition market share is 100 percent.

REDACTED

PX0243; PX0085; PX0041-004. Where

Daramic did not face competition from Microporous, it recognized that it could obtain higher prices.

See PX0843-001

REDACTED

Daramic's recognition highlights

both the impact of Microporous competition, and the lack of alternatives. As a result of the acquisition, Daramic thus acquired a monopoly in the sale of motive separators to North American customers.

2. The Acquisition Eliminated an Existing Competitor in the SLI Separator Market and Prevented Significant De-Concentration of that Market

Microporous was expanding into SLI when the acquisition occurred, and the acquisition stopped the significant effect of its future competition in SLI. See *Grumman Corporation v. The LTV Corporation*, 665 F.2d 10, 15 (2d Cir. 1981) (“the [lower] Court’s assessment of the anti-competitive effect of a Grumman-Vought merger focused quite properly on the ‘probable future’ of the market.” *Id.*, at 15 (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974));¹⁰ *United States v. El Paso Natural Gas Co., et al.*, 376 U.S. 651, 661 (1964) (“[u]nsuccessful bidders are no less competitors than the successful one”). “The effect on

¹⁰ One measure of Microporous’ future impact on this market is the use of the estimated sales for the new PE line for which Microporous had already purchased equipment that was scheduled to be finished in the first quarter of 2009. PX0080-060; PX0920-023. Using these estimated sales, Microporous would have had 6 percent share of the market, Entek 62 percent, and Daramic 32 percent. PX0080-060. In 2010, the HHI would have been 4904, and the merger effectively increased the HHI by 382 to 5288. PX0033-041.

competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." *Id.* at 660.

Prior to the acquisition, Daramic and Entek were the only two companies that had substantial sales of separators for SLI batteries. As measured by sales, Entek and Daramic

REDACTED of the North American market for SLI separators in 2007. PX0033-041. However, Microporous had the capability to produce these products, had been a consistent competitor and had come close to securing SLI business, but still had not had success in unseating Daramic or Entek as incumbent suppliers, though Microporous did sell SLI separators to one U.S. customer in 2005. PX0920-027. At the time of the acquisition, Microporous was very close to making commercial sales. Microporous had qualified its separators for use in SLI batteries, had a Memorandum of Understanding with for the supply of SLI separators, and had analyzed the capital investments necessary to add the capacity to meet needs. PX0906-048; PX0909-002; PX0920-028. Microporous had obtained equipment it needed to expand capacity. PX0910-014. Microporous was also in discussions with other potential customers such as **REDACTED** . PX0909-003-004. These sales negotiations had an effect on Daramic's prices.

Microporous' efforts were not lost on Daramic, whose documents express concern that

REDACTED

PX0238. Absent an acquisition of Microporous, Daramic documents predicted that Daramic would have had to

REDACTED

PX0174-003, 016. Microporous' efforts to obtain sales, and its impact on pricing, demonstrate that prior to the acquisition, Microporous was an actual and direct competitor to Daramic and Entek in the supply of battery

separators to SLI customers.

As a result, the acquisition eliminated Microporous as the only effective challenger to Daramic and Entek in North America.

3. The Acquisition Eliminated Microporous as a Potential Entrant in the Market for UPS Separators

Daramic has for years enjoyed a monopoly in the supply of PE separators for UPS applications. Microporous was nearing the successful conclusion of a three year project to enter this market with a special PE based separator. **REDACTED**

REDACTED Executives at Microporous anticipated revenues from the product as early as 2008 or 2009.

Since the acquisition however,

REDACTED

By eliminating Microporous as an entrant in this market, the acquisition left Daramic's monopoly unchallenged, and reduced competition. **REDACTED** also highlights the loss of innovation competition lost as a result of the merger and is an immediate anti-competitive effect of the acquisition.

4. Daramic Expected that the Merger Would Eliminate a Dangerous Competitor and Provide it With the Monopoly Power to Raise Price

Daramic's view that acquiring Microporous would eliminate a major competitor and reduce price competition is stated repeatedly in its documents throughout a period of several years, right up until the time of the acquisition. As early as July 2003, Daramic's head of sales, Tucker Roe,

sent a memo to the President of Daramic summarizing the rationale for acquiring Microporous, thus:

PX0935-001. *See also* PX0932

REDACTED

; PX0034-005

When Daramic's former President passed the reins to Pierre Hauswald in August 2006, he left these final thoughts

REDACTED

PX0167.

That the acquisition eliminated competition is more fully fleshed out in virtually all of the documents prepared either by Daramic or Polypore executives immediately prior to the acquisition. These documents project that the acquisition will allow Daramic to increase price to customers and avoid the increased competition from expected Microporous expansions. For example, in a September 2007 presentation titled Microporous Products, L.P. Acquisition, Daramic executives write that

REDACTED

PX0045-013. Daramic would also have to

REDACTED

PX0045-013. In analyzing the benefits of a Microporous acquisition, Daramic anticipated that it would be able to

REDACTED

REDACTED

Id. at 015. With respect to the business risks associated with the Microporous acquisition, Polypore's executives expressed concern about the increasing competition with Microporous, and describes three risks, including a

REDACTED

Id. at 017. *See generally* PX0053; PX0294-013

There is thus no doubt that Daramic's executives anticipated that the transaction would reduce competition, and that this was one of the driving reasons for the transaction.

5. The Alternative Market of All PE Also Raises Significant Concerns

Polypore's expert argues that the market is all PE separators worldwide. If Dr. Kahwaty is correct, then the market is still highly concentrated, and the acquisition increases concentration sufficiently to warrant a presumption of anti-competitive effects. Dr. Kahwaty concedes that according to his calculations, using 2007 dollar sales, the HHI increased by 189, from 3731 to 3920 as a result of the acquisition of Microporous by Polypore. Kahwaty (Polypore's Expert) Dep. Tr. 79:18-80:9. However, Dr. Kahwaty does not calculate a North American all PE market, which is significantly more concentrated (comprising only Entek, Daramic, and Microporous) and would therefore result in a significantly larger increase in HHI as a result of the transaction.

6. Respondent Cannot Demonstrate that Entry Would Prevent Anti-competitive Effects in the Four Markets

To prevent a reduction in competition, entry "must restore the competition lost from the merger." *Chicago Bridge*, 534 F.3d at 429 ("[C]ourts have generally concluded that for entry to constrain supracompetitive prices, the entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers.") (citing cases). A merger between two firms would be unlikely to

lead to anti-competitive harm only if entry by new firms “would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.” *Merger Guidelines* § 3. Respondent’s claim that timely, likely, and sufficient entry will rescue this anti-competitive merger is unfounded. Based on the monopoly and near-monopoly levels of concentration in the relevant markets, Respondent has the burden of providing particularly compelling evidence of ease of entry. *Chicago Bridge*, 534 F.3d at 430, and n.10 (quoting Areeda & Hovenkamp at ¶ 422 (“The more concentrated the market and the greater the threat posed by the challenged practice, the more convincing must be the evidence of likely, timely, and effective entry.”)). The mere evidence of customers inquiring about suppliers willingness in the future to provide deep-cycle, motive, and UPS separators “falls short of proving . . . that entry [will be] sufficient to replace the competition lost from the acquisition.” *Chicago Bridge*, 138 F.T.C. at 1102. Instead, as the Commission described, such efforts show “little more than a refusal to throw themselves on [a supplier’s] mercy.” *Id.*

In this case, new entry would not be timely, likely, or sufficient to counteract the anti-competitive effects of the acquisition. Furthermore, it would take many years for a new competitor to have enough of a significant market impact to restore competition.

a. Respondent Cannot Demonstrate that Entry Into the Relevant Markets Would be Timely, Likely or Sufficient

“The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.” *FTC v. Cardinal Health*, 12 F. Supp. 2d. 34, 56 (D. D.C. 1998); *Chicago Bridge*, 138 F.T.C. at 1037 n.45 (quoting 2A Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 420b at 60 (2d ed. 2002) (“The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions.”)).

There has been no de novo entry in any of these markets in North America in the last decade.

In fact, Entek *exited* the motive market almost nine years ago. Microporous' own efforts to expand in motive, UPS, and SLI have taken many, many years and have been fraught with difficulties. This is because these markets are characterized by high barriers to entry, including high capital costs to achieve necessary scale-based benefits, experience and learning effects, specialized expertise, and the value of reputation or brand. PX0265-004, 011. Respondent has represented to the investing public that these markets are characterized by barriers to entry.¹¹ Respondent's conviction that eliminating Microporous would lead to higher prices must as a matter of economic logic mean that Respondent cannot believe that entry is sufficiently easy to prevent its projected price increases. *See, e.g.*, PX0276-009; PX0174-003; PX0212. In short, the evidence demonstrates that no entrants can compete at "sufficient scale" and on the "same playing field" as Daramic and thus "eliminate the anti-competitive effects" of the acquisition. *Chicago Bridge*, 534 F.3d at 430, 442; *CB&I Initial Decision*, at 101 (entry must be "effective in offsetting any loss of competition") (citation omitted).

(1) Entry Would Not Be Timely

The *Merger Guidelines* generally use "two years from initial planning to significant market impact" as a threshold for measuring whether entry would be timely. *Merger Guidelines* § 3.2. De novo entry into any of the relevant markets - in the form of entry at a greenfield plant site - would take well in excess of two years. Building a plant and training a workforce takes about one to two years, which assumes expertise in how to build a PE separator production line.

A de novo entrant would need years simply to develop the necessary technology to compete in the more specialized markets for UPS, motive power and deep-cycle separators, including

¹¹ *See, e.g.*, PX0829 (stating to Standard and Poor's "the SUBSTANTIAL technical ability, capital investment, lengthy qualification requirement, market share and other 'barriers to entry.'");

working with customers to understand and develop product for their specific applications, obtaining product qualifications, and working around Daramic's significant patent/IP position. Just as Daramic spent many years¹² trying to design a battery separator that would work well in deep-cycle applications, it would be impossible for a new entrant to develop and design a deep-cycle separator from scratch and have it tested and ready for commercial sales within two years. *See, e.g.*, PX0433-001.

The entrant would also need to provide customers with products that the customer could test to ensure that it consistently met the customer's quality requirements. Testing can take a considerable time – more than a year in the case of deep-cycle, motive and UPS separators. For example, Microporous' greenfield entry in Europe took more than three years to accomplish.

(2) Respondent Cannot Demonstrate that Entry Into the Relevant Markets is Likely

In order to demonstrate that entry is likely, Respondent must be able to demonstrate that entry would be profitable at pre-merger prices, and such prices could be secured by the entrant. *Merger Guidelines* § 3.3. Based on the record in this case, there is no evidence of either. Rather, the market share that a new entrant would surely need to justify its investment would be sure to drive prices down well below pre-merger prices. That impact would make entry unattractive and therefore unlikely. This, together with the high barriers to entry, make sufficient and timely entry unlikely.

(3) Respondent Cannot Demonstrate that Entry Would Be Sufficient to Overcome Anti-competitive Effects

Respondent cannot demonstrate that entry would be sufficient to restore the competition lost as a result of the because it must be able to point to firms that would be able “in a reasonable time frame to build a reputation for quality and reliability.” *Chicago Bridge*, 138 F.T.C. at 1095. It must

¹² Daramic's own development of its deep-cycle separator
064.

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PX0950-

also prove that these firms would “be of a sufficient scale to compete on the same playing field as [Daramic] and thus would be unable to constrain the likely anti-competitive effects.” *Chicago Bridge*, 534 F.3d at 430. The uncontroverted evidence shows that no such entry is likely.

No potential entrants have demonstrated that they have the technology, product quality and supply capability to be taken seriously by North American customers in these markets. Indeed, Daramic documents explicitly cite a firm’s need to develop a reputation as a barrier to entry. PX0266-012. Based upon the experience Microporous gained through learning by doing, it obtained a superior reputation with North American customers. PX0033-010. Microporous’ reputation for good product design, efficiently making battery separators that met customers’ needs, an engineering and business staff with the technical skill to solve problems, and customer acceptance of their products lead to a proven record and the development of relationships with battery manufacturers. *See, e.g.*, PX0131-054-056, 064; PX0910-024.

No potential entrants are likely to replicate the competitive presence of Microporous *See, e.g.*, PX0131-054-056, 064; PX0266-012; PX0910-024; PX0092-001. Manufacturing know how is accumulated over multiple years. *See, e.g.*, PX0131-054-056, 064; PX0910-024; PX0092-001. Asian suppliers substantially lag Daramic and Microporous in these assets. *See, e.g.*, PX0913-045-046

REDACTED

For example, in assessing a small SLI battery separator manufacturer in Daramic noted that:

PX0216-001; *see*

REDACTED

also PX0217-002-003.

In the deep-cycle market, Daramic now owns all the patents for using rubber additives in PE separators for suppression of antimony, as used in CellForce and Daramic HD. PX2161; PX2166; PX1124-001. While other separator additives have been considered for antimony suppression,

natural or synthetic rubber is the only additive known to adequately suppress antimony in deep-cycle batteries. *See, e.g.*, PX2189-027. Daramic failed in its attempt to use wood lignin as an additive and switched to rubber for deep-cycle. *See generally* PX0319. An entrant wishing to enter this market would have substantial difficulty inventing or proving the effectiveness of an antimony suppression technology which does not infringe Daramic's patents.

D. Respondent's Claimed Efficiencies Defense Fails

When an acquisition increases concentration in a highly concentrated market, it is presumed that anti-competitive effects may be the result. *CB&I Initial Decision* at 88 (and cases cited therein). In three markets that resulted in a monopoly (deep-cycle, motive, and UPS), the unilateral effects are irrefutable. In the SLI market, the reduction of competitors from three to two raises a strong presumption of anti-competitive effects, such as coordinated or unilateral effects. *See FTC v. CCC Holdings, et al.*, --- F. Supp. ---, 2009 WL 723031, *27, et seq. (D. D.C., Mar. 18, 2009). ("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.'") (Citation omitted).

Daramic attempts to rebut all the counts in the complaint with an affirmative defense of efficiencies. But its defense fails. Under the law, Daramic must prove "extraordinary efficiencies" to rebut a strong presumption of anti-competitive effects. *Heinz*, 246 F.3d at 720; *see also* Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 971f, at 44 (2d ed. 2006) (requiring "a showing of 'extraordinary' efficiencies where the 'post-merger market's HHI is well above 1800 and the HHI increase is well above 100"). Moreover, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. "Delayed benefits from efficiencies . . . will be given less weight." *Merger Guidelines* § 4, n.37. Indeed, courts will

not allow an efficiencies defense when the respondent cannot prove “that [its] efficiencies are verifiable” or “that the cost savings achieved through efficiencies are likely to be greater than the transaction’s likely anti-competitive effects.” *CCC*, 2009 WL 723031, *39 (Citations omitted).

Respondent has not yet presented any comprehensive, well-documented efficiency evidence. *See, e.g.*, PX0912-008-009, 012-013. Daramic’s vague and unsupported claim that it might one day develop a superior product based on its PE expertise and Microporous’ rubber expertise is mere speculation, and is belied by the facts that Microporous already possessed PE expertise. Few former Microporous employees with expertise in rubber (e.g. Gilchrist, Wimberly, Brilmyer) are still with the company. *See* PX0912-014-015; PX0950-060. Absent any valid defense, Daramic’s acquisition of Microporous is clearly illegal.

III. Daramic Entered Into Agreements that Unlawfully Restrained Trade

In addition to its unlawful acquisition of Microporous, Daramic engaged in other conduct that violated Section 5 of the FTC Act. Section 5 prohibits “unfair methods of competition.” 15 U.S.C. § 45(a). Unfair methods of competition include, but are not limited to, any conduct that would violate Sections 1 or 2 of the Sherman Antitrust Act. *See, e.g., California Dental Assn. v. FTC*, 526 U.S. 756, 762 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators’ Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

The evidence in this case will show that Daramic engaged in conduct that violated both Section 1 (Complaint at ¶¶ 47, 50-51) and Section 2 (Complaint at ¶¶ 39-46, 52-53) standards of antitrust liability. Specifically, Daramic’s agreement to allocate battery separator markets with Hollingsworth and Vose (“H&V”) is a combination or conspiracy between potential competitors that unreasonably restrains trade. In addition, Daramic’s pattern of coercive and exclusionary behavior to obtain or maintain monopoly status in several relevant markets – a pattern that continues to this

day – violated Section 5.

A. Count II: Unreasonable Restraint of Trade

In 2000-2001, it became apparent to Daramic that Hollingsworth & Vose, a producer of absorptive glass mat (“AGM”) battery separators for sealed lead-acid batteries,

REDACTED *See, e.g.,* PX0035-005-006; PX0169-001. In order to block this competitive threat, Daramic approached H&V and proposed an “alliance” between the two companies. *Id.* From the outset, the core of this arrangement was a set of mutual promises to stay out of one another’s markets. Specifically, Daramic agreed not to make or sell AGM battery separators in the United States or anywhere in the world; in return, H&V agreed not to make or sell PE battery separators in the United States or anywhere in the world. Over time, the relationship evolved into a somnolent and insignificant joint sales agreement. The scope of actual collaboration between Daramic and H&V has never been sufficient to legitimize the parties’ broad and continuing agreement to allocate markets.¹³

As discussed below, Daramic’s conduct violates Section 1 of the Sherman Act as well as Section 5 of the FTC Act.

1. Legal Standard

Three elements must be established in order to prove a Section 1 violation: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. *In the Matter of North Texas Specialty Physicians*, 2005 WL 3366980 (F.T.C.) at 5 (Dec. 1, 2005) (Opinion of the Commission).

The Commission’s *PolyGram* decision sets forth an analytical framework for evaluating

¹³ An initial contract, **REDACTED** took effect on March 23, 2001. The Agreement specified **REDACTED** and was extended in 2006 PX0094-001, 006; PX0158-001. The parties also agreed that the restriction on competition

whether a horizontal agreement unreasonably restrains competition. *In the Matter of PolyGram Holding, Inc., et al.*, 136 F.T.C. 310, slip op. at 29-35 (July 24, 2003) (Opinion of the Commission). The initial and potentially dispositive issues are: (i) Is the challenged restraint inherently suspect? (ii) Has the respondent advanced a cognizable justification for the challenged restraint? (iii) Has the respondent advanced a plausible justification for the challenged restraint?

2. The Challenged Agreement Injures Competition

The Court should consider first whether the agreement between Daramic and H&V falls within a category of restraints that is “likely, absent countervailing efficiency justifications, to have anti-competitive effects – *i.e.*, to lead to higher prices or reduced output.” *PolyGram*, slip op. at 35-36. The assessment of a restraint’s likely competitive effects is informed by “past judicial experience and current economic learning.” *PolyGram*, slip op. at 29, *aff’d*, *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (“If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful . . .”). Applying these principles, it is apparent that the Daramic/H&V agreement to allocate markets is inherently suspect.

Agreements between competitors to divide markets are consistently treated by the courts as presumptively anti-competitive. *E.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (horizontal market division is “unlawful per se”).¹⁴ Further, antitrust law’s long-standing hostility to market division agreements is rooted in uncontroversial economic analysis. We expect Daramic to claim that this inherently suspect agreement to divide markets is reasonably related to a

¹⁴ *Accord Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1313 (S.D. Fla. 2005) (“As a general class, agreements between competitors to allocate markets are clearly anticompetitive . . .”).

collaboration between the parties, and hence potentially pro-competitive. Daramic will point to its efforts to sell H&V separators in other countries, and to limited joint promotional activities. This is not a plausible defense because it has nothing to do with eliminating competition in the United States and is thus overbroad.¹⁵

Daramic's principal purpose in contracting with H&V was to keep H&V out of the PE separator market. Indeed, the market division agreement was in place for months if not years before Daramic began to act as sales agent for H&V, and H&V did not sell any volume of PE separators on behalf of Daramic during the life of the agreement. In short, Daramic has entered into an inherently suspect restraint of trade that is unreasonably overbroad in scope and duration.

B. Count III: Monopolization and Attempted Monopolization

In the years leading up to the Microporous acquisition, many customers that wished to secure some volume of battery separators from Daramic were coerced by Daramic into accepting exclusive or near-exclusive contracts. Customers were in this way precluded from obtaining from Microporous the desired portion of their requirements. The purpose and effect of Daramic's strategy was to prevent Microporous from entering (or in some cases, expanding its presence in) one or more battery separator markets. This enabled Daramic to maintain its dominant position. Daramic's conduct violates Section 2 of the Sherman Act as well as Section 5 of the FTC Act.

1. Legal Standard

The offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished

¹⁵ *PolyGram Holding*, slip op. at 21 ("a proffered justification for an otherwise unlawful restraint must be reasonably 'tailored' to serve the asserted procompetitive interest"); *See also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50 (1980); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 981 (8th Cir. 1981) (geographic market division scheme was "merely an agreement between horizontal competitors to direct their efforts elsewhere. It has no substantial relation to any legitimate purpose of the joint venture.").

from growth or development as a consequence of superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

The offense of attempted monopoly maintenance has four elements: (1) that the defendant possesses monopoly power, and (2) has engaged in predatory or anti-competitive conduct with (3) a specific intent to monopolize, and (4) a dangerous probability of maintaining monopoly power. *See Order Denying Respondent’s Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim* (December 4, 2008) at 3 (Chappell, J.); *See also Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951).

2. Monopoly Power/Dangerous Probability of Maintaining Monopoly Power

Courts “typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected from entry barriers.” *Microsoft*, 253 F.3d at 51 (citations omitted).

Evidence in support of the conclusion that Daramic has long held monopoly power is set forth above. To recap: The company’s pre-merger shares of the UPS and motive separator markets were in excess of 90 percent.¹⁶ Entry into these markets is difficult and slow. Among the most important impediments to entry are technical expertise from “learning by doing,” reputation, and customer-specific testing requirements. Because barriers to entry are substantial, there exists at all

¹⁶ Market shares of this magnitude are sufficient to support a finding of monopoly power. *See, e.g., Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 935-36 (6th Cir. 2005); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 n.2, (6th Cir. 2002); *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). Daramic’s share of the North American SLI market was above 50 percent, and it was able to exercise monopoly power in this market as well.

relevant times a dangerous probability that Daramic's monopoly power will persist.

The conclusion that Daramic possessed monopoly power is bolstered by evidence concerning the relationship between the company and its customers. Daramic is able to charge supra-competitive prices, to dictate important terms of dealing, and perhaps most importantly, to coerce customers to abandon plans to purchase battery separators from competitors of Daramic.

3. Exclusionary Conduct

Conduct is exclusionary when it tends to exclude competition "on some basis other than efficiency," *i.e.*, when it "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) (citations omitted).

Requiring customers to purchase on an exclusive or near-exclusive basis is a classic strategy used by monopolists for improperly (albeit effectively) impeding rivals from entering the market. *E.g.*, *Lorain Journal*, 342 U.S. at 152-53; *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005). With exclusive dealing, a monopolist can exploit an entrant's inability to serve a customer's entire requirements at a particular point in time. For example, entry may be occurring in stages, the customer may desire some period of testing before shifting in full to a new supplier, or single stage entry is possible but takes a significant period of time. In all of these cases, the incumbent monopolist controls the terms on which customers are supplied during the initial period. The incumbent monopolist can threaten to withhold supply from, or charge higher prices to, customers that are unwilling to sign exclusive contracts. The monopolist uses its market power during this initial period to coerce customers into signing exclusive contracts that extend its market power into subsequent periods, thereby foreclosing or delaying entry.¹⁷

¹⁷ See Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229, 237 (2005); John Simpson and Abraham L. Wickelgren, *The Use of Exclusive Contracts to Deter*

This is precisely the anti-competitive strategy implemented by Daramic in the years leading up to its acquisition of Microporous. Microporous was interested in entering the SLI and UPS markets, and gradually expanding its presence in the motive markets. And many battery manufacturers were interested in facilitating this development (so as to be less vulnerable to Daramic). Daramic's response was to threaten to refuse to deal with customers that purchased – or even considered purchasing – battery separators from Microporous. The battery customers compelled to deal with Daramic on an exclusive basis include: **REDACTED**

REDACTED and others. Two of these episodes are described below.

In 2006, informed Daramic that it intended to shift much of its purchases of PE separators **REDACTED** to Microporous when its current contract expired. PX1203; PX1240; PX0473-005. *See generally* PX0033-028-031. Daramic responded by declaring a pretextual *force majeure* event and threatening to deliver only percent of the PE separator needs of under the existing contract. PX1207. To avoid a disastrous disruption in supply, then entered a long-term contract with Daramic.

Earlier, in 2003, and Daramic were negotiating the contract to supply European operations with PE separators. PX0820-017; PX2112-016-017. goal at the time was to reduce its reliance on Daramic and redirect some volume of its purchases to Microporous. When Daramic learned that it might lose substantial sales, it first warned that it would impose short-term spot pricing, and later threatened to withhold its supply in Europe entirely. Because felt Daramic **REDACTED** it was coerced into a worldwide exclusive contract

See, e.g., PX1832-026-027; PX1801; PX1811.

The effect of Daramic's coercive negotiating tactics and exclusionary contracts was to delay

Entry (July 18, 2001) (available at SSRN:<http://ssrn.com/abstract=287059> or DOI: 10.2139/ssrn.287059).

implementation of Microporous' plans to construct a production facility in Feistritz, Austria. *See generally* PX0033-030-031. Note that given this direct showing of competitive harm, it is not necessary for the court to infer injury from estimates of the percentage of the market foreclosed by Daramic's exclusive contracts. *See, e.g., Dentsply*, 399 F.3d at 189-91, 195-96; *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 394 (7th Cir. 1984); *In re Beltone Electronics Corp.*, 100 F.T.C. 68, 204 (1982).

Daramic's bargaining tactics toward its customers were so egregious, coercive, and hostile as to support an inference that the company's true purpose was to maintain its monopoly power. This inference will be bolstered by direct evidence showing that Daramic specifically intended, with its exclusive contracts, to exclude Microporous from the battery separator industry. None of its conduct yielded pro-competitive benefits for customers. *See, e.g., Microsoft*, 253 F.3d at 59 (defendant's conduct must yield pro-competitive benefits that outweigh any anti-competitive effects).

IV. Divestiture and a Cease and Desist Order Are Needed to Restore and Protect Competition in the Future

It is well-settled that the "Commission has wide discretion in its choice of a remedy" so long as the remedy has a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13, 66 S. Ct. 758, 760 (1946); *see also Chicago Bridge*, 138 F.T.C. at 1161, n.566. Furthermore, "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (footnote omitted). As explained by the Commission, "In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *In the Matter of B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988), (quoting *In the Matter of RSR*

Corp., 88 F.T.C. 800, 893 (1976)). Furthermore, Section 5(b) of the FTC Act allows the Commission to “issue . . . an order requiring such . . . Corporation to cease and desist from using such method of competition or such act of practice.” 15 U.S.C. § 45(b); see also *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957) (Commission is authorized “to enter an order requiring the offender to ‘cease and desist’ from using such unfair method[s].”).

To remedy the anti-competitive effects of the merger and Respondent’s other illegal acts, the Notice of Contemplated Relief provides that the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate. This relief should include, but is not limited to, an order that will restore Microporous as a fully independent and viable competitor in all of the relevant markets to the same degree that Microporous competed or would likely have competed in those markets but for the acquisition by Daramic. This will require a divestiture of the reconstituted entity or constitution of a competitive entity that would have existed in all of the relevant markets but for Daramic’s anti-competitive acquisition. Inclusion of a Polypore PE facility is likely necessary to insure the new or reconstituted entity is competitively viable in all affected markets at the same scale it would have had absent the acquisition. Assignment of contracts to the new entity, rescission of contracts, and assignment or licensing of all intellectual property and know-how associated with the relevant markets are also be necessary to restore competition lost as a result of Daramic’s acquisition and other anti-competitive conduct. Further ancillary relief is likely needed and may include, but is not limited to: (1) the replacement of any acquired assets that no longer exist and restore products or services that have been terminated or consolidated to other location since the merger; (2) the provision of certain services to an acquirer of the divested entity for a transitional period of time, including services that are currently provided by Daramic to the former Microporous from locations other than Piney Flats, TN, or Feistritz,

Austria; (3) the rescission of non-compete agreements between Polypore and its employees; (4) assistance to an acquirer of the divested entity to enter into contracts and to employ certain individuals currently employed by, or associated with Daramic; (5) the opportunity for battery separator purchasers to terminate their contracts with Daramic; (6) covenant not to sue the divested entity for its use of PE technology; and (7) the distribution of a final order in this matter to certain persons and the periodic filing of compliance reports to the Commission. This requested remedy is “reasonably calculated to eliminate the anti-competitive effects” of the acquisition and is nearly identical to the one affirmed by the 5th Circuit in *CB&I*. 534 F.3d at 442.

In addition to the merger-specific relief requested, Complaint counsel requests an order that requires Daramic to cease and desist from any other practice that is found to be an unfair method of competition or an unreasonable restraint of trade in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This order should require Daramic to cease and desist from conduct, agreements, and attempts to enter agreements that are in restraint of competition, and any activity deemed an unfair method of competition, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anti-competitive practices engaged in by Daramic. Such order should include a requirement to rescind an agreement between Daramic and Hollingsworth & Vose that, among other things, prevents Hollingsworth & Vose from entering into the PE separator market.

V. Conclusion

For the reasons stated above, which will be supported by the evidence at trial, Daramic’s acquisition of Microporous and its anti-competitive conduct are illegal. The public deserves a complete remedy to restore competition and prevent further harm to competition.

Dated: April 23, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2009 I filed *via* hand and e-mail delivery an original and two copies of the foregoing Public Version of Complaint Counsel's Pre-Trial Brief with:

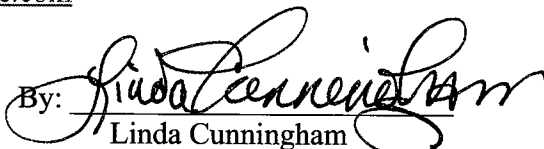
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I hereby certify that on April 23, 2009, I served *via* electronic mail and hand delivery a copy of the foregoing Public Version of Complaint Counsel's Pre-Trial Brief with:

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