UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	)	
POLYPORE INTERNATIONAL, INC.	)	**Docket No. 9327**
a corporation.	)	

ORDER ON RESPONDENT'S MOTION FOR *IN CAMERA* TREATMENT OF MATERIAL PREVIOUSLY AFFORDED SUCH TREATMENT

This matter comes before the Commission on Respondent's Motion for *In Camera* Treatment of Material Previously Afforded Such Treatment, filed December 9, 2010 ("Motion"). In its Motion, Respondent requests *in camera* treatment for certain statements within the Commission Opinion, issued November 5, 2010 ("Opinion").[1] In particular, Respondent seeks *in camera* treatment for statements on pages 2, 3, 29, 30, 31, and 38 of the Opinion it claims contain confidential, competitively sensitive business information that is known only to a handful of high-level Polypore executives. Motion at 2 and Exh. A; Declaration of Harry D. Seibert ¶¶ 6-7. Respondent also argues that it is not necessary to disclose these statements in order for the public to understand the basis of the Commission's decision. Motion at 4. For the reasons discussed below, Respondent's motion is granted in part and denied in part.

To determine whether confidential information a party produces in the course of an adjudicative proceeding warrants *in camera* treatment, the Commission balances the potential harm to the party from disclosure against the substantial public interest in access to the key facts and background underlying a Commission decision. *Orkin Exterminating Co.*, 108 F.T.C. 147 (1986). Access to the factual basis for a Commission decision allows the public to evaluate the fairness and wisdom of a given Commission decision, and provides better guidance to the business community. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *In re RSR Corp.*, 88 F.T.C. 734, 735 (1976). The *in camera* standard requires a party to establish that public disclosure would likely result in a "clearly defined, serious injury." *H.P Hood.*, 58 F.T.C. at

1 The Commission made a provisionally redacted version of its Opinion public on December 9, 2010 pending its decision on this Motion.

1188; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, *6 (1999). A party must make a "clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *General Foods*, 95 F.T.C. at 355.

While we agree with Respondent that, in this case, certain specific nonpublic information concerning its prices, revenues and production capacity meets the *in camera* standard, Respondent's request is overbroad. In various instances, Respondent seeks *in camera* treatment for full sentences and paragraphs that are both necessary to demonstrate the basis for the Commission's decision and contain information that is already part of the public record in this matter. For example, Respondent seeks *in camera* treatment for information quoted or paraphrased from its pre-acquisition strategy documents, even though this same information has appeared in the public version of the Initial Decision with only limited redactions for nearly one year.[2] *See* Motion, Exh. A. at 3, 29-30; IDF 171, 754, 855-67, 869-73, 881-83, 912-16, 920-22. Respondent also seeks *in camera* treatment for information disclosed during public testimony, as well as in the public version of its own appeal brief. Motion, Exh. A at 30-31; Roe, Tr. 1222, Benjamin, Tr. 3521-22; RAB at 37.

Respondent has not demonstrated that the disclosure of the information already in the public record would cause Respondent any competitive harm, much less the substantial competitive harm sufficient to meet the *in camera* standard. Nor has Respondent shown that the partial disclosures at issue are sufficiently specific to cause a clearly defined, serious injury sufficient to outweigh the value of making the basis of Commission decisions public to the greatest extent possible. *Orkin Exterminating Co.*, 108 F.T.C. at 147; *General Foods*, 95 F.T.C. at 355.

Accordingly, the Commission grants Respondent's motion with respect to the information the Administrative Law Judge previously accorded *in camera* treatment, as reflected in the attachment to this Order, with such treatment to expire on the dates previously set by the ALJ. Respondent's motion is otherwise denied.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: February 11, 2011

2 This order uses the following abbreviations for citations to the record.

ALJ Findings of Fact	IDF
Trial Transcript	Tr.
Respondent's Appeal Brief	RAB

ATTACHMENT A

parent corporation for approximately $76 million.[3] The acquired Microporous business included a plant in Piney Flats, Tennessee, a plant in Feistritz, Austria on the verge of commencing operations, and equipment for an additional production line (referred to as "a line in boxes").

Based on our *de novo* review of the facts and law in this matter, we conclude that the acquisition is reasonably likely to substantially lessen competition in three relevant markets: North American deep-cycle; motive; and starter, lighting, and ignition ("SLI") battery separators. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that the appropriate remedy is complete divestiture of all of the acquired Microporous assets, as well as certain other ancillary relief necessary to restore competition that was lost through the acquisition. However, while we conclude that Complaint Counsel properly defined a relevant market for uninterruptible power source ("UPS") battery separators in North America, and the record supports the conclusion that Daramic has a monopoly in that market, we find that Complaint Counsel did not meet their burden to show that the acquisition has lessened, or is reasonably likely to substantially lessen, competition in the UPS separator market.[4]

II. FACTUAL BACKGROUND

A. THE PARTIES

1. Polypore/Daramic

Polypore, a Delaware corporation headquartered in North Carolina, manufactures microporous membranes used in separation and filtration processes. Daramic, one of Polypore's four divisions, develops, manufactures, and sells various types of flooded lead-acid battery separators both in the United States and abroad. IDF 1-4. Prior to the acquisition of Microporous, Daramic had two plants in the United States and five foreign plants.[5] IDF 38-39. Daramic's worldwide production capacity was [redacted] with approximately [redacted] of that total capacity located in the United States. IDF 40.

At that time, Daramic produced polyethylene or "PE" separators for all four end-use applications alleged in the Complaint to constitute relevant product markets:

- Deep-cycle – batteries installed in products with a lower amperage draw over a longer period of time, such as golf carts and floor scrubbers (IDF 19);

[3] The Commission did not become aware of the transaction, which was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, until after the acquisition had been consummated.

[4] We adopt the ALJ's findings of fact to the extent not inconsistent with this opinion and make new factual findings based on our *de novo* review of the record. We present our findings of fact and conclusions of law throughout the opinion as appropriate to the subject matter under discussion.

[5] These plants were located in Owensboro, Kentucky; Corydon, Indiana; Selestat, France; Norderstadt, Germany; Potenza, Italy; Prachinburi, Thailand; and Tianjin, China. IDF 38-39.

- Motive power – batteries used in mobile industrial products such as forklifts and mining equipment (IDF 25, 204);

- UPS – "uninterruptible power source" products, such as backup stationary batteries for computer and telecommunication systems (IDF 35, 235);[6] and

- SLI (starter, lighting, and ignition) – batteries used in automotive applications, including cars, trucks, buses, boats, and jet skis. IDF 32.

For motive and UPS, Daramic sold primarily Daramic CL (IDF 197, 411); and for SLI it sold primarily Daramic HP. IDF 253-54, 427. Daramic also produced Daramic HD, a PE separator made with a liquid latex additive, which was created primarily for deep-cycle applications. IDF 41, 373, 472, 475. Daramic also sold a product called Darak, a non-PE separator produced in Germany and used primarily in gel batteries. IDF 41, 234, 618. Daramic's total worldwide separator sales in 2007 were approximately [redacted] IDF 42. Of that amount, approximately [redacted] was from PE separator sales for SLI applications (*i.e.*, automotive products). *Id.*

2. Microporous

Microporous, also a Delaware corporation, was a smaller battery separator company owned by a private equity firm, Industrial Growth Partners. IDF 5, 9. Microporous previously had done business under the name Amerace. IDF 8. Prior to the February 2008 acquisition, Microporous operated one plant in Piney Flats, Tennessee and was scheduled to begin operating a second plant in Feistritz, Austria in March 2008. IDF 43-44, 778-79. Microporous also owned a line in boxes – unassembled manufacturing equipment it had originally ordered for the purpose of building a fourth production line at the Piney Flats plant. IDF 773, 775. As of the date of trial, some of the equipment for the line remained in boxes in Austria, while other pieces of the new line were at a semi-finished stage with a supplier, or in use in existing lines at Piney Flats. IDF 1269-70.

Prior to the acquisition, Microporous' product line consisted of three products: Flex-Sil, a separator made of rubber, primarily for deep-cycle applications; Ace-Sil, a hard rubber separator typically used in high-end industrial applications; and CellForce, a PE-based separator sold primarily for motive applications, which includes ground-up Ace-Sil as an additive to improve performance. IDF 45, 198, 387. Microporous' 2007 sales were approximately [redacted] over [redacted] of which were attributable to Flex-Sil. IDF 46. Microporous competed head-to-head against Daramic for sales to both deep-cycle and motive battery separator customers. Additionally, Microporous had begun developing and marketing a PE separator for use in SLI applications – the source of most of Daramic's PE battery separator sales – and was in the process of negotiating a

[6] Separators for industrial applications, such as industrial motive and UPS products, are sometimes collectively referred to as "industrial" separators. IDF 23.

[7] SLI is by far the largest market segment, accounting for almost three-quarters of flooded lead-acid battery separator sales in 2005. IDF 261.

Daramic was certainly interested in acquiring Microporous' rubber technology and increasing its sales to deep-cycle battery customers, that does not contradict the strong evidence of anticompetitive intent.

Daramic's documents show it was motivated to acquire Microporous at least in part to eliminate a competitive threat in the motive and SLI markets. These documents also show that Daramic saw the acquisition as a profitable alternative to expanding its share in the deep-cycle market through continued innovation and competition with Microporous on price and quality.

Several years before the acquisition, Daramic executives began to express their concerns about competition with Microporous and discuss an acquisition as a defensive strategy. IDF 759; PX0167. Daramic's head of sales sent a memorandum to Daramic's then-CEO, Frank Nasisi, on May 13, 2005, explaining the advantages and disadvantages of acquiring Microporous. PX0433 at 4; Hauswald, Tr. 638; Roe, Tr. 1192. Mr. Roe stated that if Daramic did not acquire Microporous, Microporous "may continue [its] plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins." PX0433 at 4.

Mr. Toth took over as CEO of Polypore in July 2005. IDF 754. Daramic's Vice President, Pierre Hauswald, helped him assess a potential acquisition of Microporous. *Id.* In a cover note on the subject, Mr. Hauswald wrote that Microporous represented "a threat to Daramic for the future (construction of a second line, former discussion they had with JCI . . .). Their first line cost us [redacted] year, in price concession and loss of business. The second line could cost us another [redacted] " PX2242 at 1, *in camera*. Internal Daramic emails from 2005 also show that Daramic executives were concerned about Microporous' expansion plans and more vigorous competition in both the motive and SLI markets.[43]

Daramic remained concerned about Microporous' expansion just prior to the acquisition. On October 24, 2007, Mr. Hauswald reported to Polypore's Board on Daramic's due diligence on the proposed acquisition, known as "Project Titan." IDF 854. Documents prepared for the October 24, 2007 Board meeting show that Daramic continued to view the acquisition as a profitable alternative to competition in the motive and SLI markets. PX0738, *in camera*; PX0203, *in camera*.

On October 4, 2007, Michael Graff, Chairman of the Board, received an advance copy of the Project Titan October 24, 2007 Board presentation that included Mr. Hauswald's speaker notes as part of an interim report on the project. IDF 854. With the exception of the speaker notes and backup slides, the presentation to the Board on

[43] PX0168 (September 21, 2005 email from Pierre Hauswald to Robert Toth, stating that "[Microporous] is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts expire."); PX0694 (October 14, 2005 email from Frank Nasisi to Pierre Hauswald and Robert Toth, responding to news that Microporous had started construction on a second production line, stating "We must do everything possible to stop this process . . . . The bottom line is that [Microporous] can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth.").

October 24, 2007 was identical to the slides previously provided to Mr. Graff. IDF 859. The slides and speaker notes include projections of Daramic's sales volumes, prices, margins and earnings with and without the acquisition. Daramic projected that without the acquisition, its volume would fall by [redacted] in 2008, [redacted] in 2009, and [redacted] in 2011. PX0738 at 4, *in camera*. Daramic also projected that absent the acquisition, it would suffer a loss of [redacted] in 2008, [redacted] in 2009, and [redacted] in 2010 from competition with Microporous. *Id.* at 8. In a slide summarizing Daramic's business risks without the acquisition, Daramic wrote that it faced a "5-year EBIDTA loss of [redacted] by fighting against MP Phase III; Excess supply and market price erosion, Daramic market share loss of [redacted] " *Id.* at 10. Mr. Hauswald wrote in his speaker notes that without the acquisition, Daramic would have to "lower prices by [redacted] beginning in 2008 on [redacted] of IND volume to avoid MP phase 3." *Id.* at 4.

The Board presentation also included a slide describing benefits and synergies from the acquisition. These included "implement [redacted] price increase to non-contract customers on industrial product in 2010-generating [redacted] incremental EBITDA." PX0738 at 7, *in camera*. With respect to the deep-cycle market, the stated benefits included replacing HD with CellForce, improvements in efficiency at the Owensboro plant, and "increase in market price." *Id*. Daramic's 2008 budget also projected that absent the acquisition Daramic would lose increasing amounts of business to Microporous and would be forced to reduce prices. The budget documents projected that, with the acquisition, Daramic could increase the price of CellForce and industrial products. PX0823 at 13, *in camera*.

Shortly before the acquisition closed on February 28, 2008, the due diligence team provided the Board with a status report on the acquisition, citing, as a benefit, the intended implementation of a "[redacted] increase to non-contract customers on industrial product in 2010" and "phase out HD with CellForce . . . and increase in market price." IDF 861; PX0464 at 004, *in camera.*

c. Daramic's post-acquisition prices

The evidence also shows that Respondent announced post-acquisition price increases that were consistent with the anticompetitive increases projected in its pre-acquisition documents. This evidence is probative of the acquisition's reasonably likely anticompetitive effects and strengthens Complaint Counsel's *prima facie* case.

Approximately six months after Respondent acquired Microporous, it began to announce broad-based price increases [redacted] IDF 611, 912-16; PX0950 at 14-15, *in camera*. Daramic's announced price increases were as high as [redacted] IDF 611, 913-915; PX0950 at 14-15, *in camera*. While Respondent is correct that Complaint Counsel did not prove that all customers that received price increase announcements actually began to pay higher prices, the record does show that the announced increases were effective in at least some instances. For example, Daramic announced a [redacted] price increase to East Penn Battery on PE separators for 2009. IDF 897; PX0950 at 15, *in camera*. Daramic's head of sales testified that

Daramic had effectively negotiated a [redacted] price increase with East Penn. Roe, Tr. 1192, 1222. Mr. Roe testified that the price increase applied to Daramic's HD products, as well as separators for SLI and motive applications. *Id.* Similarly, between August and November 2008, Daramic notified Bulldog Battery that it would be increasing the price of CellForce by [redacted], effective January 1, 2009. IDF 898; PX0950, *in camera*. Mr. Benjamin, Bulldog Battery's President, testified that Bulldog experienced a price increase of [redacted] on CellForce, effective January 1, 2009. IDF 898; Benjamin, Tr. 3503, 3505, 3521-22. By contrast, in the five years immediately preceding the acquisition, Microporous had only increased the price of CellForce to Bulldog Battery by approximately 3%. IDF 613. When asked at trial whether he tried to move his business to a different supplier in response to the price increase, Mr. Benjamin testified that "there is no other supplier, so you're kind of stuck." IDF 614; Benjamin, Tr. 3526.

Additionally, Complaint Counsel's expert credibly testified that Daramic's across-the-board price increases, whether implemented or announced, could not be explained by rising input costs, increasing demand, or changes in productivity alone. IDF 920-21; Simpson, Tr. 3213-20, *in camera*. Respondent argues Dr. Simpson did not rely on the correct price indices to measure post-acquisition changes in input costs. RAB at 37. However, Dr. Simpson testified that he selected the indices based on the input costs that Daramic itself cited to customers as the basis for increasing price. Simpson, Tr. 3214-19, *in camera*; PX2068 at 1. We find Dr. Simpson's testimony on this issue persuasive.

This strong qualitative evidence of anticompetitive unilateral effects in the deep-cycle, motive, and SLI markets corroborates Complaint Counsel's already strong *prima facie* case.

3. Anticompetitive Coordinated Effects Are Likely in the SLI Market

The ALJ found that Respondent failed to rebut the strong presumption of likely coordinated effects in a merger to duopoly in the SLI market. ID at 265. Respondent maintains that, because SLI separators are differentiated and sold through large individually-negotiated supply contracts, coordination is unlikely. RAB 39-40.

In a market with high barriers to entry, a merger to duopoly creates a presumption of anticompetitive coordinated effects. *Heinz*, 246 F.3d at 724-25 (finding that the elimination of a third rival would create a "durable duopoly," increasing both the opportunity and incentive for the duopolists to coordinate to increase price); *FTC v. PPG Indus.* 798 F.2d 1500, 1503 (D.C. Cir. 1986) (noting 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"). By eliminating Microporous as a third player in the SLI market, the acquisition increased the likelihood of anticompetitive coordinated effects. A defendant can defeat the presumption of likely coordination with evidence showing structural barriers to coordination in the market. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009). Respondent has not met that burden here.

Lead Co., 352 U.S. 419, 428 (1957). In the exercise of that discretion, the Commission may order divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market. *See Chicago Bridge*, 138 F.T.C. at 1163-64 (ordering divestiture of assets for building water tanks although the relevant product market was cryogenic tanks, because cryogenic tank sales were irregularly timed and water tank sales would provide the regular income stream needed for the divestiture buyer's viability), *aff'd*, 534 F.3d at 442. We find that complete divestiture of the former Microporous battery separator business, including the Feistritz plant, is warranted here.

As an initial matter, a divestiture package that includes the Feistritz plant will allow the acquirer to maintain sufficient capacity at the Piney Flats facility to ensure that it can effectively compete for business in North America. Prior to the acquisition, Microporous produced CellForce for its foreign customers at its Piney Flats plant, which constrained its capacity to compete for additional business within North America. IDF 769, 795. In 2005 and 2006, the CellForce line at Piney Flats was operating at full capacity. RX0741 at 65; Trevathan, Tr. 3667-68. As a result, Microporous was unable to respond to new North American customer demand. For example, EnerSys was using CellForce in Europe but was unable to obtain CellForce for North America because of this capacity constraint. Axt, Tr. 2126. Similarly, Trojan Battery's ability to expand its use of CellForce for its deep-cycle batteries was limited by the capacity constraint at Piney Flats. Godber, Tr. 276. Once the Feistritz plant was under construction, Microporous became a more vigorous competitor in North America. Microporous was able to commit to additional North American CellForce sales to EnerSys, Trojan Battery, and U.S. Battery. IDF 787, 1280; Godber, Tr. 226-27; PX1741 at 4, *in camera*. Microporous also entered into discussions with other battery separator customers who had not yet made purchase commitments at the time of the acquisition. IDF 797.

Absent divestiture of the Feistritz plant, an acquirer is likely to face the same capacity constraint Microporous faced before it constructed the Feistritz plant. CellForce production in 2008 totaled nearly [redacted]. RX0677, *in camera*. Microporous' backfill efforts that began after 2008 led to additional commitments from EnerSys, Trojan, and U.S. Battery that would have added more than 3.3 msm to sales. RX0207, *in camera*; Godber, Tr. 226-27; PX1741, *in camera*; Wallace, Tr. 1977; Qureshi, Tr. 2037. The 2008 production plus the additional commitments exceeded the Piney Flats plant's CellForce capacity of [redacted] RX0561, *in camera*. Beyond the existing commitments, Microporous executives had no doubt they would be able to backfill the remaining freed capacity at Piney Flats after production for European customers was transferred to Feistritz. Microporous' President at the time of the acquisition testified that in 2007 "we had more offers for business than we were going to be able to handle under the scenario of backfilling." Gilchrist, Tr. 344. Because the purpose of any divestiture is to create an effective future competitor that would restore lost competition, it is important to avoid saddling the divestiture buyer with capacity constraints that would hinder its ability to seek future sales and limit its competitive significance in the relevant markets.

Respondent argues that even if Piney Flats does not provide the acquirer with enough capacity to compete effectively in North America, divestiture of the line in boxes