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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S REPLY FINDINGS OF FACT
TO INTERVENOR HOLLINGSWORTH & VOSE COMPANY'S
PROPOSED FINDINGS OF FACT

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October 13, 2009

1. H& V makes specialty, industrial and technical papers and nonwovens for a variety of applications. H&V manufactures and sells, among other products, an absorptive glass mat ("AGM") battery separator for use in valve-regulated lead acid ("VRLA") batteries in a variety of applications. (PX0925 at 3-5 (Porter Dep. at 15-21, *in camera*)).

Response to H&V Finding No. 1:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

2. Unlike polyethylene ("PE") battery separators made by Daramic, H&V's AGM battery separators are not intended for use in flooded lead acid batteries, and are used instead in VRLA batteries. (CCFOF ~ 18; PX0925 at 5 (Porter Dep. at 21-23, *in camera*)). Daramic's flooded battery customers cannot substitute H&V's AGM battery separators for Daramic's PE battery separators, and H&V's VRLA battery customers cannot substitute Daramic's PE battery separator for H&V's AGM product. (PX0925 at 7-8 (Porter Dep. at 28- 31, *in camera*)). Complaint Counsel maintains that AGM battery separators do not compete with Daramic's PE battery separators in the same markets. (*see* CC Post-Trial Br. at 25 & n.16).

Response to H&V Finding No. 2:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the

proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

3. In March 2001, Daramic and H&V entered into the Cross Agency Agreement. (PX0094 (hereinafter "Agreement")). The Agreement provided for [REDACTED] } (PX0917 at 14-15, 16 (Cullen Dep. at 53-56, 60-61, *in camera*); PX0925 at 16, 17, 24-25, 31-32 (Porter Dep. at 61, 64-65, 94-97, 126-28, *in camera*); Roe, Tr. 1746).

Response to H&V Finding No. 3:

The proposed finding is incomplete. Complaint Counsel incorporates by reference CCFOF 1184-1187 and CCRF 1124-1129.

4. [REDACTED] } (PX0917 at 77 (Cullen Dep. at 321-23, *in camera*)).

Response to H&V Finding No. 4:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

5. H& V expends time and effort in developing and maintaining customer relationships and its goodwill with those customers. (PX0917 at 77 (Cullen Dep. at 320-22, *in camera*)). H&V engineers work closely with customers to solve manufacturing issues, and customers rely on H&V's technical manufacturing expertise. [REDACTED] [REDACTED] } (PX0917 at 77 (Cullen Dep. at 320-23, *in camera*)).

Response to H&V Finding No. 5:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

6. In order to permit the parties to exchange confidential information about their sales and distribution forces, customers and confidential technical information, know-how and pricing, the Agreement provided that [REDACTED] [REDACTED] } (Agreement § 4(a-b); PX0917 at 12, 14- 15, 16, 18, 42 (Cullen Dep. at 48, 53-56, 60-63, 68-70, 177-78, *in camera*); PX0925 at 17-18, 31 (Porter Dep. at 65-66, 126-31, *in camera*)).

Response to H&V Finding No. 6:

Complaint Counsel also incorporates by reference CCFOF 1191 and 1195, and CCRF 1130-1132, which demonstrate that the [REDACTED] [REDACTED] } to permit Daramic and H&V to exchange confidential information during the course of their agency relationship.

7. Section 4 of the Cross Agency Agreement states in relevant part:

[REDACTED]

[REDACTED]

[REDACTED]

(Agreement § 4(a-b)).

Response to H&V Finding No. 7:

Complaint Counsel has no specific response.

8. Paragraph 4(a) of the Cross Agency Agreement

[REDACTED] } Paragraph 4(b) [REDACTED]. }

Response to H&V Finding No. 8:

Because this proposed finding is a legal conclusion, without any factual support, it should be rejected. The factual record shows that Daramic and H&V understood their arrangement under Sections 4(a) and (b) as a reciprocal obligation to stay out of each other's markets. (See CCFOF 1180-1182, 1191; CCRF 1123-1124).

9. During the course of H&V's and Daramic's business relationship under the Cross Agency Agreement,

[REDACTED] } (PX0917 at 024-025 (Cullen Dep. at 99-102, *in camera*); PX0925 at 024 (Porter Dep. at 94-96, *in camera*)). Daramic and H&V [REDACTED]

[REDACTED] } (PX0917 at 14-15, 16, 18, 76, 77-78 (Cullen Dep. at 54-56, 60-63, 68-70, 317-18, 321-24)).

Response to H&V Finding No. 9:

With respect to the second sentence, Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely. Complaint Counsel incorporates by reference its Response to H&V Finding No. 11, below.

10. During the term of the Cross Agency Agreement, Daramic [REDACTED] [REDACTED] } As a result of Daramic's sales activities on behalf of H& V, Daramic [REDACTED] [REDACTED] } (PX0917 at 075 (Cullen Dep. at 313-14, *in camera*)).

Response to H&V Finding No. 10:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

11. In the course of making sales calls on behalf of H& V, Daramic representatives [REDACTED] [REDACTED] } (PX0917 at 077-078 (Cullen Dep. at 322-24, *in camera*)). H&V also disclosed [REDACTED] [REDACTED]

[REDACTED] (PX0917 at 077 (Cullen Dep. at 322-23, *in camera*)). }
[REDACTED] } (PX0917 at 077-078
(Cullen Dep. at 321-23, *in camera*)).

Response to H&V Finding No. 11:

Complaint Counsel objects to this proposed finding because it does not address how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. It does not comply with the Court's Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009, (the "Order on Intervention by H&V"), which stated H&V was allowed to submit proposed findings of fact "only for the limited purpose of" demonstrating how the proposed remedy might affect H&V's rights under the Cross Agency Agreement. This finding does not demonstrate how the proposed remedy might affect H&V's rights under the Cross Agency Agreement and should be rejected completely.

Complaint Counsel incorporates by reference CCFOF 1184-1186 and 1191, and CCRF 1126-1129, which demonstrate { [REDACTED]

[REDACTED]

[REDACTED].} Complaint Counsel also incorporates by reference CCFOF 1195 and CCRF 1130-1132, which demonstrate that the { [REDACTED]

[REDACTED] } during the course of their agency relationship.

The testimony of Mr. Cullen on which H&V relies { [REDACTED]

[REDACTED]

[REDACTED].} (PX0917 at 077 (Cullen Dep. at 322, *in camera*)). No testimony or documentary evidence supports the conclusion that H&V appears to imply in the last sentence of this proposed finding, namely,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], } Complaint

Counsel incorporates by reference its Response to H&V Finding No. 13, below.

12. The Cross Agency Agreement [REDACTED]
[REDACTED] } (PX0158, *in camera*).

Response to H&V Finding No. 12:
Complaint Counsel has no specific response.

13. Complaint Counsel seeks an order requiring Daramic to modify the Cross Agency Agreement by declaring Sections 4(a) and (b) void and by ordering Daramic to refrain from "implementing or enforcing" either sub-sections 4(a) or 4(b). The requested relief requires the Respondent to do as follows:

1. Within fifteen (15) days after the date this Order becomes final:
(a) modify and amend the H& V Agreement in writing to terminate and declare null and void, and (b) cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing, the covenant not to compete set forth in Section 4 of the H& V Agreement, and all related terms and definitions, as that covenant applies to North America and to actual and potential customers within North America.

2. Within thirty (30) days after the date this Order becomes final, file with the Commission the written amendment to the H& V Agreement (" Amendment") that complies with the requirements of Paragraph VI.A.1 [sic] .

(CC Proposed Order VIII.A, at 26-27 (emphasis added)).

¹ Aside from deposition testimony of H&V employees and exhibits taken from H&V's document production, H&V has not been provided access to *in camera* exhibits. The citation to PX0158 is taken from Complaint Counsel's Exhibit List (PX0001 at 004), which is described as "Cross Agency Agreement - Renewal and Daramic Correspondence." H&V does not know what is meant by "Daramic Correspondence" and understands the Renewal to the Cross Agency Agreement to be [REDACTED] }

Response to H&V Finding No. 13:

Complaint Counsel does not disagree. For clarity and completeness, it should be noted that Complaint Counsel does not seek to modify [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (See PX0094 at 007-008 and 012, *in camera*).

14. H&V has a valuable property right arising under Section 4(a) of the Cross Agency Agreement to [REDACTED]
[REDACTED] (Agreement § 4(a), PXO158).

Response to H&V Finding No. 14:

Because this proposed finding is a legal conclusion, without any factual support, it should be rejected. To the extent any such “valuable property right” derives from the overbroad and unlawful agreement to refrain from competition, it is not cognizable in antitrust law and would not be accepted by this Court.

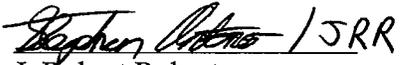
15. If the requested relief were to be awarded with respect to H&V's rights under Section 4(a), Daramic would be entitled to [REDACTED]
[REDACTED] within fifteen days of the Commission's final order. (Agreement § 4(a); CC Proposed Order VIII.A(1)).

Response to H&V Finding No. 15:

This proposed finding is a legal conclusion, and impermissibly speculative. Complaint Counsel also incorporates by reference its Response to H&V Finding No. 14 above. For completeness, it should be noted that – assuming Intervenor’s assertion is correct – the requested relief would permit H&V to [REDACTED]
[REDACTED], which is a pro-competitive result. Furthermore, the parties to the Cross Agency Agreement have agreed [REDACTED]
[REDACTED]

Dated: October 13, 2009

Respectfully submitted,

 JRR

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2009, I filed via hand and electronic mail delivery an original and two copies of the foregoing public version of Complaint Counsel's Reply Findings of Fact To Intervenor Hollingsworth & Vose Company's Proposed Findings of Fact with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
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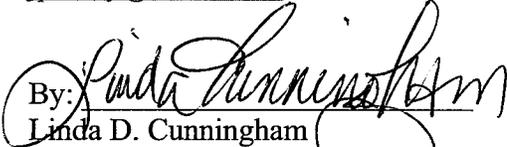
I hereby certify that on October 13, 2009, I filed via hand delivery two copies of the foregoing public version of Complaint Counsel's Reply Findings of Fact To Intervenor Hollingsworth & Vose Company's Proposed Findings of Fact with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I hereby certify that on October 13, 2009, I filed via electronic mail delivery a copy of the foregoing public version of Complaint Counsel's Reply Findings of Fact To Intervenor Hollingsworth & Vose Company's Proposed Findings of Fact with:

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